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by

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A thesis presented to the University of Dublin (Trinity College) for the Degree of Doctor of Philosophy (Ph.D.)

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Volume II

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Chapter Four
Relief in Equity for Coercion

In this chapter the focus turns to the impact of equity on the legal treatment of coercion. Equity has operated for some eight centuries as a body of judge-made doctrine co-existing with and supplementing the common law.\(^1\) Originally noted for the considerable breadth of discretion which attended its exercise\(^2\) - and the often inconsistent and unprincipled decisions which were handed down by the Lord Chancellor and his Court\(^3\) - equity has built up a coherent body of principles working as a valuable check on some of the more restrictive confines of the common law. Some measure of discretion still exists but by and large equitable relief is nowadays granted on the basis of established doctrine.\(^4\) That said the flexibility inherent in the equitable jurisdiction has allowed it to evolve a set of rules that cater peculiarly well to the regulation of more complex and subtle relations of power and influence.

*Coercion in Equity and at Common law compared.* Whereas previously the equitable jurisdiction was confined to the Courts of Chancery, the Supreme Court (Judicature) Act (Ir.) 1877 served to enable a unified High Court of Justice to grant

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2 See Delany, *op. cit.*, at pp. 5-6.
3 “While the early Chancellors”, *per* Delany, *op. cit* at p. 6, “in theory acted on a number of established principles...there was little uniformity in the judgments handed down and the types of remedies varies from one chancellor to the next”. The later chancellors, especially Lord Nottingham (1673-1682), and Lord Eldon (1801-1806, 1807-1827), largely remedied this to a point where equity, by the early 1800s, had become almost as settled as the common law. In *Gee v. Pritchard* (1818) 2 Swans 402 at 414, Lord Eldon L.C. felt confident in proclaiming that equity could no longer be seen, as of old, as a body of law that “varies like the Chancellor’s foot”.
4 In particular it is said that such equitable discretion as remains must be exercised by reference to established principles of equity. In *Conlon v. Murray* [1958] N.I. 17 at p. 25, Black L.J. of the Northern Ireland Court of Appeal noted that the discretion afforded by equity “is not, of course, the arbitrary discretion of the individual judge but is a discretion to be exercised on the principles which have been worked out in a number of decided cases".
relief at common law or equity as was required. Nevertheless Equity retained its separate character and at a time when the common law, as seen in the last Chapter, operated a particularly constrained regime with reference to incidents of compulsion, equity was dispensing relief in cases involving even the most subtle and insidious forms of exploitation. Yet given the tendency to dichotomise the common law and equity, it is perhaps somewhat surprising to note the level of overlap between the two areas. In fact, the fusion of the courts of common law and equity in 1877 led to a wider range of remedies being available for duress. The influence of equity has also, according to some commentators, played a subtle part in the recently widened jurisdiction at common law to strike down contracts for economic duress.

This widened jurisdiction in turn may explain the falling into abeyance of the equitable doctrine of undue pressure, a doctrine that in some respects tempered the former absence of relief for economic duress. The narrow remit of the common law relief for duress was once such that many events that might now be dealt with as duress were once categorised by equity as ‘undue pressure’. This was evidently a remedy in its own right, distinct from undue influence, there being “…good authority

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5 See generally Delany, op. cit., at p. 8ff.
6 The fusion rendered by the Act was according to Delany (1961) 24 M.L.R. 116 “nothing more than a fusion of jurisdiction, procedure and pleading; the substantive rules themselves remained”. See also Salt v. Cooper (1880) 16 Ch. D. 544 at p. 549, and Ashburner’s Principles of Equity, 2nd ed., (London: Butterworth’s, 1933), at p. 18, where it is rather colourfully argued that “[t]he two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters”. This ‘fluvial metaphor’ ran aground in the House of Lords decision in United Scientific Holdings v. Burnley Borough Council [1978] A.C. 904, the House suggesting that there had indeed been substantive confusion. Notwithstanding such authority, Both Delany, Equity and the Law of Trusts in Ireland, op. cit., at p. 8ff., and Coughlan, Property Law, 2nd ed., (Dublin: Gill & Macmillan, 1998) at p. 49 maintain the established understanding that the fusion was procedural only.
7 By the Supreme Court (Judicature) Act, 1877. This had the effect of granting jurisdiction to a unified High Court to invoke either equity or the common law, notwithstanding the former tendency to allow a court to rely on only one set of doctrines rather than both. The word ‘courts’ is used deliberately in this regard. It did not, however, fuse these respective areas of law themselves. The common law and equity remain technically distinct, notwithstanding the fusion in court jurisdiction. See fn. 6 directly above.
8 At least one jurist suggests that equity had a hand in this development - see the commentary of the Court in Rich and Whillock v. Ashton Development, 175 Cal. App. 3d 1154 at 1158-1159 (1984) “the [economic duress] doctrine is equitably based and represents ‘but an expansion by courts of equity of the old common-law doctrine of duress’. If this was the case in the U.K., it is suggested that the influence of equity was more subtle - few if any of the leading cases in the U.K. make any direct reference to the influence of equity.
for pressure as a word of art indicating a distinct equitable principle”. Equity’s
dominant source of relief in this field, the doctrine of undue influence, embraces
situations in which there is typically neither force nor fear but rather improper
influence and persuasion. The doctrine of pressure, by contrast, deals with more
blatant instances of overt force being used to extract a contractual agreement, usually
by means of fear of the consequences of choosing an alternative option.

Indeed in many respects the doctrine bears an uncanny resemblance to common law
relief for duress. One of the most celebrated cases in this area is the 1866 case of
Williams v. Bayley. There a father charged property as security for monies owed by
his son, for fear that the son would be (duly) prosecuted by his creditor for forgery.
The prospective mortgagee had warned (though not explicitly threatened) the father
that he had it in his power to do so and this was adjudged to amount to an implicit
threat. The House of Lords rescinded the agreement at the father’s request. While
some reference is made, in the course of the judgments, to the presence of ‘undue
influence,’ there are several clear statements indicating that, in Lord Chelmsford’s
words, “…the agreement had been extorted from the father by undue pressure”.

There was some discussion in their Lordships’ judgments of the impropriety of the
pressure applied. For Cranworth L.C. it was not enough that there was an indication
that the creditor was ‘reserving his rights’ in relation to the son’s wrongdoing. Lord
Westbury expanded on this observing that “…taken independently of the pressure”
the question was whether the transaction was an ‘illegal’ one, probably implying that
the contract in that case amounted to an attempt to stifle a prosecution.

Several of the most prominent cases in this area, including perhaps Williams v.
Bayley, concern forms of pressure that might nowadays be treated as duress. In

9 Winder, “Undue Influence and Coercion” (1939) 3 M.L.R. 97 at p. 112.
10 4 Giff. 638 (sub. nom Bayley v. Williams); (1866) L.R. 1 H.L. 200 (H.L.).
11 ibid. (L.R. 1 H.L.) at p. 214.
12 Such an agreement would not be enforced at common law either as the consideration would have
been illegal. Brook v. Hook (1871) L.R. 6 Ex. 89.
Ormes v. Beadel\(^3\) an agreement was set aside on the ground that it had been extracted by means of a threat not to pay monies duly owed, a threat that would arguably now constitute economic duress. In Collins v. Hare,\(^4\) an Irish case from 1828, the Irish Chancery and the House of Lords set aside assignments secured by the use of a threat to ruin the character and credit-rating of the assignor, threats which at that time would not have amounted to duress at common law.

With the expanded remit of the doctrine of duress, then, the equitable plea of ‘undue pressure’ is now rarely used.\(^5\) The fate of undue pressure seems then to have been sealed as result of the onward march of economic duress, an advance rendering very fine indeed the distinction between relief at common law and relief in equity. Indeed such is the extent of overlap that one might be tempted to suggest, as do Birks and Chin, that “it is time that in this field we overcame the old jurisdictional duality”.\(^6\)

This arguably ignores the very real if subtle differences that do exist. Equity typically acts in circumstances that generally escape the more rigid categorisations of the common law. With the apparent demise of undue pressure, it might now be said that these two realms differ primarily in the type of coercive force to which they relate, equity being concerned with the more subtle and insidious forms thereof. Equitable

\(^{13}\) The fact scenario in that case closely resembles that of the 1966 case of D. & C. Builders v. Rees, [1966] 2 Q.B. 617. The majority of the Court of Appeal decided the latter case on the ground of absence of fresh consideration, but, by reference to Ormes v. Beadel, 2 Giff. 166 (1860), could equally have so ruled on the presence of undue pressure. In both cases a sum of money less than that owed was offered to builders on a ‘take it or leave it’ basis. In both the creditors took payment as, to the knowledge of the debtors, they were in urgent need of the money. Lord Denning in D. & C. seems to have been open to such a line of argument, having noted the possibility that the contract in that cases might have been voidable for lack of true consent.

\(^{14}\) (1828) 1 Dow. & Cl., H.L. 139 (H.L.)

\(^{15}\) See Birks and Chin, “On the Nature of Undue Influence", in Beatson and Friedmann, Good Faith and Fault in Contract Law, (Oxford: Clarendon Press, 1995) at p. 64, who argue that “it is now difficult to conceive of any pressure which will not be relieved satisfactorily, if it should be relieved at all, within the category of duress”. Earlier cases of undue pressure seem sometimes to have been subsumed by undue influence. See Mutual Finance v. Wetton [1937] 2 All E.R. 657, where a case involving what was arguably undue pressure was treated as an instance of undue influence, though it arguably involved undue pressure. Though implicit threats were made, the restrictive nature of the then law of duress prompted Porter J. to opt for a finding of undue influence rather than duress. The existence of an intermediate ground of relief seems to have been overlooked.
intervention is arguably more attuned to coercive and persuasive forces that arise from the dynamic of ongoing relations. The presumption of undue influence, in particular, (where transactions between certain persons in ongoing relationships are presumed to be the result of an abuse of trust and confidence), sensitises the discourse of law to context, and in particular to the relational history against which contractual events should be considered. The primary question in cases where the presumption is alleged to exist is not whether a particular event occurred - this is often a given - but whether a particular relationship existed such that the presumption should automatically arise. This should not be taken, however, as a necessary indication of equity's respect for the sanctity of relations, arguably quite the contrary. By positing the presumption, equity arguably exhibits a certain \textit{prima facie} suspicion of relations. The requirement of manifest disadvantage tempers this considerably, asserting that such suspicion should only arise when an event has been to the clear disbenefit of one party to the relation. Absent this requirement the unequivocal message would be that equity generally is suspicious of such relations.

While there are instances where actual undue influence has been established, it is, in fact, altogether more common to encounter cases concerning the presumption of undue influence. Equity then is generally less concerned with the fact of undue influence than with its appearance. Once the conditions giving rise to the presumption are satisfied the onus is cast upon the person presumed to have exercised the influence to show that there was no such influence. Before tackling undue influence, however, it is necessary to refer to another important instance in which equity intervenes (or more accurately refrains from doing so) in order to prevent a party profiting from his or her coercive acts.

I. Specific Performance

Perhaps the strangest lacuna in the common law is that, regardless of the existence of a binding and enforceable contract, a party thereto cannot be obliged under common law rules alone to perform the obligations laid out therein. Effectively the only remedy that is available is an award of damages.\(^\text{18}\) It was Equity that first empowered an aggrieved party to seek judicial enforcement of the performance of outstanding obligations. This was sometimes by means of an injunction (and especially when the obligation was negative, i.e. a duty not to do something), but more typically where the obligation was positive, through the remedy of specific performance. Like all equitable remedies, the granting of specific performance is subject to the discretion of the Court but this discretion is not untrammeled. It is, on the contrary, subject to well-established principles that in fact considerably restrain the circumstances in which an order will be granted.\(^\text{19}\) One such principle is that specific performance will not be ordered where there has been any material defect in the contracting process, such as a material misrepresentation or some form of coercive behaviour.

One important instance where an order for specific performance was sought but refused is to be found in the Irish case of *Smelter Corporation v. O'Driscoll*\(^\text{20}\) a case of particular relevance to our analysis of the treatment of coercive practices by Equity. *Smelter Corporation* is one of the few Irish cases, outside the realm of Family law, which deals in any manner with the subject of duress, albeit, as will be seen, in a somewhat unenlightening manner.

\(^{17}\) See generally Chapter 14 of Delany, *Equity and the Law of Trusts in Ireland*, 2\(^{\text{nd}}\) ed. (Dublin: Round Hall, 1999) at p. 528ff.

\(^{18}\) *Ibid.* at p. 4.


In that case the plaintiff sought specific performance of a contract for the sale of land belonging to the defendant. The latter had initially been unwilling to sell. She and her husband, however, had been led to believe that the local authority had power compulsorily to acquire her land and would, as a matter of probability, exercise this power in relation to her property.\(^{21}\) In fact, the County Council, whatever its powers, had never either attempted or contemplated such an exercise nor was there any question of compulsory acquisition on the plaintiff's behalf. As a result of this "...fundamental misapprehension as to the true facts" created by the plaintiff's agent, "...the defendant had agreed to sell believing she had no real option..."\(^{22}\) but to do so. On the basis of what she had been led to believe she saw "no real purpose in refusing to sell".\(^{23}\) The plaintiffs then sought specific performance of the resulting contract. The Supreme Court, on appeal, refused to make such an order.

As an authority on duress and coercion *Smelter Corporation* is quite equivocal, despite the fact scenario revealed above. O'Higgins C.J. seemed to prefer to found his refusal on the elements of misrepresentation\(^{24}\) present in the case. To the extent that there are any comments on the existence of duress they are sparse and largely unsatisfactory. Noting the suggestion that the defendant had been coerced into granting an option to purchase by the threat of compulsory acquisition the learned Chief Justice pointed out that to his mind "on the evidence" no threat "as such was ever used".\(^{25}\) It is arguable that an implicit threat, being sufficient to found duress,\(^{26}\) was indeed present. It was clearly conveyed to her, albeit indirectly,\(^{27}\) that unless she capitulated to the plaintiff's request, the latter would arrange for the land to be

\(^{21}\) This erroneous impression was reinforced by a visit to the property from several officials of the local authority with a view to encouraging the defendant to sell up. At this meeting the issue of compulsory purchase again arose.

\(^{22}\) *Smelter Corporation, op. cit.* at p. 311.

\(^{23}\) This mirrors in certain respects the requirement of 'no feasible alternative' posited by the common law doctrine of duress. See above in Volume I, Chapter Three, p. 168ff.

\(^{24}\) The line between duress and other vitiating factors is thus not always as clear as static analyses might suppose. It could, indeed, be said that the presence of misrepresentation in this case created the pressure to contract.

\(^{25}\) *Smelter Corporation, op. cit.*


\(^{27}\) The plaintiffs strangely directed most of their correspondence through the defendant's husband.
compulsorily acquired on its behalf, and would have little difficulty in persuading the council to exercise its supposed powers in this regard.

O’Higgins C.J. did note that the defendant had been placed at a “serious disadvantage”. There was a “fundamental unfairness in the transaction” the defendant believing that she had no real option but to sell. He pointed out that specific performance is a discretionary remedy, one that ought not be exercised in an arbitrary or capricious manner but rather, that was predicated on the essential fairness of the transaction in question. In the light of the circumstances, he felt it would be unjust and would cause undue hardship to grant a decree and he thus refused to do so.

Some commentators\(^\text{28}\) seem to indicate that *O’Driscoll* is of general relevance to an analysis of the Irish law of Duress. Certainly on the fact scenario therein, such a conclusion is merited, but little of legal relevance is said on this topic. The Court proceeds on the basis that the defendant’s actions were the product of pressure owing to misrepresentation and not duress *simpliciter*. It is arguable, at any rate, that the case and the *dicta* therein should be confined to the rather unique confines of the doctrine of specific performance. As Jessel M.R. comments in *Re Banister*\(^\text{29}\) a misrepresentation of fact which may not be sufficient to allow rescission of a contract may nevertheless suffice to ground a refusal to order specific performance: the considerations motivating each are quite different. Specific performance, indeed, only issues in the rarest of circumstances. No such order will be made where damages would be an adequate alternative.\(^\text{30}\) Thus where the item in question is “an ordinary

\(^{28}\) Clark, and Clarke, *Contract, Cases and Materials*, (Dublin: Gill & Macmillan, 1994), classify the case as an instance of duress. Clark, in *Contract Law in Ireland*, 4\(^\text{th}\) ed. (Dublin: Round Hall, 1998) at p. 277, ranks it as “[t]he most important Irish decision on duress” although he concedes that its relevance should not be overstated. But see, contra, Doolan, *A Casebook on Irish Contract Law*, at pp. 156-158 who treats the case solely as an instance of misrepresentation

\(^{29}\) (1879) 12 Ch.D. 131. See also *Longmate v. Ledger* 2 Giff. 157 at p. 164. In the course of his judgment Stuart V.C. refers to several authorities cited before him “…none of which being] a strict analogy to the present case”. In particular, he distinguishes between situations where specific performance is sought and where a contract has already been executed, implicitly suggesting that the applicable principles in each respective case differ to a substantial degree.

article of commerce" easily obtainable elsewhere no order will be made.\textsuperscript{31} Similarly, where undue hardship would ensue\textsuperscript{32} or where it would necessitate continuing supervision on the part of the court to secure performance,\textsuperscript{33} the court will refuse to act.\textsuperscript{34}

Thus it will be obvious that there may be some cases in which specific performance will be refused on grounds of improper force, where such coercion would normally not suffice to obtain an order of rescission. As Clark\textsuperscript{35} concedes such “isolated instances of equitable jurisdiction do not constitute a coherent, unified system of jurisprudence”. In such circumstances, then, it is with great reluctance that one would draw any general conclusions about the approach of Irish judges to relief against coercive practices.

II. Undue Influence\textsuperscript{36}

Of much greater relevance, however, is the authority concerning the doctrine of undue influence. The equitable concept of undue influence defies easy definition.\textsuperscript{37} In

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\textsuperscript{31} Cohen v. Roche, ibid. In Sky Petroleum Ltd. v. V.I.P. Petroleum Ltd. [1974] 1 W.L.R. 576, specific performance was granted in respect of a contract for petroleum supply in circumstances where supplies were limited and it was difficult to locate an alternative supplier.


\textsuperscript{34} See also Clark who observes that Smelter Corporation “is perhaps to be regarded as an illustration of the reluctance of equity to grant specific performance of a contract which is struck in circumstances of substantial unfairness, or where the unfairness would be oppressive to the defendant, or where consent cannot be said to have been given...”. Clark, Contract Law in Ireland, 4\textsuperscript{th} ed., (Dublin: Round Hall, 1998), at p. 277.

\textsuperscript{35} Clark, Contract Law in Ireland, 4\textsuperscript{th} ed., (Dublin: Round Hall, 1998), at p. 277.

\textsuperscript{36} See generally Delany, Equity and the Law of Trusts in Ireland, 2\textsuperscript{nd} ed. (Dublin: Round Hall, 1999), at p. 580ff.
fact, there seems in some quarters to be an active aversion to definition of the term.\textsuperscript{38} This is not least because judges, past Chancellors and present justices alike, are anxious not to fetter unduly its application to new situations but rather to leave leeway for it to expand as the facts of a case may dictate. As Lord Scarman noted in \textit{National Westminster Bank v. Morgan}\textsuperscript{39} there is "...no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence...definition is a poor instrument when used to determine whether a transaction is unconscionable or not".\textsuperscript{40} Perhaps this is with good reason considering that "...the circumstances and requirements [of cases] will vary infinitely with the infinite variety of human affairs".\textsuperscript{41} The result, nonetheless, is a somewhat impressionistic approach that rejects "neat and tidy rules" in favour of "a meticulous examination of the facts".\textsuperscript{42} This led one commentator\textsuperscript{43} to liken the approach to that of Stewart J. in \textit{Jacobellis v. Ohio},\textsuperscript{44} who, though admitting his inability to define obscenity, remarked that, nevertheless, "I know it when I see it".

What can however be said with some measure of certitude is that the character of the fact scenarios that typically fall within this category differ markedly from those that are encountered when dealing with duress. Here it is rare to find the overt pressure that gives rise to the common law plea. "The influence of one mind over another", can, according to Lindley L.J. in \textit{Allcard v. Skinner}, be "very subtle".\textsuperscript{45} The victim of undue influence is typically unaware, at least at the time of contracting, that he is

\textsuperscript{37} See Vaisey J. in \textit{Bullock v. Lloyd's Bank} [1955] Ch. 317 who opines (at p. 324) that the concept "...is, to my mind, one of ambiguous purport".

\textsuperscript{38} Bigwood, for instance, suggests "the possibility of a deliberate, strategic circumvention of a definitional approach". Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?", (1996) 16 \textit{O.J.L.S.} 503 at p. 512.

\textsuperscript{39} [1985] 1 A.C. 686, [1985] 2 W.L.R. 588

\textsuperscript{40} See also \textit{Tate v. Williamson} (1866) L.R. 2 Ch. App. 55 Chelmsford L.C. (at p. 61) "...the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise" which Bigwood cites as supporting his suggestion of "the possibility of a deliberate, strategic circumvention of a definitional approach".


\textsuperscript{44} 378 U.S. 184 (1964) at p. 197.

\textsuperscript{45} (1887) 36 Ch. D. 145 at p. 183.
being treated unconscionably. Lord Hatherley L.C. noted in *Turner v. Collins* that the exercise of influence for improper ends need not instill fear in the party to whom it is directed. In fact it is very often the contrary. In the context of a claim of undue influence exercised by a parent over a child he commented that “[w]hen we think of parental authority 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 bias the child’s mind”. As Bigwood comments, “what the ascendant party does...is wrongfully make the option put to the subservient appear to be the reasonable thing to do in the circumstances”. Indeed the donor of a gift may not merely intend that it be given but may in fact have been so influenced that he desired the intended result. Active opposition and protest are rare in such cases.

It goes without saying of course that it must have been possible for the party accused of undue influence to exert or impose influence at the time in question. In *Grealish v.*

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46 See also Friel, *The Law of Contract*, 2nd ed., (Dublin: Round Hall, 2000) at p. 260 who argues that with undue influence “freedom has been removed not by brute threats and force but by subtlety and guile”. That influence can be subtle and insidious is underlined by an Appeal involving a divorce settlement. The Court of Appeal recently cut a divorce settlement in favour of a wife who had reportedly “used her ‘considerable charm and physical attraction’ to reduce her elderly multimillionaire husband to a ‘pitiful figure’”. Blinded by love and devotion to his wife, the elderly husband reportedly accepted the most remarkable indignities at the hands of his wife. Gentleman, “Wife reduced millionaire to ‘pitiful figure’”, *The Guardian*, May 7, 1999. See also, Johnstone “‘Gold digger’ sent packing at the polls”, *Times*, May 8, 1999. See also *Louth v. Diprose* (1992) 175 C.L.R. 621.

47 (1871) 7 Ch. App. 329 at p. 340.


49 Bigwood: “the victim still acts ‘intentionally’, perhaps even acceding to the transaction euphorically”, at p. 511. Bigwood, “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?”, (1996) 16 O.J.L.S. 503 at 512. A pertinent example comes from a case before Trim Circuit Court involving what appears to have been the undue influence of an elderly man by his neighbour. The relatives of the deceased owner of a house worth £20,000 successfully challenged its transfer for a mere £20 to the neighbour, who claimed that she had requested the sale on instructions from God. It seemed that the owner not only approved of the scheme but actively followed it through to completion. When his own solicitor refused to facilitate the sale, advising him that it was extremely improvident, the owner went to another solicitor who agreed to arrange the sale. Note also the “exultation and satisfaction” of the transferor of lands in *Huguenin v. Baseley* ((1846) 14 Ves. Jun. 273 at 299) who despite her apparent “delight” was found to have acted under the undue influence of the transferee.

50 Though see *McCarthy v. McCarthy* (1846) 9 Ir. Eq. R 620. The evidence there showed that the two nuns (sisters both in religion and in blood) whose property was at stake were extremely upset at the conduct of their superiors and actively objected to the attempt to divest them of their inheritance. One of the sisters indeed went so far as to challenge the bishop on the matter, an action that seems to have resulted in her being punished.
Murphy for instance, Gavan Duffy J. held that, the plaintiff having first proposed the transaction at a time long before the defendant had any influence over him, the former could hardly plead that he had been influenced in the venture by the latter, let alone unduly so.

Grounds of intervention. The precise ground upon which equity intervenes in these cases has been the subject of some concerted debate in the academic community. One of the few points that is clear is that for the doctrine to operate the person alleged or presumed to have exercised undue influence need not have personally benefited from the impugned transaction, a point underlined by the decision in Bullock v. Lloyd’s Bank. There the father of a child was deemed by operation of the presumption, to have exercised undue influence over his daughter. This was despite the fact that the father in that case dictated the impugned transaction “not with any sinister desire of benefiting himself”, Vaisey J. expressly noting that the doctrine was “not confined to cases in which the influence is exerted to secure a benefit for the person exerting it”.

An argument that has attracted much attention is that of Birks and Chin. They posit that the doctrine of undue influence is directed to the matter of impaired consent and is thus largely unconcerned with the propriety of behaviour that gave rise to such impaired consent. This is what might be termed a ‘consent-based’ perspective - it takes as its primary reference point the absence of consent either ignoring, or treating as merely evidential, the factors that gave rise to that absence. This perspective is

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52 This again is perhaps symptomatic of the aversion to definition noted above.
53 [1955] Ch. 317
54 Ibid. at p. 325.
55 Ibid. at p. 324. See also the cases in which religious advisers have exercised their influence to exact certain benefits not for themselves but for the church of which they are members. In O’Neill v. Murphy, [1936] N.I. 16, influence was presumed to have been exercised by a Canon Murphy with a view to securing a benefit, inter alia, to a convent of nuns and to the parish of which he was a priest.
57 The authors of that essay may garner some support from a dictum of Eldon L.C. in Huguenin v. Baseley (1807) 14 Ves. Jun 273 at p. 296: the court would not undo instruments that were the product
supported by some quite prominent precedents, including statements of the High Court of Australia in *Commercial Bank of Australia v. Amadio*.\(^5^8\) According to Dixon J., for instance, "undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party...".\(^5^9\) Other authorities are somewhat less equivocal, indeed some point entirely in the opposite direction, suggesting that undue influence requires more than mere impaired consent. Several *dicta* require an element of improper exploitation, though not necessarily the 'wicked' exploitation identified by Birks and Chin as a rather caricatured counterpoint to their argument. In the leading case of *Allcard v. Skinner*\(^6^0\) for instance, it is made perfectly clear that the basis of relief is the wrongful act of the person holding influence:

"...The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from *his or her fraud or wrongful act*. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to *prevent the relations which existed between the parties and the influence arising therefrom from being abused*.\(^6^1\)

In the same vein, Lindley L.J. concludes quite explicitly that the doctrine of undue influence is designed to obviate the improper conduct of those holding influence over others:

"What then is the principle? Is it that it is right and expedient to save person from the consequences of their own folly? or is it that it is right of "the pure, voluntary, well understood, acts of the [transferor's] mind" but would act if the gift was "the true effect of that friendly assistance, that kind, providential, interference to which she was looking, for the management of her affairs with advantage and facility to herself...", the latter "always having been considered in this Court as undue influence". In short unless they were the "pure understood, acts of her mind, this Court will undo them".

\(^5^8\) (1983) 151 C.L.R. 447.

\(^5^9\) *Ibid* at p. 474. *Dicta* of Davey J.A. in a Canadian case, *Morrison v. Coast Finance Ltd.* (1965) 55 D.L.R. (3d) 761 at p. 713 seem to support this perspective, the latter noting that "[a] plea of undue influence attacks the sufficiency of consent...". This was further endorsed by McIntyre J.A. in *Harry v. Kreutziger* (1979) 95 D.L.R. (3d) 231 at p. 236. See also the comments of Henchy J. in *Harris v Swardy*, unreported, High Court, Henchy J., December 21, 1967 at p. 15: he suggests that undue influence involves "unfair, undue and unreasonable mental control", thus perhaps suggesting that the grounds for equity’s intervention relate to the effect on the mind of the alleged victim.

\(^6^0\) (1887) 35 Ch. D. 145

\(^6^1\) *Per* Cotton L.J., *ibid.*, at p. 171. Emphasis added by present author.
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 folly, imprudence or want of foresight on the part of the donor".  

No less an authority than Lord Scarman, in a similar vein, has remarked that:

"the principle justifying the court in setting aside a transaction for undue influence...is not a vague ‘public policy’ but specifically the victimisation of one party by the other",  

suggesting in the very strongest terms that the basis for equitable relief is not mere impaired consent, but something more.

Bigwood, amongst others, disputes the Birks and Chin thesis, arguing instead that undue influence "operates to police the conduct or ‘conscience’ of the recipient of a beneficial transaction, whether it be contract or gift". He disputes in particular the use of the term ‘wicked exploitation’ to describe the counterpoint against which they make their case for a doctrine based on ‘impaired consent’. Bigwood notes that the types of exploitation that may give rise to equity’s intervention may be passive as well as active in nature. There is in most of these cases, a relative disparity in the contracting power of the parties. The stronger party may be at fault not merely in consciously employing his comparative strength to attain a benefit but also in failing

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62 Ibid. at pp. 182-183. But see also at p. 179 of the same case where Lindley L.J. notes that “no unfair advantage” had in fact be taken. This curious comment is perhaps the source of some confusion and does not help to clarify the basis upon which Allcard was decided.

63 National Westminster Bank v. Morgan [1985] A.C. 686 at p. 705. See also Smith v. Kay (1859) 7 H.L.C. 750 at p. 759 where it is noted that equity acts so that influence is not “abused” and that the confidence reposed in a person is not “betrayed”.

64 See also the comments of Lowry L.C.J. of the Northern Ireland Court of Appeal in R. (Proctor) v. Hutton [1978] N.I. 139 at p. 146: “the plaintiff must prove that an unfair advantage has been gained by an unconscientious use of power in the form of some improper conduct, some coercion from outside, some overreaching, some form of cheating”. (Emphasis added by present author).


to take ‘positive steps’ to obviate the potential for exploitation arising from the relative disparity. Smith too suggests that fault is the defining criterion in this context, again noting that there may be fault where a party with influence “carelessly or negligently fail[s] to take adequate precautions to ensure that the other party was acting autonomously”. The fact that a party exerting influence acted honestly and in good faith, (as in *Allcard v. Skinner* and *Cheese v. Thomas*) does not, as Birks and Chin suggest, negate the implication of fault. A party, even where acting without malice, may be at fault in neglecting to confront the possibility that the alleged victim is acting non-autonomously and thus in failing to act to prevent such non-autonomous action. “The present cut-off points” Smith concludes, thus “seem to be based on fault”.

Certain features of the law on undue influence tend to support Bigwood and Smith’s perspective. One is that concerning the effect of undue influence on third parties contracting with the party whose consent has been impaired. If the thesis proposed by Birks and Chin were correct it would logically follow that where there is impaired consent, a contract with a party not responsible for the equitable wrong would be voidable at the instance of the party whose consent has been impaired. If this were so the extensive judicial debate about when and on what basis a third party will be affected by undue influence would, frankly, be otiose. If impaired consent alone were the relevant ground, the relevant contract would be voidable even in the case of the most vigilant third party. The true rationale, it is suggested, is that the third party may take a benefit unless his conscience is affected by the wrong. This may arise, for instance, where he has failed to take reasonable steps to obviate the possibility of equitable wrong in certain cases where such wrong is likely, or where he has failed to

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69 (1887) 36 Ch. D. 145.
70 [1994] 1 All E.R. 35.
72 See Smith, *op. cit.*, who observes that the “‘[f]ault-based interpretation is supported by the fact that relief for undue influence is limited to the situation where the source of the influence is the defendant, or, in three party cases like *O’Brien*, where the third party has actual or constructive knowledge of the dependence”. [1996] *Restitution Law Review* 261.
make adequate inquiries of those possibly affected (both again clearly passive forms of wrong).

The donor reposes such trust and confidence in the donee, usually though not exclusively consequent upon a particular relationship that exists between them, such that the donor may prove particularly susceptible to the suggestion of the donee. In such circumstances, the danger exists that having acquired such influence it will be abused so that unfair advantage can be taken of the servient party's dependent state. Thus, equity intervenes "not primarily on want of a true consent" but on the ground that the conduct of the donee has in some sense been unconscionable or is assumed to have been so until the contrary is proved. An equity attaches to the conscience of the donee and to that of each subsequent party with notice of the wrong, to whom the property in question passes.

The use of the term 'undue' in this connection posits an important qualification. Birks and Chin attempt to dilute the significance of the use of this key term in support of their argument that it is impaired consent that is the true ground of intervention. They argue that, in this context, the term 'undue' imports, not an element of impropriety or fault, but, rather suggests that there has been "an excessive and exceptional degree of lost autonomy". It is the very fact of such influence, they suggest, that prompts the intervention of equity. In this, Birks and Chin reveal an excessively liberal individualistic approach to social relations. They assume that Equity objects to the presence of influence per se, a perspective that damns as improper the very interconnectedness of individuals, the very fact of inter-personal dependence. In fact as Winder suggests "there may be a right use as well as an abuse of influence".

Equity, however, adopts a much broader approach to the issue of propriety than does the common law, drawing into its web instances of misconduct that fall well outside

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75 Ibid.
76 Winder, "Undue Influence and Coercion", (1939) 3 M.L.R. 97 at p. 98.
the boundaries of ‘legal wrong’ which, as seen in Chapter Three, constrain the operation of the doctrine of duress. There are in fact two quite distinct circumstances in which equity will intervene. The first involves the situation where there is actual undue influence, where a party A, receives a benefit under a contract with B, as a result of influence actually and unconscionably exercised by A over B. The second and more common circumstance arises where there exists a relationship of trust and confidence between the parties such that it can fairly be presumed that it was the result of undue influence exercised by one party over the other, until otherwise proved by the alleged wrongdoer, that is where a presumption of undue influence arises.

Thus it is not necessary in the second class of cases to show that any wrong has in fact been perpetrated. However, mindful of the risk of abuse that such relations give rise to, once the existence of a relationship of trust and confidence is established, the onus shifts from the alleged victim to the alleged wrongdoer to prove that the latter acted in such circumstances or took such steps as sufficiently negated the implication of undue influence. Thus in Cheese v. Thomas the English Court of Appeal rescinded an agreement on the ground of presumed undue influence even though (somewhat strangely) the court was satisfied, in Sir Donald Nicholls V.C.’s words, that the defendant did not “…behave improperly or seek to trick or take advantage of his aged uncle”. Notwithstanding this apparent absolution of blame, it is nonetheless suggested that the defendant had failed to ensure that such circumstances

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77 The problem may be that Birks and Chin are confounding the issue of relief in restitution with that in contract. Each is a distinct field, subject to different principles. It is arguable that the Birks and Chin thesis is indeed correct but only insofar as it relates to relief in restitution. Relief in the latter field is indeed grounded upon impaired consent. See the comments of O’Dell, “Incapacity” in Birks and Rose, Lessons of the Swaps Litigation, (Mansfield, 2000) at pp. 120ff. and at p. 124.

78 Indeed Birks and Chin suggest that the function of the presumption may be prophylactic. Thus equity relieves in such cases not because a party has been wickedly exploited but rather “to obviate the danger of wicked exploitation...[of]...those whose capacity to make judgments was impaired by relational imbalance”. Birks and Chin, op. cit., at p. 80. In the present author’s opinion this in no way discounts the theory that undue influence is fault-based. Though fault need not definitively be proved in cases where the presumption applies, this does not mean that fault is not relevant. In fact, as Birks and Chin seem to admit in the preceding passage, it is to prevent the possibility of advantage being taken that the presumption arises.

existed or steps were taken such that the risk that his uncle would be prevailed upon was reduced to a minimum. It is for this reason, it is submitted, that equity acts in these cases.

A. The Classes of Undue Influence Examined

As noted above there are two distinct categories under which undue influence is treated. Each will now be examined in turn.

1. Actual Undue Influence

Here, as Lord Browne-Wilkinson notes in *Barclays Bank p.l.c. v. O’Brien* 1993 All E.R. 417, "...it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned". It is in fact comparatively rare to encounter this ground being invoked: litigants are more likely to seek out the more favourable territory of the second class of undue influence.

One of the most remarkable cases in this present class is *Bridgman v Green* 1971 Ch. 95. This was an eighteenth century case in which a butler was found to have so ‘completely dominated’ his master that a conveyance made by the latter to the former was set aside as having been made *de facto* as a result of undue influence. The master was in such “a state of vassalage” to his servant that he even submitted to the latter’s inducement to separate from his wife.

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80 *Ibid* at p. 39.
82 (1755) 2 Ves. Sen. 627.
83 See also *Re Craig* [1971] Ch. 95, involving a housekeeper who bullied her employer, an elderly man, into giving her several expensive gifts.
A recent Irish case in this category, *O’Flanagan v. Ray-Ger Ltd.* involves a somewhat more conventional scenario, that of advantage taken of an impressionable business partner. It suggests also that the boundary between cases in which actual undue influence is established and where the presumption can be remarkably thin. Here the court held that there had been actual undue influence. Two businessmen, Mr. Pope and Mr. O’Flanagan, had embarked on a business venture involving the purchase and running of a public house. While Mr. and Mrs. O’Flanagan, almost exclusively, funded the venture, Mr. Pope seemed intent on drawing most of the benefits to himself. Pope, contrary to the initial agreement, had failed to invest a single penny in the company short of the incorporation costs. Knowing that his business partner was close to death, Pope prevailed upon O’Flanagan to agree that on either’s death, the survivor would effectively take full control of the company, free from the claims of the deceased’s family. Upon O’Flanagan’s death, Pope attempted to enforce this agreement. Costello P. concluded that undue influence had in fact been exercised over O’Flanagan.

Although there was evidence that the deceased, fearing that he would be prevailed upon, was anxious not to meet in any of their old haunts, the agreement was made in a pub. At the time the deceased was suffering from terminal cancer and had been seriously ill prior to the meeting, both facts of which the defendant had been well appraised. Both he and the deceased must thus have realised that the likelihood of the latter surviving Pope were slim in the extreme. In the circumstances Costello J. could

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85 This was despite the agreement that each party would invest an equal amount of capital in a company set up for the purposes of running the business in exchange for which each would receive one of the two issued shares in the company. The capital for the company was to be raised by each of the investors by the purchase and resale of the freehold in several local business premises. This is underlined by a separate finding in the case. The capital for the company was to be raised by each of the investors by the purchase and resale of the freehold in several local business premises. One of these properties was purchased with money paid over to Mr. Pope by Mr. and Mrs. O’Flanagan on the understanding that the property would be put in Mr. O’Flanagan’s name. Instead, and unknown to the latter, Mr. Pope purchased the freehold in the name of the company and furthermore charged the property as security for a loan made to it. In such circumstances, Costello J. ruled that the company held the property in trust for O’Flanagan and had been in breach of trust in charging the property. He was prepared, in the circumstances to hold that a constructive trust arose by operation of law, but in
only conclude, taking into account evidence of prior dealings between the parties in which the defendant seemed to have exercised considerable influence over the deceased, that undue influence had been used to procure the agreement made. “The defendant...” he noted “…had a strong and forceful personality and had obviously exercised considerable influence amounting to domination of the deceased on previous occasions.”

What is interesting about this case is that, though it falls clearly into the first class of Cotton L.J.’s scheme, it nevertheless seems ultimately to turn on the history of dealings between the parties and on the relationship subsisting between them. The only evidence of the meeting that spawned the impugned agreement was that of Mr. Pope. In the circumstances Costello J. was left only with an inference of undue influence which he could not have failed to draw from a survey of the previous relations of the parties. He cited numerous examples of the ease with which the defendant could persuade and manipulate not only the deceased but also the deceased’s wife, a woman who displayed more than her fair share of common sense and level-headedness. From this, coupled with the inference that the deceased acting with a free mind, was most unlikely to divest his family of his most valuable asset, Costello J. was satisfied that the plea of de facto undue influence had been made out.

He therefore did not have to consider whether the relationship that existed between the two men was sufficient to give rise to the presumption. It may have been difficult to establish considering that the relationship had been frosty right up to the time immediately before the impugned agreement was reached. Nonetheless in one respect the case shares much in common with the cases in which the presumption arises, being that there exists a history of dealings from which certain inferences may be

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87 The defendant as good as admitted it himself. In making inquiries as to his rights subsequent to the death, Pope failed to bring to the attention of the company’s advisors the impugned agreement until it became clear that without it he would not succeed in his stratagem. This absence of candour betrayed a lack of confidence in the document’s validity “...which could only have arisen if it was tainted by some wrongdoing on his part”. 
drawn as to the likelihood of influence arising as a causal factor in individual transactions between the parties. Indeed there exist several cases where actual undue influence has been established where the protagonists have a history of dealings. For instance in Morley v. Loughman actual undue influence was established in a case involving a religious adviser and devotee. Wright J. observed that the influence improperly exerted in that case had been “…established and maintained…” words that seem to suggest ascendancy having been acquired over a period of time. In both Re Craig and Farmers’ Co-operative Executors & Trustees Ltd. v. Perks the respective courts held that while there had been actual undue influence in each case, the benefit of the presumption also arose from the same fact scenarios.

In fact it is arguable that of its essence, influence can only be garnered, by all but the most charismatic of individuals, through a course of dealings. The trust and confidence upon which such influence is typically based built up over a timeframe spanning not one but several instances of interaction between the parties. In this regard the equitable doctrine of undue influence readily lends itself to a more relational or dynamic approach to contracts than does its common law counterpart. At the risk of repetition, the typical contract law narrative tends to depict and therefore analyse contractual transactions as discrete occurrences, viewed independently of the history of dealings between the parties. A relational or dynamic perspective, by contrast, demands a more contextual approach, which analyses the transaction not as a single event but rather as an episode in an ongoing dynamic between the parties.

88 Clark, Contract Law In Ireland, 4th ed., (Dublin: Round Hall, 1998) at pp. 295-296, supports this view: “In fact, in this writer’s view, the facts are so compelling that it would have been possible to hold that the whole evidence would raise the presumption of undue influence in the second sense in which Jones L.J. talked of the presumption arising in R. (Proctor) v. Hutton, Re Founds Estate, [1978] N.I. 139 (C.A.), as well as coming within Class 2B in Barclays Bank v. O’Brien, [1994] AC 180”.
89 [1893] 1 Ch. 736.
90 [1971] 1 Ch. 95
92 In Re Craig, op. cit., Ungoed Thomas J. found that the presumption in fact arose from the particular relationship of the housekeeper and her employer. He subsequently held that there had, on the evidence been actual undue influence. In Farmers’ Co-operative v Perks, op. cit., the judge proceeded
Trust and confidence are not merely ascribed by virtue of status but rather through a track record of behaviour that tends to display the trustworthiness of the actor. Therefore the doctrine of undue influence may be said to reflect most closely, though perhaps not self-consciously, this relational perspective, which, it is argued, must be adopted if we are to formulate a clearer picture of the dynamics of power and a more cohesive approach to its regulation.

2. Presumed Undue Influence

The categories of relationships embraced. The potential for the application of a relational perspective in this field is most clearly to be seen in the context of the presumption of undue influence, the ground upon which the overwhelming majority of cases concerning undue influence is based. The presumption is indeed quintessentially relational: it arises only where there exists, in law or in fact, a relationship of trust and confidence such that the party in whom such trust and confidence is reposed is in a position materially to influence the actions of the other party to the relationship. The impugned transaction is viewed against a history of dealings between the parties from which certain inferences may be drawn about the transaction, which inferences the alleged wrongdoer must displace. The categories of relationship which the law recognises as giving rise to the presumption of undue influence are, as Gavan Duffy J. noted in Gregg v. Kidd, never closed. Nor have the courts, he continued, laid down the precise “degree of confidence or trust that must exist so that it can be said that the donee is in a position to exert influence”. In each case the court must take a dynamic view of the relations between the parties, examining the dealings between with the ultimate purpose of ascertaining whether, as Nourse L.J. observes in Goldsworthy v. Brickell “...the party in whom trust and confidence is reposed is in a position to exert influence over him who reposes it”."}

in the opposite direction, first showing that there had been undue influence in fact, then noting that the presumption, on the facts, would have been available to the plaintiffs.


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It is neither necessary nor indeed is it sufficient to show that the parties stood in a fiduciary relationship towards each other as seems to have been suggested by Sachs L.J. in *Lloyd's Bank v. Bundy*, but discounted by Lord Scarman in *National Westminster Bank v. Morgan*. Nor is it necessary, as suggested in the latter-mentioned case, that the presence of a ‘dominating’ influence be established. It is enough that the relationship between the parties is such that the servient party reposed an element of trust and confidence in the other party such that the latter party was in a position to exert influence over the former.

There are in fact two distinct categories where undue influence is imputed. The first category embraces relationships that, as a matter of law, raise the presumption. Certain relationships have been ‘judicially recognised’ as automatically giving rise thereto as a matter of course. The second category, involves relationships where, as a matter of fact, established in court, one party reposes such a degree of trust and confidence in the other that the former is presumed to have acted under undue influence. In other words “although the relationship does not come within a class in which influence has traditionally been presumed, the factual relationship is such that the court will presume undue influence to be present”. The burden of establishing the existence of such a relationship lies on the party alleging undue influence, although once established the onus shifts to the other party.

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97 See *Tufton v. Sperni* [1952] 2 T.L.R. 516: the plaintiff, per Evershed M.R., was not required to have “abdicated all his authority” to the defendant. Birks and Chin note, thus, that while there must be excessive dependence for the presumption to arise it need not be such as to involve “an absolute surrender of one mind to the other”. Birks and Chin, “On the Nature of Undue Influence” in Beatson and Friedmann, *Good Faith and Fault in Contract Law*, op. cit. at p. 69.
99 These are discussed further below but Goff and Jones offer a non-exhaustive list thereof: parent and minor child, parent and ill adult child, solicitor and client, doctor and patient, spiritual adviser and follower, trustee and beneficiary, guardian and ward, step-parent and step-child, manager and young entertainer.
The presumption is closely related to, though not to be confused with, the doctrine of abuse of confidence.\textsuperscript{101} It is not necessary, however, as in the latter case, that the relationship to which the presumption applies be fiduciary in nature. The presumption casts upon the person against whom it is pleaded the obligation of establishing that the contract to which it attaches involved a free and fair bargain. It is primarily an evidential aid, "a tool of the lawyer's trade" designed 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 or impossible to come by".\textsuperscript{102} Its use as such however belies a certain presupposition of more socio-political significance. The presumption's strength is that it acknowledges the relation. It does not presuppose that contractual relations are predominantly discrete in nature. It recognises and identifies relations and the arrangements that surround them.

As a discourse, however, it remains largely suspicious of the relation; it assumes after all that where a relationship of trust and confidence gives rise to a gift that the donation is the product of oppressive practices. The donee must prove that it is not. Perhaps this is a symptom of a more pervading legal ill: legal discourses do not, by their very nature, trade in happy endings. The narratives of law deal with worst case scenarios, situations where relations have disintegrated so much as to require legal resolution or closure. Legal discourses thus tend, by nature, to assume the worst.

It is arguable that this tendency has over-sensitised the doctrine of undue influence to certain oppressive practices. It seems to suggest that one should be naturally suspicious of trust and confidence. It posits a suspicion of the gratuitous, the

\textsuperscript{101} This is a ground of restrictive application. The 'confidence' of which it speaks is of a highly specialised nature and only arises where parties stand in a fiduciary or similar relationship, such as solicitor and client, trustee and beneficiary, principal and agent and other analogously onerous relationships. Where parties stand in such a relationship, a transaction between them will be set aside unless it can be shown that certain conditions were met. The first is that there was full disclosure of all material facts known to the person in whom the confidence is reposed, the second, that the transaction was shown to be "in itself, a fair one". \textit{Demerera Bauxite v. Hubbard} [1923] A.C. 673.

\textsuperscript{102} Per Bridge L.J. in \textit{Re Brocklehurst} [1978] Ch. 14 at p. 43. The difficulty in establishing proof is also alluded to in \textit{Allcard v. Skinner}: the presumption being described as protecting "persons from the exercise of such influence under circumstances which render proof of it impossible".
charitable, the gift motivated by love and affection. The paradigm of the ideal transaction of liberal discourses is subtly endorsed by this current of suspicion; the implication is that the party motivated by self-interest is acting reasonably; the party motivated by more affective matters, trust, love, affection, respect, is assumed to be acting under improper influence. Even the parental relation is not immune from such suspicion: "...though there is no very great evidence of undue influence, yet the court will always look with a jealous eye upon a transaction between a parent and child just come of age and interpose if any advantage is taken".¹⁰³

(a.) The Established Classes of Relationship

Parent and Child. The very earliest cases of undue influence concern the relationship of parent and child. As early as 1737 Lord Hardwicke remarked¹⁰⁴ that "...as the parental authority is great, to prevent any undue influence it may have in prejudice of the children, there must, in all cases of this kind, be a valuable consideration moving from the father and an actual benefit accruing to the child".¹⁰⁵ Here the law takes a descriptive attitude to the parenting role, extending the remit of its protective role to relationships where the parental link is not strictly biological but, rather, social. Thus, like principles have been applied to the relationship between guardian and ward¹⁰⁶ and others acting in a quasi-parental capacity.¹⁰⁷

¹⁰⁴ In Morris v. Burroughs, (1737) 1 Atk. 398.
¹⁰⁵ In a similar vein, Strange M.R. noted in Cocking v. Pratt (1750) 1 Ves. Sen. 400 at p. 401, 27 E.R. 1105 at p. 1106, that "...[t]hough there is no very great evidence of undue influence, yet the court will always look with a jealous eye upon a transaction between a parent and a child just come of age, and interpose if any advantage is taken".¹⁰⁶
¹⁰⁷ See O'Connor v. Foley [1905] 1 I.R. 1 where the plaintiffs claimed that their guardians, their aunt and uncle, had unduly influenced them into signing over their rights in respect of land that had been devised to them by their father, and into endorsing certain promissory notes given by the guardians to a creditor. While Porter M.R. (at p. 16) does not explicitly mention the presumption, he ruled that the transactions should be set aside "unless it can be shown that the influence has not been misapplied".
The duration of the presumption is, as Chitty notes "a question of fact and degree in the circumstances of each case". The presumption can certainly outlast the minority and even the marriage of a child. In fact, owing to the fact that a minor child may be otherwise deemed incapable of contracting owing to his infancy, it is the child who has just reached his or her majority that is arguably most in need of equity’s intervention. Indeed, several of the most notable cases in this field involve transactions entered into shortly after a child has turned 21, the former age of majority.

It is clear however, that the presumption will rarely outlast the age of majority by more than a few years. Once a child has attained relative independence of its parents, the presumption will quickly wither. The possibility of approbation should also be noted, as where a child, having been liberated from his or her parents, refrains from acting so as to upset an arrangement made with one of them. In Wright v. Chitty on Contracts, 28th ed., (London: Sweet & Maxwell, 1999) at §7-053, p. 441. See for instance McMackin v. Hibernian Bank [1905] 1 I.R. 296.

In Lancashire Loans Ltd. v. Black [1934] 1 K.B. 380 it was alleged that a daughter who had married at the age of 18 and subsequently returned home to her mother was nonetheless subject to her mother’s influence. As a result certain transactions made by the daughter enabling the mother to secure the latter’s debts were deemed invalid by reason of undue influence.

Indeed Strange M.R in Cocking v. Pratt (1750) 1 Ves. Sen. 400, 27 E.R. 1105 seems to have restricted his comments pointedly to children who had just come of age. A case cited by McCann as an example of older children being subject to parental undue influence is Ahearn v. Ahearn (1910) 45 I.L.T.R. 28. (See McCann, “The setting aside of deeds and gifts inter vivos obtained by the exercise of undue influence”, (1967) 2 Ir. Jur. (n.s.) 205 at p. 209. This involved a daughter and two sons who were in their thirties who had effected a mortgage of their interest in a farm to the plaintiff as security for their mother’s debts. Being uneducated and having had no independent advice in the matter, the Irish High Court set aside the transaction as against the three siblings. While McCann maintains that the mother induced them to enter into the mortgage, the report of the case does not reveal any maternal pressure or influence being exerted and tends instead to indicate that the defendants acted in consequence of threats made by Mr. Ahearn, the plaintiff. The basis of the decision being rather unclear, it is arguably unreliable as an authority on parental undue influence. Indeed McCann himself acknowledges that the confidential relationship “did not play any part in the outcome of the action as it should have been terminated by the age of thirty”.

Indeed there are important practical considerations that counsel caution in extending the presumption too far beyond a child’s minority. Many small and medium size enterprises are run by family owned companies where dealings between family members may be quite common. If the presumption were interposed too readily some difficulty would be introduced into intra-familial dealings with disturbing implications for business efficacy.
Vanderplank\textsuperscript{114} a daughter, upon attaining the age of 21, executed a deed of gift in favour of her father. The daughter died some ten years later, having made no complaint about the transaction in the intervening time. Her husband subsequently challenged the validity of the gift. While the court felt that the original gift would probably not have stood had it been challenged at the time it was made, it felt that the daughter, by her subsequent conduct, had approbated the arrangement.

It should not be discounted the dependence that ‘biases’ a child towards its parent, may in later life give rise to situations where the tables are effectively turned. As ReCoomber: Coomber v. Coomber\textsuperscript{115} illustrates, the simple fact of a relationship of parent and child (even if it be described as ‘fiduciary’) will not impute a presumption of undue influence where a parent has made a disposition, even a gift, in favour of a child.\textsuperscript{116} The fact scenarios in both Williams v. Bayley\textsuperscript{117} and Lloyd’s Bank v. Bundy\textsuperscript{118} however, bear testimony to the formidable pressure that may be exerted on a parent when a son or daughter risks loss of liberty or financial ruin.\textsuperscript{119} Thus the simple familial-hierarchical model of parent prevailing over child ill-describes the more complex dynamic of family relations. In particular there are several instances of elderly persons being subject to the influence of younger relatives.\textsuperscript{120} These cases suggest a more diffuse, complex conception of power, one that, following the

\textsuperscript{114} (1856) 8 De G. M. & G. 133, 44 E.R. 340.
\textsuperscript{115} [1911] Ch. 723 (C.A.)
\textsuperscript{116} In that case it appeared that the mother intended that her son benefit - this was her freely held intention (and it seemed, that of her deceased husband). Even if the presumption had arisen, however, there was ample evidence to displace it, the mother having been independently advised and well-appraised as to the consequences of her actions. See also A.S.B. Bank v. Harlick [1996] 5 N.Z.B.L.C. 103, [1996] R.L.R. 217, where the New Zealand Court of Appeal affirmed that children cannot be presumed by dint of their relationship with their parents alone, to have exercised undue influence over their parents. In that case the evidence went “no...further than to establish a normal family relationship in which parents agree to assist children in their business ventures”. From this alone it seemed no presumption could arise.
\textsuperscript{117} (1866) L.R. 1 H.L. 200.
\textsuperscript{118} [1975] Q.B. 326.
\textsuperscript{119} See also Commercial Bank of Australia v. Amadio (1983) 151 C.L.R. 447 where the parents of a child reposed trust and confidence in their son.
Foucauldian model of power relations,\textsuperscript{121} acknowledges a more dynamic element to the exercise of power and influence.

**Solicitor and Client.** The presumption has always applied with great rigour to the relationship between solicitor and client. In fact, for some time it was believed that a solicitor was precluded from taking any benefit from a client at all, above and beyond his or her legitimate legal costs, even where it could be shown that the transaction was entirely at arm’s length. In *Atkins v. Delmege*\textsuperscript{122} the legal representative of an estate was precluded absolutely from buying part of the estate, ordered for sale by a court.

That view has since been tempered so that a solicitor may now retain a benefit flowing from a client provided that it is established that the latter did not act under the influence of the solicitor.\textsuperscript{123} Even so, the solicitor’s unique position as confidential adviser clearly places him or her “in much greater difficulty in rebutting the presumption than other persons”.\textsuperscript{124} Thus as Cozens-Hardy M.R, pointed out (\textit{obiter}) in *Re Coomber*\textsuperscript{125} a “solicitor cannot, in ordinary circumstances take a gift from a client in a matter in which he is solicitor. There is from that relationship in itself a presumption of undue influence”. Where a client acts without independent advice, the voidability of the gift or disposition is virtually assured.\textsuperscript{126} In *O’Kelly v. Glenny*,\textsuperscript{127} an heiress, in ignorance of the extent thereof, divested her whole estate to

\textsuperscript{121} Foucault suggests that since the end of feudal times the dynamic of power relations has become infinitely more complex, with simple hierarchies no longer being sufficient to explain the phenomenon of power. Foucault, “Two Lectures” in Foucault, *Power/Knowledge*, (Brighton: Harvester, 1980).

\textsuperscript{122} (1847) 12 Ir. Eq. R. 1.

\textsuperscript{123} In *Wright v. Carter* [1902] 1 Ch. 17 the English Court of Appeal accepted that a solicitor might be able to rebut the presumption, although in that case the Court concluded that the solicitor in question had not done so and thus the gift in his favour was set aside.

\textsuperscript{124} McCann, “The setting aside of deeds and gifts \textit{inter vivos} obtained by the exercise of undue influence”, (1967) 2 Ir. Jur. (n.s.) 205 at p. 211. See also *Chitty on Contracts*, 28\textsuperscript{th} ed., (London: Sweet & Maxwell, 1999), at §7-055, p. 442 where it is noted that such gifts are viewed with “considerable suspicion”.

\textsuperscript{125} *Re Coomber: Coomber v. Coomber* [1911] 1 Ch. 723 at p. 726.

\textsuperscript{126} Kay L.J, puts the proposition in no uncertain terms when he posits that where a solicitor “chooses to act himself in the matter, I think that there is an imperative rule that such gift is invalid”. *Liles v. Terry* [1895] 2 Q.B. 679 at p. 686.

\textsuperscript{127} (1846) 9 Ir. Eq. R. 25
her solicitor at a gross undervalue, without any independent legal advice. Despite a
twelve-year delay in taking proceedings, the Court had no hesitation in setting aside
the deeds.

Care is needed even where the donor is a member of the solicitor's family, as in
Garrett v. Wilkinson\textsuperscript{128} where a mother's gift to her son was set aside on the footing
that he was also her legal adviser.\textsuperscript{129} Nor should the solicitor's colleagues at the Bar
rest easy. A barrister who received a gift of property from a client for whom he had
previously conducted successful litigation saw this gift set aside in Broun v. Kennedy\textsuperscript{130} again on the basis of the presumption.

One probable rationale for this approach is outlined in the judgment of Stuart V.C. in
Re Holmes' Estate\textsuperscript{131}: "The solicitor is considered to have an amount of influence
over the mind and action of his client which, in the eye of this court, while that
influence remains, makes it almost impossible that the gift can prevail". In the face of
superior skill and experience the client is often content to abdicate responsibility for
his affairs to the legal adviser. Such a specialist will, in addition, often be invested
with responsibility not only for the legal affairs but also for the financial affairs of the
client. Even where the relationship has come to an end the presumption may still be
deemed to apply such is the pervading influence that the law officer holds.\textsuperscript{132}

It is perhaps not surprising that the judiciary would rate the influence of lawyers so
highly. Here again, however, a stereotypical and linear view of professional
relationships is best avoided. What happens if the seasoned managing director of a

\textsuperscript{128} 2 De G. & Sm. 244.
\textsuperscript{129} There is a similar risk of invalidity where a gift is given indirectly, to, for instance, the son of one's
\textsuperscript{130} 4 De G.J. & Sm. 217.
\textsuperscript{131} (1861) 3 Giff 337 at p. 345.
E.R. 1262, a case on appeal to the Privy Council from Canada, the respondent's influence was deemed
to have subsisted notwithstanding the fact that the formal relationship of solicitor and client had ended.
The confidence arising from that relationship was said to have survived its formal ending.
company rewards his newly recruited junior legal adviser with membership of an exclusive golf club? Should the presumption stand? Partners in large business practices typically accumulate vast experience in financial and legal matters, a fact that may easily displace the presumption in cases involving transactions with legal advisers.

This latter point was recognised in the Australian case of *Westmelton Pty. Ltd. v. Archer and Schulman*, heard before the Supreme Court of Victoria. A solicitor who had done considerable work for the appellant company had agreed to reduce his fees by 40% in exchange for a 7.5% share of the company’s future profits. The appellants subsequently failed in their attempt to overturn this transaction. While the presumption of undue influence did initially arise, it was deemed to have been easily rebutted by evidence of the considerable business acumen of the company’s directors, who were described as having more experience in commerce and finance than the average solicitor.

**Doctor and Patient.** The relationship between doctor and patient also attracts the presumption such that a disposition in favour of a medical practitioner must be affirmatively shown to have been the result of the patient’s untrammelled free and informed consent. The sensitivity to possibly inequitable results in such cases, by their very ‘life-or-death’ nature, is especially heightened. In addition to the possibility that the presumption may be rebutted, however, there is also the

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135 In the wake of the Harold Shipman trial in Manchester, where a doctor was found guilty of killing 15 aged female patients over a number of years, concerns regarding the propriety of gifts to doctors have been heightened even further. It appeared that Dr. Shipman had been named as beneficiary in the wills of at least one of his victims. In the case of Mrs. Kathleen Grundy, this was shown to have been a forgery, for which Dr. Shipman received an additional four-year prison sentence. See generally the *Manchester Evening News* Harold Shipman Murder Trial website, http://www.manchesteronline.co.uk/shipman/. In fact, in February of this year, a private member’s bill was introduced seeking to render void testamentary dispositions in favour of the medical practitioner(s) of a testator. See Succession Bill, 2000 (No. 9 of 2000), introduced by Deputy Seán Ryan T.D., February 15, 2000.
possibility of approbation, as in *Mitchell v. Homfray*. There the executors of the deceased challenged a gift to her physician enabling him to purchase a house, given without independent advice. From the time the relation ended to the time of the donor’s death, however, she continued to abide by her gift. “[S]he determined”, in Lord Selborne’s view “that she would not undo what she had done”. Under the circumstances, the court intimated that the presumption of undue influence was no longer warranted.

**Religious Adviser and Devotee.** Most religious and spiritual denominations operate through at least a vaguely hierarchical structure in which those who occupy the higher positions are deemed to have certain spiritual authority over lay disciples or followers of the religion. Many, repose in one person or in a body of persons the ability to rule authoritatively on matters of faith and morals that bind followers in the spiritual realm. This is admittedly an arena of some difficulty for the courts, especially in Ireland. The Judiciary, *per Walsh J. in McGee v. Attorney General*, typically eschews adjudicating upon the validity of differing interpretations of religious dogmata and is hardly likely to view with any greater relish the prospect of determining whether or not the influence of a pastor is proper or otherwise. A

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136 (1881) 8 Q.B.D. 587 (C.A.)
137 Ibid. at p. 591.
138 The notable exception is the Quakers, who reject the vesting of religious authority in any one person.
139 [1974] I.R. 284 at 318. See also *T.F. v. Ireland* [1995] 1 I.R. 321 at pp. 330-331, and 333-334 where Murphy J. declined to allow evidence to be given by a Roman Catholic priest regarding the natural law doctrines of his Church, the Court reasoning that this was irrelevant to the proceedings. Even if not so, it would have been contrary to the requirement of non-discrimination in Article 44.2.3 of the Constitution to do so. See also Sheehy who argues that there can be no ‘covert’ incorporation of Catholic theology in the law of marriage, the Irish law of marriage no longer being based on religious tenets. Sheehy “The Right to Marry and the Irish Tradition of the Common Law”, in O’Reilly (ed.), *Human Rights and the Constitutional Law*, (Dublin: Round Hall, 1992).
140 Although Gavan Duffy J. arguably came dangerously close in *Maguire v. A.G.* [1943] I.R. 238. The learned judge had to consider whether the endowment of a convent for the perpetual adoration of the Blessed Sacrament conferred a ‘public benefit’ and was thus a ‘charitable purpose’. The learned judge seemed at pains to establish that such worship conferred an objective spiritual benefit. At pp. 253-254 he goes so far as to pronounce that: “...a gift to found a convent for perpetual adoration of the Blessed Sacrament is beyond all doubt, a gift charitable at common law, because it is a gift to God, a gift directly intended to perpetuate the worship of God”. It is arguable that a preferable approach would have been to hold that the fact that the masses were being said was considered by a portion of the population to be of spiritual benefit and thus promoted a sense of psychic well-being.
decision denoting improper conduct may in some cases be seen as an implicit rejection of the tenets of a religion, an impression that most judges will be anxious to avoid.\textsuperscript{141}

Religious zeal or faith – depending on one’s perspective – do tend to inspire gifts and dispositions of great, sometimes excessive, generosity towards churches and their spiritual leaders. Recognition of the fact that many spouses and children were being divested of their inheritance in favour of such testamentary dispositions was at least part of the rationale behind the partial curtailment of freedom of testation in the Succession Act, 1965, guaranteeing a bereaved spouse a minimum portion of his or her spouse’s estate.\textsuperscript{142} The courts have regularly stated that arrangements by which property is transferred from devotee to spiritual mentor (who need not necessarily have an official religious post)\textsuperscript{143} are subject to special scrutiny. Thus, in \textit{Nottidge v Prince,}\textsuperscript{144} Stuart V.C. commented that: “...[n]o person who stands in a relation of

\textsuperscript{141}\textsuperscript{141} Notes for instance the comments of Andrews L.J. in the course of his decision in \textit{O’Neill v. Murphy} [1936] N.I. 16 at p. 30

\textsuperscript{142}\textsuperscript{142} The application of the presumption poses some interesting and as yet untested questions regarding the legitimacy of the many donations upon which the modern clergy depend for their financial wellbeing. In the course of his or her ministry, a pastor may receive many gifts from parishioners in each of which cases the presumption theoretically may arise. In the Roman Catholic Church Christmas and Easter dues and weekly collections for the priests of a parish go directly towards the upkeep of the local clergy. One may conceivably argue that the priest is providing his parishioners with a service of an important nature and that the donations constitute the \textit{quid pro quo} therefor. However this argument falters on several grounds. First, the priest is obliged under canon law to offer up a daily mass whether or not there are others in attendance. Second, the payments made are strictly discretionary. (At any rate, does officiating at a mass constitute good consideration in law? That spiritual benefit does truly flow from a donation or gift is a matter of faith, not of fact.) In most such cases, however, the issue is of theoretical interest only. The operation of the maxim \textit{de minimis non curat lex} was held in \textit{Rhode v. Bates} (1866) L.R. I Ch. 252 per Turner L.J. at p. 258 to preclude the operation of the equitable doctrines where the gift is relatively trifling.

\textsuperscript{143}\textsuperscript{143} A peculiarly stark example of religious influence involving a lay visionary was the subject of a decision of the Trim Circuit Court on May 11, 1999. Molony, “Judge quashes £20 lands gift ‘for God’”, \textit{Irish Independent}, May 12, 1999, O’Shea, “I acted on the orders of God”, \textit{Sunday World}, May 16, 1999. The deceased, an ailing pensioner, had before his death executed a deed of transfer of lands valued at over IR£100,000 in favour of the defendant for a mere £20. He had also spent a small fortune publishing, at the latter’s request, a religious brochure and in the production of a religious medal. The defendant, a neighbour of the transferor claimed that she had asked the transferor to do these things on the request of God, with whom she claimed to be in ‘constant contact’. Judge Linnane seemed to have little difficulty setting aside the transfer and making an order of compensation in favour of the transferor’s estate: “It’s the most clear-cut case I have ever seen. Terrible advantage was taken of this elderly man”. While neither report states the grounds for this decision, it is arguable that it is consistent with either a finding of undue influence or unconscionability.

\textsuperscript{144}\textsuperscript{144} (1860) 2 Giff. 246 at p. 249.
spiritual confidence to another so as to acquire habitual influence over his mind can accept any gift or benefit from the person who is under the dominion of that influence, without the danger of having that gift set aside". In Allcard v. Skinner, for instance Lindley L.J. observed, in a similar vein that "of all influences, religious influence is the most dangerous and the most powerful". In that case, the Court of Appeal held in principle that a gratuitous transfer of property from a nun to her superior was subject to the presumption. As the gift had been made, they determined, under pressure that the nun was unable to resist, and without the benefit of external advice the court was satisfied that the presumption had not been displaced.

In the strikingly similar Irish case of White v. Meade a transfer for the benefit of a convent was set aside on like grounds. The transferor was a newly professed nun in the convent, just of age. She had executed the conveyance without obtaining any advice save that of the convent's legal adviser. Pennefather B., in a judgment that spared the religious sisterhood no blushes, concluded that "...no man can doubt that it was produced by the influence of these ladies over a young person, secluded from every friend".

In O'Neill v. Murphy the Northern Ireland Court of Appeal ruled that a finding that a Canon had unduly influenced an architect to forego his normal fees for building work done for a parish and a local convent could not be disturbed. There were nonetheless some troubling aspects of this case, one being that the Canon, being dead, had no opportunity to refute the presumption. The donor was "a businessman in the prime of his life, and in full possession of his faculties". It is doubtful at any rate that the Canon in fact fell into the category of the donor's spiritual adviser. The

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145 (1887) 36 Ch.D. 145.
146 Ibid. at p. 183.
147 Indeed the nuns were barred under the rules of the order from obtaining external advice on such matters without the permission of the Mother Superior.
148 It nevertheless refused, on the ground of excessive delay, to grant relief.
149 (1840) 2 Ir. Eq. R. 420.
150 Ibid. at p. 423.
152 Ibid. at p. 33.
Architect lived in a different Parish and had rarely if ever approached the Canon for confession or spiritual advice.\textsuperscript{153}

Here again the contract law’s fixation with the material – and its corresponding disdain for the affective - comes to the fore. A promise to pray for another is not recognised as good consideration in law.\textsuperscript{154} This is symptomatic, perhaps of a wider judicial suspicion of religious practices exhibited in some of the undue influence cases, as in \textit{Allcard v. Skinner} where Lindley L.J. described religious influence “as the most dangerous and the most powerful…” of influences.\textsuperscript{155} The law grapples poorly with the affective, the very personal and admittedly mystical benefits of religious faith, with the result that the intangible psychic benefits that do accrue to the individual and to the cohesion of the community in general, are ignored.

\textbf{Other Cases of Established Relationships.} The categories of relationship in which the presumption will issue as a matter of law are not yet closed but several familiar connections have been clearly established as falling inside or outside this category as the case may be. The presumption also applies automatically to a series of persons

\textsuperscript{153} But see \textit{contra Kirwan v. Cullen and Curtis} (1854) 4 Ir. Ch. R. 322, where the opposite conclusion was reached. In that case, a lady of some wealth, having consulted with her spiritual confessor, made a sizeable gift to the defendants, being respectively the Roman Catholic Archbishop of Dublin and the Spiritual Superior of the Order of Jesuits in Ireland. This was to be held in trust for the benefit of an order of nuns. Neither the trustees nor her confessor received even the “smallest portion of the gift”. On her death, her brother, the administrator of her estate, challenged the validity of the gift. In the circumstances Lord St. Leonards L.C. believed it was “...not possible to contend that this can be classed with those cases in which donations and gifts have been held...to have been tainted by the fact that they are made to a person who was placed in a situation giving him the power to exercise undue influence over the donor...”. Although there was certainly enough evidence to rebut any presumption that may otherwise have arisen, the court seems to have thus discounted the implication of the presumption. His lordship’s comments above seem to imply that where a gift is made to a spiritual superior for the benefit of a third party the presumption quite simply does not arise. Indeed he noted in the course of his judgment that there was “no evidence to impeach the gift”, a fact that would have been of no relevance had the presumption arisen as in such circumstances the evidence must actively displace the prima facie implication of undue influence. It is arguable however that where a gift is made to a church or order thereof of whom a spiritual confessor is a member the presumption should nonetheless arise. Where, as in the Church of Ireland, for instance, a minister is paid out of a central fund, it is obvious that any donation to the church will indirectly accrue to his benefit. Similar gifts by a client of a solicitor to the wife or offspring of the solicitor have been held to give rise to the presumption and there is no reason why a similar implication should not arise here.


\textsuperscript{155} (1887) 36 Ch. D. 145 at p. 183.
upon whom the law calls to carry out certain tasks for the benefit of others. These are
most notably a trustee (towards the *cestui que trust*),\textsuperscript{156} an agent towards his
principal,\textsuperscript{157} and the executor of a will (towards the legatees thereunder), (and
presumably *a fortiori*, the administrator of the estate of a person who dies intestate).
Regarding the last of these, Romer L.J. in *Wheeler v Sergeant*,\textsuperscript{158} remarked that the
courts “will look with great suspicion” on a transaction between the executor of a
will and a beneficiary thereunder, suggesting that it would only be upheld where
“exceptional circumstances” were established.

**A Notable Exception.** The presumption does not automatically apply and must be
established as a matter of fact between employer and employee, bank manager and
customer and between the holder of a monopoly in the supply of goods and a
consumer or retailer respectively; though of course the presumption may be held to
arise where it is shown to the satisfaction of the court that there is *in fact* a
relationship of trust and confidence between the parties. One notable exception,
where one might have expected a presumption to be imputed as a matter of law,\textsuperscript{159} is
the relationship between husband and wife. Some earlier cases seem to indicate that
the presumption might issue as a matter of law. Later decisions, however, in
particular *Howes v. Bishop*\textsuperscript{160} and the *Bank of Montreal v. Stuart*\textsuperscript{161}, held that the
existence of a relationship of trust and confidence giving rise to the danger of undue
influence must be proven to exist in each respective case of a husband and wife.\textsuperscript{162}

1978.

\textsuperscript{157} *King v. Anderson* (1874) I.R. 8 Eq. 625

\textsuperscript{158} 69 L.T. 181 at p. 183.

\textsuperscript{159} McCann for instance indicates such an expectation: “In one cases where one would expect the
relationship to be fiduciary or confidential there is abundant authority to the contrary...” McCann,
“The setting aside of deeds and gifts *inter vivos* obtained by the exercise of undue influence”, (1967) 2
Ir. Jur. (n.s.) 205 at p. 212.

\textsuperscript{160} [1909] 2 K.B. 390.

\textsuperscript{161} [1911] A.C. 120.

\textsuperscript{162} There seems to have been some considerable earlier authority for this proposition: See *Nedby v.
Ch.D. 578, [1902] A.C. 271. For an additional modern authority see the decision of the Privy Council
in *Mackenzie v. Royal Bank of Canada* [1934] A.C. 468 (Appeal from S.C. of Ont.) (per Lord Atkin at
p. 475). But see *contra*, the U.S. decision of *Eubanks v. Eubanks*, 159 S.E. 2d. 562 where Sharp J.
This appears to be a reflection of the modern spousal relationship and the assumption that it is be based on equality between spouses, an assumption that militates against the implication of influence either way. The criminal law, at one time posited that where a wife committed certain crimes in the presence of her husband, a rebuttable presumption arose to the effect that she committed the act under marital coercion. This excused her from guilt unless and until “the prosecution was able to prove that she took the initiative in committing the offence”. This defence of ‘marital coercion,’ as it was called, was found by the Supreme Court in the State v. Walsh and Conneely to have been inconsistent with the principles of equality and marital equality implicit in Articles 40(1) and 41 respectively of the Constitution. The presumption “…presupposed a disparity of status between spouses which ran counter to the relations between spouses in modern times”.

Certainly the modern marital relation operates in an environment of some considerable spousal equality. Of its counterpart of some decades ago, by contrast, Edwards felt able to say that: “…there still remains a considerable proportion of married women who regard their husbands as their lord and master to disobey whose commands would be unthinkable”. Intimations of a dramatic reform of marital relations however, face the accusation that a significant number, perhaps even the majority of modern cases where undue influence is alleged in these islands involve

remarks that “[t]he relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable”.

There was some doubt and dispute as to the precise application of the defence. It certainly did not apply to murder (see People (D.P.P.) v. Murray [1977] I.R. 368) or treason and in the opinion of some commentators, could not be pleaded where the crime was manslaughter, robbery or brothel-keeping.

Smith and Hogan, Criminal Law 5th Ed., (Butterworth’s, 1982) at p. 217.

husbands and wives or those in an intimate relationship. Those allegedly subject to the influence tend overwhelmingly to be female.

Thus, the danger of the rhetoric of equality clouding a frank view of the reality of some marital relationships cannot be overstated. Indeed the Courts have acknowledged that they will scrutinise with greater zeal than normal any voluntary transaction between husband and wife or between other intimate partners. In the words of Lord Browne-Wilkinson in *Barclay's Bank v. O'Brien:* 

"...the risk of undue influence affecting [such transactions] is greater than in the ordinary run of cases where no sexual or emotional ties affect the free exercise of the individual’s will". There is, of course, no question of the presumption arising by virtue of the existence of a marital relationship *per se.* The House of Lords in *O'Brien* explicitly rejected a line of authority suggesting that the Courts would view the marital relation with 'special tenderness'. Nevertheless the alternative test posed by Lord Browne-Wilkinson in that case seems to amount to something rather similar, albeit perhaps more egalitarian (the protection not being reserved to either wives or women alone), under a different name.

**(b.) Relationships existing as a matter of fact**

Where no recognised relationship exists, a party to a contract may nevertheless raise the presumption by proving that there existed *in fact* a relationship a feature of which was the trust and confidence reposed by one or both parties in the other. Such a relationship has been established in the particular circumstances of certain cases

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171 See also Keane J. in *Bank of Nova Scotia v. Hogan*, unreported, High Court, Keane J., December 21, 1992, at p. 13ff. and Murphy J. in the Supreme Court in the same case at [1996] 3 I.R. 239 at pp. 247-249. The latter whilst actually agreeing with the true analysis of the House of Lords, seems to have incorrectly assumed that the House endorsed the special equity principle and odd feature of a generally rather unsatisfactory decision. Again cleaving very close to the principle of equality, the Irish Courts strongly rejected the thesis that wives are deserving of special treatment.
between, for example, a bank manager and client,\textsuperscript{172} a man and his elderly great-uncle,\textsuperscript{173} and even between two unrelated persons sharing a house.\textsuperscript{174} The fact of each of these relationships alone is not sufficient to give rise to the presumption.\textsuperscript{175} It must be established that the parties did in fact enjoy such a relation and for these purposes the onus of establishing the existing of a confidential relation lies on the person seeking to set aside the transaction or gift in question. The closer and more intimate the relationship the easier it will be to shift the onus of proof. For instance, two persons experienced in business and dealing at arm’s length will encounter much greater difficulty in establishing a relationship so confidential than will a husband and wife.\textsuperscript{176} The category of relationships is nevertheless infinite and never closed, although there is some old authority indicating that the law may set certain limits to the types of relationship which may be recognised.

The presumption may certainly arise as a matter of fact between a married couple, although it seems, strangely, that the Courts are more especially vigilant in the case of engaged couples. An interesting example of such is the case of Zamet \textit{v.} Hyman.\textsuperscript{177} This involved a couple of septuagenarians who had decided to marry despite their advancing years. Three days before their nuptials the bride-to-be had effected a deed divesting herself of an interest in her new husband’s estate, should he predecease her. Upon his death, and left with virtually no means, the widow successfully sued for the setting aside of the deed on the grounds of undue influence. While Evershed M.R. seems to suggest that the presumption would not automatically arise in such circumstances, (it “may” arise) the presumption seemed to have been very easily


\textsuperscript{173} \textit{Cheese v. Thomas} [1994] 1 All E. R. 35 (Court of Appeal.)

\textsuperscript{174} \textit{Aitken v. Williamson} [1956] N.Z.L.R. 151.

\textsuperscript{175} See for instance \textit{National Westminster Bank v. Morgan}, [1985] 1 A.C. 656, where the relationship of bank manager and client was said not to give rise to the presumption automatically. Nor could the defendant in that case prove that the relationship that did exist was sufficient as a matter of fact to give rise to the presumption.

\textsuperscript{176} See the dictum of the M.R. in \textit{Fowler v. Wyatt} 24 Beav. 232 at p. 238 to the effect that, “where you have two gentlemen actively engaged in business, both competent to carry on an active and thriving business, it requires strong evidence to explain how it is that the one should have obtained this peculiar influence over the mind of the other”.

\textsuperscript{177} [1961] 1 W.L.R. 1442 (C.A.)
implied from the greatly imbalanced nature of the bargain entered into. Donovan L.J. was more skeptical, preferring instead to find that actual undue influence had been used. The case is largely unsatisfactory, particularly in that Evershed M.R. is not especially clear as to whether engaged couples fall within the category of relationships automatically deemed to give rise to the presumption. It is submitted that Donovan L.J.’s judgment that undue influence “should be proved as distinct from being presumed” in such cases is equally confusing.

From the prescriptive to the descriptive: widening the scope of relationships recognised. At one point, it was open to a court to refuse to recognise a particular relationship as existing, for what it considered reasons of moral probity. The fact of a confidential relationship was not enough. If the relationship was of a kind attracting social disapproval, the presumption, as a matter of law, might be deemed not to have arisen. This prescriptive element is most notable in *Hargreave v. Green*,178 a mid-nineteenth century case before the Irish Court of Chancery. In that case the Petitioner had sought to set aside an assignment of property made by her for the benefit of the wife and children of a Rev. Thomas, a man with whom she was engaged in an “adulterous relationship”.179 The petitioner claimed that the assignment was the result of the exercise by the Reverend of an overwhelming influence that he had acquired over her in the course of their relationship.

The Court however refused to treat their relationship as giving rise to the presumption. In reference to the liaison - with regard to which he reserved “the strongest condemnation” – Lord St. Leonards L.C. commented that “…I know of no law, no public policy which seeks to encourage it or intervenes to protect one of the parties to such a relation from the other”. As the presumption of undue influence was devised to protect and nurture “certain relations recognised by law”, it had “no bearing upon such a connection as is disclosed in this case”. Thus, he continued “in

178 (1856) 6 Ir. Ch. R. 278.
179 The agreement had been made with a view to relieving the Reverend from the prospect of imprisonment for failure adequately to support his family.
the eyes of the law [the couple] stand isolated from one another: there is no legal or
recognised relation between them from which undue influence will be presumed".180
Considering the mores of the time it seems likely that the Court would have taken a
similarly dim view of a non-marital relationship of cohabitation not involving
adultery.

Nowadays the courts lean towards a more value-neutral or descriptive attitude to
inter-personal relations.181 Indeed in *Barclay's Bank v. O'Brien*182 Lord Browne-
Wilkinson makes some interesting inclusions amongst the category of relationships
that attract the requirement of 'reasonable steps' to obviate the possibility of
equitable wrong. Non-marital cohabiting couples, both heterosexual and, notably,
homosexual, between the parties to which there exists a sexual and emotional
relationship were explicitly to be embraced by the principle, he notes.183 Does the
principle laid down in *Hargreave* nevertheless hold true for relationships to which
the law still takes a stern line. What of gifts made to a prostitute by a client
(otherwise than for services rendered)? How is the relationship between a ganglord
and his minions to be treated? If the rationale on which equity imposes the
presumption is that a relationship of trust and confidence is to be protected and

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180 Indeed, he opined, it was not clear in such a situation precisely who was more likely to prevail upon
whom. Lord St. Leonards, in what must be one of the classic depictions of the fabled *femme fatale*,
noted: "...nor could we with certainty conjecture at which side the influence exists. It is much more
frequently the woman who influences the man than the man who influences the woman..." The
distinct possibility that the man was equally to blame seems not to have occurred to the learned, yet
blinkered, Lord Chancellor.

181 See the discussion of *Fitzpatrick v. Sterling Housing Association* [1999] 3 W.L.R. 1113 in Ryan,
"Sexuality, Ideology and the Construction of Family: *Fitzpatrick v. Sterling Housing Association*"


183 A similarly descriptive approach is evident from a line of cases recognizing non-marital family
groupings as 'family' for the purposes of Rent Control legislation. See *Hawes v. Evenden*, [1953]
(non-marital heterosexual couple with children), *Dyson Holdings v. Fox*, [1975] (non-marital
heterosexual couple without children), and the ground-breaking *Fitzpatrick v. Sterling Housing
Association* [1999] 3 W.L.R. 1113 (non-marital homosexual couple without children). See generally
Court of Appeal 1989).
nurtured. What ground is there for equity's intervention where the relationship in question is perceived as being of patent detriment to social order and morality?184

Manifest Disadvantage

For the presumption to arise, at least as a matter of English law, one additional requirement is posited. The transaction must be to the manifest disadvantage of the party claiming equitable relief.185 In a field that is largely 'historicist' in its approach, (in that it focuses primarily on matters leading to the inception of a contract), this is a curiously alien element. It springs from a perspective directed at the 'ends-result' of the contracting process, one that demands examination of the propriety or otherwise of the substantive product of the resultant contract rather than of the contracting process per se. The matter of its presence in Irish law it is not yet settled. Shanley J.'s attempt, in Carroll v. Carroll,186 to clarify matters in this field seems simply to have added to the confusion. “The law does not concern itself”, he remarks, “with insignificant transactions...the presumption will only arise where one party to the transaction has derived a substantial benefit from it”.187 This substantial benefit test was adopted with approval by the Supreme Court in the same case,188 with Denham J.189 alluding to it as a prerequisite to the raising of the presumption. This directly contradicts the proposition, evident from several cases,190 that the party exercising the

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184 Some reliance might be garnered from the maxim ex turpi causa non oritur actio. See Pitts v. Hunt [1960] 3 W.L.R. 542. See the discussion in Winfield and Jolowicz on Torts, 14th ed. (London: Sweet & Maxwell, 1994) at pp. 740-745. As an example of the operation of the latter in tort, see Ashton v. Turner [1981] Q.B. 137, [1980] 3 W.L.R. 736. In that case, it was held that, provided the harm caused was not remote from the criminal act, the law negated any duty of care that might otherwise have been owed by the parties to each other. Thus, ironically, the special relationship between the parties operated not as a ‘prerequisite” but rather as a ‘bar’ to the implication of a duty of care. In Ireland, however, according to section 57 of the Civil Liability Act, 1961 it is “not a defence in an action of tort merely to show that the plaintiff is in breach of the criminal law”.


186 [1998] 2 I.L.R.M. 218

187 Ibid. at p. 229


189 Ibid.

influence need not benefit from the transaction, but this is only one of the problems with this pronouncement. It leaves entirely unclear whether the requirement of manifest disadvantage applies in Irish law. Benefit to one party to a transaction, after all, as Hume\(^{191}\) ably illustrated, need not preclude a similar benefit being enjoyed by the other.

**What constitutes manifest disadvantage?** The requirement of manifest disadvantage in England and Wales, though a particularly controversial one, is at least more clearly established. Its inception in that jurisdiction\(^{192}\) was relatively recent, having first been posited as a substantive requirement for the raising of the presumption by Lord Scarman in *National Westminster Bank v. Morgan*.\(^{193}\) Having posited the requirement, the learned judge suggests that the mere fact that a person has accepted a risk is not sufficient to amount to ‘manifest disadvantage’ for these purposes. Lord Scarman seemed to adopt a test of proportionality in assessing the advantage or otherwise to be gained from a particular transaction. It appears that the standard of disadvantage is relative rather than absolute. It involves an analysis of all the features of an agreement with a view to ascertaining whether, overall, there is a substantive ‘transactional imbalance’ to the detriment of the person alleging undue influence.\(^{194}\)

*Morgan* itself is a good illustration of this point. In that case, a woman, fearing that she would otherwise almost definitely lose her home, agreed to the remortgaging thereof in exchange for a loan which would pay off a previously subsisting charge over the home. The ultimate objective in securing this finance was the rescue of her home from possession and this benefit, viewed at the time of the transaction, far outweighed the “essentially theoretical” disadvantage of the new mortgage. Thus, in

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\(^{192}\) Although the Indian Contracts Act 1872, section 16, stipulates that the presumption will only arise where there is undue influence. See *Poosathurai v. Kannappa Chettiar*, (1919) L.R. 47 upon which their Lordships in *National Westminster Bank v. Morgan* [1985] A.C. 656 relied heavily.

\(^{193}\) Ibid.

the opinion of the Court, there was no disadvantage sufficient to raise the presumption. The agreement accrued to her benefit in that it amounted to the only chance she had of saving her home. The decision seems to suggest that the availability of hindsight should not cloud the Court’s judgment. Every transaction has inherent risks and these should not of themselves preclude a decision that a particular transaction, all things considered, was not disadvantageous. The mere fact that a risk that has been accepted is subsequently realised does not mean that the transaction at its inception cannot be regarded as being relatively more beneficial than disadvantageous.

Manifest disadvantage does not arise simply because a party has been substantially deprived of a feasible choice.\textsuperscript{195} This criterion may be satisfied however even where the alleged victim receives some benefit that in law amounts to sufficient consideration. In \textit{Cheese v. Thomas}\textsuperscript{196} an agreement was found to have been substantially and manifestly disadvantageous to an elderly man who had thereby agreed to spent most of his life savings on the purchase of a house to be put in his great-nephew’s name. The great-uncle, in exchange, was granted an exclusive right of residence therein for the duration of his life. Though no doubt a valuable consideration it was clear that there was a significant transactional imbalance therein. The elder relative had invested almost all he owned in exchange for a mere right of residence, a non-proprietary and thus non-marketable right. He had no means of recouping his investment\textsuperscript{197} had he wished to make alternative provision for his accommodation. And if, as indeed did happen, the latter defaulted on his mortgage repayments the uncle risked eviction. Again the court seemed to have embarked on a determination of the overall providence of the transaction, a proportional balancing of the risks and benefits that the English courts have traditionally shied away from.

\textsuperscript{196} [1994] 1 All E. R. 35 (Court of Appeal).
\textsuperscript{197} The great-uncle could not compel the sale of the house, which had been, both legally and beneficially, transferred to his younger relative.
The demise of manifest disadvantage. The House of Lords originally established in Morgan that manifest disadvantage was a necessary prerequisite to the raising of the presumption. The Court of Appeal, in the subsequent case of B.C.C.I. v. Aboody, suggested that the requirement applied even in a case where actual undue influence was alleged, although the Courts in Britain have since recoiled from this proposition. In C.I.B.C. Mortgages v. Pitt, the House of Lords overruled the Court of Appeal in this matter, confining the criterion of manifest disadvantage to the arena of presumed undue influence alone and even then hinting that it might not apply at all, even within this restrictive sphere. Lord Browne-Wilkinson suggested as much in Pitt when he noted that “...the exact limits of the decision in Morgan may have to be considered in the future”.

This retreat represents, perhaps, a resurgence of judicial reticence in determining matters of substantive rather than procedural justice. It is not confined, however, to the judiciary. Indeed, similar doubts as to the validity of the new stipulation abound in academic circles, some suggesting that its existence has little basis in principle at all, it being merely a judicial ploy to “limit the incidence of relief for undue influence”. Others simply point to the lack of precedent support therefor,

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200 Ibid. at p. 209. See also Bigwood who cites Pitt as evidence of “the gradual diminution, in recent times, of the ‘manifest disadvantage’ criterion...”. Bigwood, “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?”, (1996) 16 O.J.L.S. 503 at 513. But see Staples v. Lea [1998] 1 F.L.R. 138 where Nourse L.J. states that for undue influence to be presumed the transaction must have been “so improvident as to be not reasonably accounted for on ordinary motives on which ordinary people act”, in other words, he adds “manifestly and unfairly disadvantageous”. Millett L.J. as he then was, confirmed that the requirement of manifest disadvantage still applies as a prerequisite to the invocation of the presumption in Dunbar Bank p.l.c. v. Nadeem [1998] 3 All E.R. 876 at p. 882.

201 See e.g. Callaghan, “Manifest Disadvantage in undue influence: an analysis of its role and necessity”, (1995) 25 V.U.W.L.R. 289 who suggests that the presence of manifest disadvantage is not required for either proof of actual undue influence or for the raising of the presumption. The simplest, though perhaps starkest, argument is that the suggestion of Lord Scarman was strictly an obiter dictum, Capper pointing out that the relationship between the bank and the wife did not give rise to the presumption on other grounds, having failed to “cross the boundary between arms-length and trust and confidence relationships”. Capper, “Undue Influence and Unconscionability: A Rationalisation”, (1998) 114 L.Q.R. 479 at p. 487.

203 The case on which their Lordships did rely, Poosathurai v. Kannappa Chettiar, (1919) L.R. 47 Ind. App. 1, was arguably of little assistance, involving as it did the provisions of the Indian Contracts Act.
Capper, for instance, noting that "no case prior to Morgan appears to have treated transactional imbalance as a prerequisite for the grant of relief". The Australian Courts have taken a particularly sceptical line, suggesting that in Australia manifest disadvantage is, while a persuasive factor in evidential terms, not to be viewed as a substantial prerequisite to relief. Received wisdom suggests that the requirement of manifest disadvantage should be retained, if at all, merely as an evidential aid in determining whether there has been undue influence. It is clear, of course, that the mere fact of undervalue, without more, will not be sufficient to give rise to an inference of undue influence. In McCrystal v. O’Kane, for instance a sale of land was upheld despite the existence of a substantial undervalue, there being no other factors permitting the Court to upset the transaction. The fact of transactional imbalance in itself is not sufficient to trigger the presumption.

Defending the requirement. That said, as Capper himself admits, the simple fact is that Courts almost invariably act in this sphere in cases where there is ‘transactional imbalance’. It is suggested that its retention as a substantive requirement, even applying to actual undue influence, can also be justified, although not on liberal individualist lines. As a general proposition, equity does not tend to intervene where a gift is small or a benefit merely trifling. This accords with the general maxim de minimis non curat lex, but gains support also from established authority such as the

1872, which measure contained an explicit stipulation regarding manifest disadvantage. See Capper, op cit., at p. 487.

204 Detriment actually sustained is good evidence, per Fullagar J. in Blomley v. Ryan, (1956) 99 C.L.R. 362, that influence was unfairly made use of and thus may even be of evidential aid in determining whether there was in fact an abuse of influence. See also Capper, op. cit., at p. 489.

205 See Johnston v. Buttress (1936) C.L.R. 113, Blomley v. Ryan (1956) 99 C.L.R. 362 at p. 405, Baburin v. Baburin [1990] 2 Qd. R. 101. See also Birks and Chin, op. cit., at p. 83, who argue that the requirement of manifest disadvantage is one "which has never been welcomed [in Australia] even in cases of presumed undue influence". The basis for this is outlined by Carter and Harland, Contract Law in Australia, 3rd ed., (Butterworth’s Australia, 1996) para. [1412] at p. 486, who comment that it is the abuse of influence rather than the consequent presence of detriment against which equity originally acted: "...it was on account of public policy directed against the risk of abuse of influence, not disadvantage actually suffered, that equity relieved". But see contra, James v. Australia and New Zealand Banking Group Ltd., (1986) 64 A.L.R. 347 at p. 390.

206 See also Capper, op. cit. who argues for the retention of manifest disadvantage but only as an evidential aid and not as a substantive prerequisite to the presumption of undue influence.

208 [1986] N.I. 123
judgment of Turner L.J. in *Rhodes v. Bates*.\(^{209}\) A somewhat similar line was taken by some of the judges\(^{210}\) of the Supreme Court of Canada in *Geffen v. Goodman Estate*,\(^{211}\) Wilson J. asserting the long-held view that the "sanctity of bargains should be protected unless they are patently unfair."\(^{212}\) In an apparent endorsement of the requirement of some form of substantial disadvantage she remarks that:

"when dealing with commercial transactions, I believe that the plaintiff should be obliged to show, in addition to the required relationship between the parties, that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefitted by it."\(^{213}\)

One argument against this approach centres on the point that the requirement cannot be satisfied where a sale, though made at full value, deprives the vendor of an item of extraordinary sentimental value.\(^{214}\) The assumption that this does not amount to manifest disadvantage is itself the result of a liberal conceit that restricts the concept considered here to disadvantage that is purely economic. Just as the law has refused to recognise purely affective advantages as giving rise to consideration, so too does this perspective risk the possibility of disadvantage that is not economic but, rather, affective in nature, being ignored by the Courts. It is arguably feasible to assert, by means of a wider, more affective and less monetary understanding of disadvantage, that the concept of manifest disadvantage can embrace more than simple economic loss. In fact it is already well-established that the criterion of disadvantage for these purposes is a subjective one.\(^{215}\)

\(^{209}\) (1866) L.R. 1 Ch. 252

\(^{210}\) Wilson and Cory JJ. The remaining judges are reported to have declined to rule on the matter, not regarding it as necessary to the ultimate decision in the case.

\(^{211}\) [1991] 2 S.C.R. 353

\(^{212}\) *Ibid.* at p. 376. Indeed the learned judge remarks that she knew of no case "in which a contract has been rescinded on the sole basis that the process leading up to the bargain was somehow tainted. Something more, like detrimental reliance, must be shown". *Ibid.* at p. 376.


\(^{215}\) Per Bridge L.J. in *Re Brocklehurst* [1978] 1 All E.R. 767 at pp. 782-783.
The rejection of manifest disadvantage as a limiting factor would involve the proposition that even a party who benefits from an exercise of influence should be able to challenge its result due to impaired consent. With respect this would require equity to penalise not simply the abuse of influence but its very presence. Certainly there may be cases where the presence of force alone may be sufficient to ground relief. A party who is forced through threats of extreme violence to part with an object for its full value could hardly be denied a remedy on the grounds that there was no ‘loss’. Where there are threats so grave, relief clearly must lie.

But should the law protect a person from others who have the former’s best interests at heart? Again the emphasis in the discourse allowing relief even where there is no disadvantage leans towards an agenda that is decidedly liberal in sentiment. The attempt to assert the primacy of the ‘impaired consent’ test buttresses, intentionally or otherwise, a suspicion of the values inherent in the relations with which the presumption concerns itself. Absent the requirement of manifest disadvantage, equity asserts no more than that it disapproves of the influence per se, however beneficial its results. Why should the fact of influence alone, absent proof of disadvantage, ground relief? Take the impressionable and spendthrift youth whose parents persuade him to invest an inheritance in secure government bonds (to the youth’s own benefit alone) rather than squandering it on transitory items. Though influence has been exercised, and the consent of the child perhaps thereby impaired, it can hardly be argued that the child’s purchase should thereby be impeachable. Equity may rightly be vigilant to prevent a relationship being abused to the disadvantage of the weaker party but why should it act to prevent a party using his influence over another to enhance the wellbeing of that other?

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217 Although it is by no means those who support the proposition of Birks and Chin alone that reject the insertion of a substantive requirement of manifest disadvantage. Bigwood, in an article largely critical of the theory of ‘impaired consent’, nonetheless praises what he sees as the demise of the criterion of manifest disadvantage as a prerequisite to the raising of the presumption. Bigwood, “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’” (1996) 16 O.J.L.S. 503.
218 Let it be assumed that the youth has just reached the age of majority and is therefore capable of contracting and owning property. Problems of capacity arise where a person is not ‘of full age’, that is, eighteen (per section 2 of the Age of Majority Act, 1985). Cf. Infants Relief Act, 1874.
There is certainly a strong ground for the retention of manifest disadvantage in relation to the presumption. In order to justify the raising of the presumption it is arguable that some evidence of disadvantage should be required to merit placing the onus on the dominant party to displace such an inference. In *Goldsworthy v. Brickell*, for instance, Nourse L.J. commented that certain gifts may be so large or certain transactions so improvident that standard motives of "...friendship, relationship, charity or other ordinary motives..." are displaced. "Although influence might have been presumed beforehand..." he continues, "...it is only then that it is presumed to have been undue". It is surely not sufficient, without more, to show that the parties were in a relationship of influence and that therefore all transactions between them must be viewed with suspicion. To so conclude seems to suggest that it is the existence of influence rather than the abuse thereof that is suspect. There are plenty of relationships in which trust and confidence are essential features. To assume without more that there is abuse of such influence in each case is cynical to say the least.

**Rebutting the presumption**

The onus of rebutting the presumption of undue influence is upon the party in whom the confidence is reposed. In order to displace the onus the alleged wrongdoer is required to adduce evidence tending to show that the gift was the product of a mind unencumbered by the influence of the donee, that is, that there was a free exercise of independent judgment on the part of the donor which resulted in the impugned transaction being made. The party labouring under the onus must demonstrate the 'righteousness' of the transaction by showing that the donor entered into the contract only as a result of full, free and informed thought.

At first glance, this would seem to be an endorsement of the 'impaired consent'

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219 [1987] Ch. 378 at p. 401G.
220 See Denham J. in *Carroll v. Carroll* [2000] 1 I.L.R.M. 210 at p. 223: “thus the onus lies on the donee...to establish that the transfer was the free exercise of the will of the donor".
thesis, suggesting as it does that the flaw that equity seeks to redress is the lack of consent. It is suggested however, that, as with duress, the lack of consent alone is not sufficient to ground relief, at least on the basis of the presumption. As illustrated above it would also be possible to rebut the presumption by showing that the alleged victim had suffered no manifest disadvantage. In other words the grounds for relief under the presumption are two-fold: the existence of a relationship of influence having been established, it must be further shown that the result of the impugned transaction was to the alleged victim’s clear disadvantage.

Though there is “no one way in which the presumption may be rebutted”, it is in fact the question of ‘independent advice’ that has tended to dominate the discussion of the presumption’s rebuttal. The most popularly recommended method of rebuttal lies not in showing that there is an absence of disbenefit, but rather in providing evidence that a competent and fully informed adviser independently advised the donor such that the influence of the donee was displaced. According to Fletcher Moulton L.J. in Re Coomber; Coomber v. Coomber, the person giving this advice does not necessarily have to state that he thinks the transaction should or should not be carried out. “A solicitor best gives advice”, he notes, “when he takes care that the client understands fully the nature of the act and the consequences of that act”. Such advice as is given must be competent and given with full knowledge of all the relevant circumstances.

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222 See for instance Chandler’s remarks concerning the competence of the legal advisor in Massey v. Midland Bank plc. to give financial advice. (Chandler, “Undue Influence and the Function of Independent Advice”, (1995) 111 L.Q.R. 51). Chandler suggests, admittedly contrary to the ruling of the court in that case, that the defendant bank did not act so as to ensure that the plaintiff had competent advice, as it failed to note that a solicitor would not be well placed to advise her on the financial prospects of her partner’s proposed business ventures.
223 See for instance Inche Noriah v. Shaik Allie Bin Omar, [1929] A.C. 127 where the solicitor advising an elderly woman was not informed that the proposed transaction would divest the latter of most of her property.
224 [1911] 1 Ch. 723 at pp. 728-9.
225 Ibid at p. 729.
In *Inche Noriah v. Shaik Allie Bin Omar* an aged and illiterate woman, gifted land to her nephew, who took considerable responsibility for his aunt’s financial affairs. In such circumstances the presumption was deemed to arise and in order to rebut it evidence had to be adduced that the donor acted freely and not under the influence of her nephew. According to the Judicial Committee of the Privy Council, who decided the case:

“[t]he 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 independent of any influence from the donee and with the full appreciation of what he was doing”.

By definition such advice must emanate from an independent source. Where, as often happens, the adviser is an agent of the opposite party, such advice as is given will not generally suffice. A key issue is the extent to which the legal adviser in question must be independent. A particularly stark illustration of the requirement is to be found in *Bank of Montréal v. Stuart.* With a view to securing the debts of her husband’s company, a woman had made a series of transactions in favour of the bank. The solicitor who advised her not only acted on behalf of the husband and the bank in the same transactions. It turned out that he was also a director, shareholder and creditor of the company in question, which roles clearly put him well beyond the status of independent adviser. It is enough however, that the solicitor was acting solely on behalf of the advisee in the transaction in question.

It is now clear as a matter of Irish law that for these purposes a solicitor will not be regarded as independent if he acts for both parties in the matter. In *Carroll v.*

229 Ibid. at p. 135.
231 [1911] A.C. 120.
a solicitor who had acted for both the donor and donee was held not to have been sufficiently independent for these purposes.

It may not be necessary to show, however, that the solicitor in question has never previously acted on behalf of any of the other parties in other cases. In Bank of Nova Scotia v. Hogan advice was found to have been independent notwithstanding the fact that the firm of solicitors had acted on the bank’s behalf in previous transactions. Nonetheless the case is somewhat troubling, the relevant advice having been given in the presence not only of representatives of the creditor but also of the party alleged (but never proved) to have used undue influence, a point that seems to have troubled neither the High Court nor the Supreme Court in that case. In fact it seems that the courts have proved increasingly willing artificially to construct independence, even where it is, strictly speaking, not present. Price points to the prevalence of what he calls a “modern legal fiction” whereby a solicitor requested by a bank to provide legal advice a surety or guarantor is deemed, in so doing, to be acting solely on advisee’s behalf. The suggestion that the relationship of agency between bank and legal advisor ceases in such cases is, he suggests, unpersuasive in principle, the reality being that “the solicitor acts in a dual capacity, as agent for the bank to advise the wife and ad hoc as the wife’s agent in giving that advice”.

Even where the advice given is truly independent, some doubts may be raised as to its true value in cases where undue influence arises. Independent advice is arguably only of real benefit where a party is labouring under a misapprehension regarding certain

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234 In fact the solicitor in question was not even giving ‘advice’ as such but “merely set out to carry out the donor’s instructions”. Ibid. per Barron J.
236 Although the bank initially used the same firm of solicitors to call in the loan, the solicitors later withdrew correctly sensing the conflict of interest that would otherwise arise.
237 See [1996] 3 I.R. 239 at p. 244. At the time that the deposit was explained to her by the solicitor, the local bank manager, the area manager of the bank and the defendant’s husband were all reportedly present, factors that could hardly have lent themselves to facilitating Mrs. Hogan’s objection to the transaction, had she been so minded.
239 Ibid.
material facts. The problem with undue influence (and duress for that matter), is that the victim is typically perfectly aware of the terms of the agreement to which they are subscribing but because of improper influence, their judgment is clouded or suppressed. The chances of the independent advisor displacing such influence must be slim where for instance a religious disciple has been convinced that a donation to his or her spiritual superior would yield immense spiritual benefit for the donor. Effectively to displace this influence, the advisor would have to interfere with the belief system of the donor, to convince him or her that it was not of such benefit, or at least that it is of no consequence either way. The more comprehensive the influence, the less likely that it will be displaced by the advice, however competent, of a legal advisor.

O’Dell, in a similar vein, warns against over-reliance on the curative effects of independent advice. It is, he notes, “at best an unreliable guide. There may be no such advice, and yet the contract could be voluntary; or, there may be independent advice, and yet the undue influence could be so strong that such advice would be ineffective or ignored”. In short, the presence of independent advice does not necessarily negate the presence of coercion. Why should it? “...[I]t may be an important factor to be taken into account, but it should not be used as a proxy for an analysis as whether a spouse’s consent was a valid one”. As Gardner notes it may make little difference to the plight of a guarantor or surety “to have it spelled out to her that, if the worst

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240 Take for instance the case of the man who, under the spiritual influence of his neighbour, sold his lands on her instructions. (Trim Circuit Court on May 11, 1999). [Molony, “Judge quashes £20 lands gift ‘for God’”, Irish Independent, May 12, 1999, O’Shea, “I acted on the orders of God”", Sunday World, May 16, 1999.] Claiming that God had so requested, the defendant in the case asked her neighbour to transfer his lands to her so that the former could establish a centre for prayer. The deceased man went to his solicitor seeking to do so. The solicitor, genuinely alarmed by the proposal, refused to act on his behalf, presumably explaining that he thought it to be an improvident proposal. Notwithstanding this advice, the deceased man sought the services of another solicitor who performed the transfer on his behalf.


242 O’Dell, “Contract Law” in Byrne and Binchy, Annual Review of Irish Law, 1996, (Dublin: Round Hall, 1997) at p. 224. See also the 1995 Review at p. 236, where O’Dell remarks that independent advice “is not some talismanic cure for coercion”.

comes to the worst, she may lose her home”. This does not, he notes, create any additional element of choice. If anything it simply underlines the lack thereof.

It is, indeed, not necessary that the advice be taken or otherwise heeded. The advice, however, must be such that the donor is fully and competently informed; any material deficiency in the information conveyed or the competence of the adviser will render the advice insufficient. As was pointed out in Inche Noriah, the advice “must be given with knowledge of all the relevant circumstances and must be such as a competent and honest advisor if acting solely in the interests of the donor”. Thus in Inche Noriah itself, the court set aside the impugned transaction on the ground that, while independent legal advice was given to the aunt, it was so given in ignorance of the fact that the transaction conveyed almost all of her property to the nephew.

It must also be stressed that the advice must be such as an ordinary reasonable lawyer of adequate skill and knowledge would have given in the same circumstances. In Inche Noriah their Lordships implicitly cast doubt on the competence of the lawyer appointed to the plaintiff, noting in particular his failure to advise the donee that bequeathing the property by will in favour of her nephew would, in all the circumstances have been a “more prudent” yet “equally effective way of making the gift”.

In the course of that decision, the Privy Council did note that proof of the provision of independent advice may, in some cases, constitute the “only means” whereby the presumption might be rebutted. It is however to be stressed that this was where there were ‘no other circumstances’ in existence, by which it is to be implied that where other circumstances were present, these may suffice to rebut the presumption, even in

245 See also Aitken v. Williamson [1956] N.Z.L.R. 151, per Barrowelough C.J. at p. 158. In that case, advice given by a solicitor not being aware of all relevant circumstances was deemed insufficient on like grounds. The insufficiency of such advice, however, will not affect the determination as to whether a third party, seeking to avoid liability for the undue influence of another, has taken the ‘reasonable steps’ required by Lord Browne-Wilkinson in Barclay’s Bank v. O’Brien [1994] 1 A.C. 180.
the absence of independent advice. As the Supreme Court of Victoria pointed out in *Westmelton (Vic.) Pty. Ltd. v. Archer and Schulman* "...there is no rigid rule requiring advice to be given..." in such cases. Nor were the Privy Council in *Inche Noriah* prepared to accept the proposition that "...independent legal advice is the only way the presumption can be rebutted".

*Westmelton* is one example of a case in which the presumption was rebutted in the absence of proof of independent advice. The evidence before the court, it felt, was more than sufficient to show that the appellant company’s expertise in matters financial and legal exceeded that of the average lawyer. Thus the court held that the directors needed no independent advice in order to exercise a free and unfettered judgment in the matter. There was then "...[no] obligation upon the [solicitors] to obtain, or advise the obtaining of, independent legal advice". It was, it had noted earlier, "pointless as well as unjustified in law to attempt to lay down any particular requirements for all cases, or indeed any classes of cases, because the circumstances and requirements will vary infinitely with the infinite variety of human affairs". The Court was thus thrown back on the ‘true test’ of rebuttal, that is, that in order for the presumption to be displaced it must be shown that the donor acted freely and without being materially affected by the confidence reposed in the donee.

And yet the real question surely is not alone whether influence was exercised but also whether such exercise was improper or undue. The function of Equity, surely, is not to punish the exercise of influence but rather its abuse. Thus, it is submitted, that where a party upon whom the presumption lies is unable to demonstrate the lack of

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246 See the comments of Barron J. in *Carroll v. Carroll* [2000] 1 I.L.R.M. 210 at p. 232: “it is equally good to show that all the relevant facts...show that the donor was not in any way influenced in what he did by the donee”.


249 See also *Provincial Bank v. McKeever* [1941] I.R. 471. There, the presumption of undue influence was rebutted notwithstanding the absence of independent advice. See also *Mitchell v. Homfray* (1881) 8 Q.B.D. 587 (C.A.) where notwithstanding the absence of independent advice, a former patient of a doctor was deemed to have freely acted in favour of the latter.
influence but can nevertheless show that his actions were unblameworthy, the presumption should be regarded as having been displaced. In this light, the decision in *Cheese v. Thomas* is to be viewed with some concern. There as we noted above, an elderly man entered into what turned out to be an improvident transaction with his great-nephew. The latter, a man of some business experience, was close to his great-uncle and found to have exercised a degree of influence over his elderly relative. The uncle had, furthermore, contracted with "insufficient advice and understanding to make a proper judgment". It was conceded that the presumption did arise and no attempt was made to show that the plaintiff had obtained independent legal advice. The Court was nonetheless satisfied that the defendant "...did not behave improperly or seek to trick or take advantage of his aged uncle". This apparent innocence of any wrongdoing, while taken into account for remedial purposes, was strangely not considered to be of any value in displacing the inference of undue influence. The presumption stood. If to the satisfaction of the court the defendant had been guilty of no improper conduct, how could the exercise of influence by him still be deemed "undue"?

**B. Third Parties and Undue Influence**

One of the enduring dilemmas in this field that has exercised contract lawyers and academics alike is the extent to which parties to a contract can be affected by third party undue influence or misrepresentation. The point most frequently arises in situations where a party, A, is persuaded, by means of an equitable wrong perpetrated

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251 Some of this is based on a paper entitled "Protecting the Surety Wife: O'Brien and Hogan under the Microscope", delivered by the present author at the Irish Association of Law Teachers' Conference 1998, Royal Marine Hotel, Dún Laoghaire. Thanks are due to those who attended the panel at which the paper was given for their enlightening comments and observations.
252 The choice of words here is deliberate. It is often assumed that the 'third party' in such cases is the creditor who receives the guarantee or the benefit of the surety agreement, the privy parties being the person with influence and the person under that influence. In fact the 'third party', more often than not is the alleged wrongdoer. The parties privy to the contract of surety or guarantee are generally the creditor and the alleged victim of undue influence. See for instance Mee, "An Alternative Approach to Third Party Undue Influence and Misrepresentation", (1995) 46 *N.I.L.Q.* 147 at p. 147 where Mee speaks of the "equitable wrong" having been committed by "a third party".

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by C, to stand surety for a debt or grant a mortgage over property in favour of B, a
financial institution. This is done in exchange for the latter extending credit facilities
to, or refraining from calling in the debts of C, the alleged wrongdoer. In these
circumstances, the effective question is which of the parties, A or B, neither of whom
have personally made false statements or exerted any undue influence, should suffer
the consequences of C’s improper conduct towards A? It is at this juncture that the
thesis posited by Birks and Chin\(^{253}\) is at its weakest. After all were the fact of
impaired consent alone enough to vitiate a contract, it should not be of any
consequence who or what is the cause of the influence. As Smith\(^{254}\) observes “the
‘fault-based’ interpretation is supported by the fact that relief for undue influence is
limited to the situation where the source of the influence is the defendant, or in three
party cases, where the third party has actual or constructive knowledge of the
dependence”.

Important issues of policy are at play. As was noted in *Barclay’s Bank v. O’Brien*\(^{255}\)
family property is a common source of security without which many financial
institutions would be unwilling to advance money to prospective entrepreneurs.
Mortgages and charges over real property are an important source of liquid capital
for many new industries, a considerable number of which are family-owned. So long
as the financial institutions in this country remain largely wary of investing directly
in fledging companies (through the purchase of share capital therein), few small to
medium size enterprises would see their inception without such security being given.
Investment in industry being more labour-intensive than investment in realty, the
creation of employment relies heavily on easy access to security for credit. Thus as
Oliver L.J. has indicated in *Coldunell v. Gallon*\(^{256}\), the Courts are wary of “put[ting]
upon commercial lenders a burden which would severely handicap the carrying out


\(^{255}\) [1994] 1 A.C. 180 at p. 188.

\(^{256}\) [1986] Q.B. 1184.
of what is, after all, an extremely common transaction of everyday occurrence for banks and other commercial lenders”.

On the other hand Irish legislative policy undeniably exhibits a strong tendency towards the protection of family members from being unduly deprived of secure accommodation within the family home. The Family Home Protection Act 1976 requires that every conveyance of the family home by a spouse must be made with the consent of the other spouse, whether or not that other spouse has a proprietary interest in the property. The meaning of ‘conveyance’ is very widely drawn to include almost every possible means by which an interest in property can be transferred to another, including in particular the making of a contract for the sale of land and the creation of a mortgage or charge. If such consent is not obtained, or otherwise judicially dispensed with, the conveyance is deemed void. In addition, the consent required must, according to the recent seminal Supreme Court decision in *Bank of Ireland v. Smyth*, be made fully, freely and with full information as to the consequences of making the conveyance. Third parties then will find that absent such consent being given, a mortgage or other security will be void. The third party,

257 In this case however, it is confined to the family based on marriage – it is the consent of a ‘spouse’ that is required.

258 Section 1(1) of the Family Home Protection Act, 1976: “‘Conveyance’ includes a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property otherwise than by a will or *donatis mortis causa* and also includes an enforceable agreement (whether conditional or unconditional) to make any such conveyance, and ‘convey’ shall be construed accordingly”.

259 It is possible in certain restricted circumstances to seek and obtain a judicial dispensation from the requirement of consent. Section 4 of the Act of 1976 allows such dispensation but only where the Court is satisfied that it is “unreasonable for the spouse to withhold consent”. Where suitable alternative accommodation has been offered, for instance, in the place of the property to be sold, the Court might agree to order such dispensation.

260 Although once the person whose consent is required has left the family home in question, proceedings pleading the voidness of the transaction must be taken within 6 years of his or her departure therefrom. After this six year period has ended, the purchaser is regarded as having taken good title in the property purchased, notwithstanding the absence of the required consent. Section 3(8) of the Family Home Protection Act, 1976, as inserted by section 54(1)(b) of the Family Law Act, 1995.


then, will be unable to take a benefit unless it can be shown to have been a bona fide purchaser for value without notice of the lack of consent.\footnote{263}

The ambit of the legislation, however, is deliberately limited, it being confined in application to the family home\footnote{264} and only that of persons legally married. The ambit of equitable relief, by contrast, is not so limited, applying as it does to all forms of property and whether the parties are married or not.\footnote{265} That said, the Courts have tended to confine relief within the boundaries of the traditional grounds for equitable remedies. Thus, mere lack of understanding alone will not, as with the Family Home Protection Act,\footnote{266} vitiate in any way the required consent,\footnote{267} unless it is the result of an actionable misrepresentation.\footnote{268} Another key difference lies in the effects of such invalidity, the Act rendering such contracts void rather than voidable, the latter approach being favoured by the equitable regime.

Here then one encounters a conflict between two peculiarly important social interests. Attempts at resolving this dilemma in Britain have tended towards emphasising the importance of maintaining the incentive to accept family property as security, although some inroads have been made into the previously restrictive English law in

\footnote{263} The term used in the legislation is “in good faith” but this has been deemed to import the equitable concept of notice: see the decision of the Supreme Court in Somers v. W. [1979] I.R. 94.
\footnote{264} As defined by section 2 of the Act. See A.I.B. v. O’Neill and Kidd [1997] 4 I.F.L.R. 265 where Laffoy J. had to consider the effect of a conveyance of security relating to family as well as non-family property. A consent not having been given, the learned judge declared the security invalid but only to the extent of its application to the family home and no further. The security was thus deemed to have been well-charged on the remainder of the property.
\footnote{266} See Bank of Ireland v. Smyth [1996] 1 I.L.R.M. 241, where the Supreme Court ruled that mere lack of understanding alone, whatever its cause, is sufficient to vitiate a consent apparently given under the 1976 Act. The distinct irony, then is that a spouse who owns no land at all may be better protected from loss of accommodation than some classes of property owner, a point adverted to by Murphy J. in Hogan, op. cit. at p. 246.
\footnote{267} Although see Scott L.J. in the Court of Appeal in O’Brien. He suggests that in cases involving wives or other intimate partners standing surety for a spouse or partner, a ‘special equity’ would arise such that the creditor would have to show that it took steps to eliminate a lack of understanding, however caused. Absent the taking of such steps, the lack of understanding \textit{per se} would be sufficient to vitiate the contract between the surety and the creditor. This approach was expressly discounted by the House of Lords on appeal: see Lord Browne-Wilkinson [1994] 1 A.C. 180 at p. 197.
\footnote{268} As in Barclay’s Bank v. O’Brien [1994] 1 A.C. 180. There the defendant had been deceived as to both the amount of a loan and as to its duration.
this area, most particularly in the decisions of the House of Lords in Barclay’s Bank v. O’Brien\(^{269}\) (hereinafter referred to as O’Brien), and C.I.B.C. Mortgages v Pitt,\(^{270}\) (hereinafter called Pitt).

Several strategies have been suggested for dealing with the consequences for creditors of the occurrence of third party undue influence or misrepresentation.\(^{271}\) That the cut-off points must be based on some criterion of fault (passive or active) on the part of the creditor is, it is suggested, self-evident. The suggestion that liability can be based on the fact of coercion \textit{simpliciter}\(^{272}\) (a perspective that seems to be a spin-off on Birks and Chin’s theory that undue influence is grounded on the absence of consent alone) is, with respect, unpersuasive. Mee\(^{273}\) argues that simple proof of undue influence or misrepresentation, whatever the source, should be sufficient to vitiate a contract of surety or a guarantee. This would, he suggests, be subject to a variety of defences founded upon reliance-based grounds.\(^{274}\) The presence of these defences does not, however, blunt the overall impression that the approach suggested is unsound in principle. To say that banks and other lenders should \textit{prima facie} be liable to see their security rent asunder by reason of the presence or presumed presence of coercion \textit{simpliciter},\(^{275}\) without more, surely places on those lenders a


\(^{271}\) See O’Dell, “Contract Law” in Byrne and Binchy, \textit{Annual Review of Irish Law} (Dublin: Round Hall) 1993, 1995 and 1996. In the last mentioned O’Dell, at p. 219, identifies no less than seven strategies. If A is found to have unduly influenced B to enter into a guarantee in favour of C, (1) C will be affected by the simple fact that coercion has occurred, (“coercion \textit{simpliciter}”); (2) C will be affected if A is to be regarded as C’s agent in obtaining the consent of B, (“agency”); (3) if C had actual knowledge of A’s wrongdoing, (“actual knowledge”); (4) if C had notice, actual, constructive or imputed, of A’s wrongdoing, (“notice”); (5) if C could be said to be ‘privy to’ A’s fraud, (“equitable fraud”); (6) if it would be unconscionable for C to rely on the guarantee (“unconscionability”); and (7) if the relationship between A and B is such that a special equity arises in favour of B (“special equity”).


\(^{273}\) Ibid.

\(^{274}\) Ibid. at pp. 155-161.

\(^{275}\) O’Dell for instance states quite clearly that the coercion \textit{simpliciter} strategy is the most logically defensible of the strategies. While he seems implicitly to indicate that the taking of reasonable steps might absolve the third party of responsibility, this is clearly on the basis that such steps would have the effect of eliminating the effects of the equitable wrong and not of absolving the third party of
most onerous burden, one that seems unfair. Why should a financial institution alone, not being at fault, bear a disproportionate responsibility for social ills that are no more its fault than that of any other private institution or individual? An analogy may be drawn with a line of constitutional cases establishing that the burden of achieving certain socially desirable ends cannot be placed on one sector of society alone.\textsuperscript{276} However laudable the desired goal, it is unjust to require one sector of society alone to foot the bill for what is the responsibility of society as a whole. If fault is, as argued above, a prerequisite to the commission of an equitable wrong it would be especially ironic and oppressive to suggest that creditors should \textit{prima facie} be liable regardless of their blameworthiness.

Amongst the variety of other possible strategies it appears that it is the ‘notice’ strategy that has eventually prevailed in these islands.\textsuperscript{277} This is in line with the perfectly well-settled equitable principle that a third party benefiting from a transaction between two other parties where there has been some form of equitable wrong, will only be allowed to take the benefit if he is a \textit{bona fide} purchaser for full value\textsuperscript{278} of the legal estate, and only then when he takes without notice. For there to be notice the party affected need not have ‘actual knowledge’ of the equity thereby arising in favour of the wronged party. It is enough that the creditor (or any of his representatives) failed to make adequate inquiries that would have revealed the presence of such an equity.

That is not to say that other strategies have not had their moment. Prior to the Court of Appeal determination in \textit{O’Brien}, the law in England seemed to be that where a surety agreement or mortgage over property in favour of a financial institution had been obtained through the exercise of an equitable wrong by someone other than a


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representative of the latter, the equity would attach to the latter only where one of two conditions were met.\textsuperscript{279} These were where either (1) the third party had ‘actual knowledge’ of the wrong or where (2) a debtor was deemed to be the agent of the third party in the obtaining of the guarantee or surety agreement such that the latter could stand in no better position than the debtor in relation to the ostensibly consenting party.

(1) Where a lender was actually aware of an equitable wrong and yet proceeded to take the benefit of a transaction effected through such wrongdoing, it would be fixed with notice thereof such that equity would allow the victim’s claim to prevail over that of the lender.\textsuperscript{280} It was not essential, however, that the lender was in fact aware that undue influence had been exerted. It was enough that it had actual knowledge of such facts as would have led any ordinary financier, acting reasonably, to draw the inescapable inference that the agreement had been procured through inequitable means. Nor was ‘wilful blindness’ an adequate defence. A lender who, suspecting foul play, chooses to ignore or suppress any such suspicions that would otherwise have led it to discovering the true facts, will also be fixed with a qualified form of actual knowledge.

(2) Where a financial institution entrusted to a prospective debtor the task of procuring the consent of another to the impugned agreement or mortgage, the institution could stand in no better position than the debtor in relation to the ostensibly consenting party.\textsuperscript{281} In other words the financial institution would be deemed to have implicitly appointed the debtor as its agent for the purposes of

\textsuperscript{278} Although typically equity follows the law in requiring only that the consideration be ‘sufficient’.


securing the third party’s agreement if it ‘left all the arrangements to’ the debtor\(^\text{282}\) to secure the signature of the guarantor or surety.\(^\text{283}\) Therefore, as principal, would be equally affected by the debtor’s actions \textit{qua} agent as the agent himself would have been if acting in his own behalf.\(^\text{284}\)

The criterion of actual knowledge being, perhaps, somewhat difficult to make out, the English courts initially weighed in heavily in favour of employing the second of these tests, the ‘agency theory’. The highpoint of this approach came in \textit{King’s North Trust v. Bell}.\(^\text{285}\) There, a woman, consequent upon her husband’s false reassurances as to the purpose of a loan that he wished to obtain, had agreed to join in executing a mortgage of their family home in favour of the plaintiff. The Court held that the latter, notwithstanding its innocence of any personal wrongdoing, was nevertheless affected by the equity of the wife against her husband such that the mortgage would be set aside. Relying on two turn of the century cases, \textit{Turnbull & Co. v. Duval}\(^\text{286}\) and \textit{Chaplin & Co. v. Brammall},\(^\text{287}\) Dillon L.J. propounded the principle that:

\begin{quote}
“…if a creditor, or potential creditor of a husband\(^\text{288}\) desires to obtain, by way of security for the husband’s indebtedness, a guarantee from
\end{quote}

\(^{282}\) See \textit{Lloyd’s v. Egremont} [1990] 2 F.L.R. 351 where the plaintiff bank had entrusted the matter of obtaining the relevant consents to the solicitor representing the debtor and his wife. As such, the Court of Appeal held, the bank could not be taken to have appointed the debtor as its agent in this regard. The bank being entitled to assume that the solicitor to whom the documents had been sent would ensure that steps were taken to ensure that the surety wife in that case was independently and competently advised, it could not be held liable for any shortcomings on the solicitor’s part.


\(^{284}\) The extent to which this reflects the general law of principal and agent is applicable in such cases is uncertain. Purchas L.J. in \textit{Barclay’s v. Kennedy} suggests that the principle of agency applicable in undue influence cases is different from the ordinary principle of the law of agency, a point disputed \textit{inter alia} in \textit{Lloyd’s v. Egremont} [1990] 2 F.L.R. 351 and in a host of other authorities. See Oliver L.J. in \textit{Caldunell v. Gallon} [1986] Q.B. 1184, Fox L.J. in \textit{Midland Bank v. Perry} [1988] F.L.R. 161 at 166H, Dillon L.J. in \textit{Kingsnorth Trust v. Bell}, [1986] 1 W.L.R. 119 at 123. The latter suggest that it is the ordinary law of agency that applies, the phrase ‘leaving it all to the husband’ being merely a shorthand for the standard principles and not a ‘term of art’.


\(^{286}\) [1902] A.C. 429.

\(^{287}\) [1908] 1 K.B. 233 (C.A.).

\(^{288}\) The principle is not however, confined to husbands and wives. It extends beyond this to all cases in which “…the creditor could or should have been aware that the relationship between the debtor and the persons from whom a guarantee or security was sought was such that the debtor could be expected to have some influence over those persons”. \textit{Per} Dillon L.J. [1986] 1 W.L.R. 119 at p. 124.
his wife or a charge on property of his wife and if the creditor entrusts to the husband himself the task of obtaining the execution of the relevant document by the wife, then the creditor can be in no better position than the husband himself." 289

The tendency more recently, however, has been to confine the application of the agency principle to the greatest extent possible. 290 In B.C.C.I. v. Aboody 291 the Court of Appeal restricted the circumstances in which the principles of agency would apply to cases in which "a true agency ‘in accordance with the general law of principal and agent’” had been established. There is, indeed, some acknowledged artificiality involved in the implication of agency in such circumstances. 292 The typical relationship of principal and agent arises where the latter is invested with the legal personality of his principal, usually for limited purposes, and with a view to the execution of a transaction on the principal’s behalf. To the extent that the agent acts within his ostensible powers, he binds his principal regardless of the latter’s knowledge or specific wishes in that regard. Typically an agent is little more than a surrogate. He usually takes no personal interest in the transaction (beyond the retention of a fee for services,) and any profit made in the course of his agency effectively belongs to the principal.

In the case of a husband procuring the signature of his wife, then, the implication that he is acting on behalf of and moreover as agent for a financial institution seems largely fictitious. The reason for the spouse’s so acting is only indirectly related to

290 See for instance Bank of Baroda v. Shah [1988] 3 All E.R. 24 at 29 where Kingsnorth Trust v. Bell was distinguished by Dillon L.J., himself one of the judges in the latter case. See also Harlick v. A.S.B. Bank [1995] Restit. L.R.. There, Blanchard J. remarks on the rarity of inferring a relationship of agency between a principal debtor and a lender where the former is attempting to secure a guarantee for his debts to the latter.
292 And not a little arbitrariness in its results. See O’Dell, “Contract Law” in Byrne and Binchy, Annual Review of Irish Law 1993, (Dublin: Round Hall, 1994). According to O’Dell: “[t]he agency strategy will often leave the court in the invidious position of enforcing a contract plainly procured by objectionable means, or spurious finding that [the financial institution] is an agent for the [person accused of undue influence] so as to render the contract unenforceable”. [Ibid. at p. 199].
the bank’s interests. The bank may ultimately benefit but this is merely an incident of, or at best a prerequisite to, the achievement of the debtor’s personal goal: his true motivation is to secure the loan requested. Thus, his personal interest in procuring the consent is ultimately as strong as that of the creditor, if not more so. Lord Browne-Wilkinson in *O’Brien*\(^2\) seems to have agreed, observing that:

“...in the majority of cases the reality of the relationship is that, the creditor having required of the principal debtor that there must be a surety, the principal debtor on his own account in order to raise the necessary finance seeks to procure the support of the surety. In so doing he is acting for himself, not the creditor”\(^2\)

While there might certainly be circumstances in which an implication of agency might fairly be made and without artificiality, “such cases will be of very rare occurrence”\(^2\)

In so narrowing the scope of the ‘agency theory’, Lord Browne-Wilkinson expressed the wish that the law be “...restate[d]...in a form which is principled, reflects the current requirements of society...” including presumably the need to maintain ready access to security for credit, “...and provides as much certainty as possible”.\(^2\) Thus he moves in *O’Brien* and in the contemporaneous decision in *Pitt* to reformulate the rules upon which the liability of third parties is to be determined.

In *Bainbrigge v. Browne*\(^2\) Fry J. had noted that the inference of undue influence extended not only to “…the person who is able to exercise the influence...” but to “…every person who claimed under him with notice of the equity thereby created or with notice of the circumstances from which the court infers the equity”. To the extent that this latter passage seems to suggest a more relaxed test of liability it seems nonetheless to indicate that “… the third party must actually know of the

\(^2\)Emphasis added by present author.
\(^2\)Ibid. at p. 195.
\(^2\)Ibid.
\(^2\)[1881] 18 Ch. D. 188.
circumstances which give rise to a presumption of undue influence". This in effect is a modification of the test of actual knowledge. Lord Browne-Wilkinson by contrast propounds a much wider principle, one that embraces the concept of constructive notice properly so called. A third party is "put on inquiry" where "...the known facts are such as to indicate the possibility of an adverse claim". In other words, there are certain circumstances in which the risk of undue influence or misrepresentation is such that the creditor must take certain additional steps to offset the potential for wrongdoing, failing which the equity of any wronged party will prevail over any security it has obtained. The onus of disproving constructive notice in such cases is upon the financial institution.

In *Barclay's Bank v. O'Brien* the defendants, a husband and wife, executed a mortgage over the family home in favour of the plaintiff. This was in exchange for the extension of credit facilities to a company in which the husband was a major shareholder, but in which the wife had no stake. The wife had so acted in reliance on her husband's assurance that these facilities were of limited amount and for a restricted duration, Stg£60,000 to be repaid by the end of three weeks. In fact, the credit given far exceeded both supposed limits, that of amount and that of duration alike. On an application by the plaintiff for an order of possession the defendant wife counter-argued that the agreement between the spouses had been tainted in equity by the misrepresentation and that, furthermore, this defect extended to affect the conscience of the creditor.

At first instance, Judge Marder Q.C. granted the order. With reference to the agency principle, he noted that as the husband had not been acting on the bank's behalf, no responsibility attached to the latter for the misrepresentation of the wife. The Court of Appeal, by contrast, granted an appeal to withdraw the order. Scott L.J. noted the existence of the 'agency theory' but nevertheless considered felt that it was of little

practical use in most circumstances. Instead he noted a current of authority, of which the Australian case of Yerkey v. Jones was a notable example, indicating that married persons, amongst others, fall into a ‘protected class’ of individuals in dealing with which creditors must take very special care. “...Equity has in the past treated married women differently and more tenderly than other third parties and who provide security for the debts of others”.

Thus there existed a special ‘protected class’ that included not only spouses but all persons who provided security for the benefit of other persons with whom they share a relationship of which the natural and probable features are influence over the surety by the debtor and reliance by the former on the latter. A ‘special equity’ thereby arose such that a mortgage or surety agreement would be set aside where:

(i) such relationship and “...the consequent likelihood of influence and reliance was known to the creditor”, and

(ii) either: (a) “the surety’s consent to the transaction was procured by undue influence or material misrepresentation on the part of the debtor or (b) the surety lacked an adequate understanding of the nature and effect of the transaction; and

(iii) the creditor, whether by leaving it to the debtor to deal with the surety or otherwise, had failed to take reasonable steps to try and ensure that the surety entered in to the transaction with an adequate understanding of the nature and effect of the transaction and that the surety’s consent was a true and informed one”.

300 As Scott L.J. himself noted: “...to describe the issue as one which depends on whether or not the bank must be taken to have appointed the husband as its agent to deal with the wife and to procure her consent serves, in my opinion, to mask the basis upon which in certain cases creditors have failed to enforce their securities against the third parties and upon which in other cases they have succeeded”.

In short there had to be actual knowledge of the relationship, the existence of a defect and a failure to take reasonable steps to counter that defect.

In relation to the above-mentioned element (ii)(b), Scott L.J. was certainly extending the remit of the law. Never before had a mere "lack of understanding", not being the result of material misrepresentation, amounted to an actionable wrong in English contract law. Indeed in the House of Lords, Lord Browne-Wilkinson discounted the possibility of introducing such a ground, noting that the scope of actionable defects was confined to the traditional grounds, amongst them being undue influence and misrepresentation:

"...the wife will not have any right to disown her obligations just because subsequently she proves that she did not fully understand the transaction".

Scott L.J. seems, further, to have included spouses in his protected class almost as a matter of right, without a clear requirement that a relationship of influence and reliance be established in each case. This is in marked contrast to the requirement that such a relationship be established as a matter of fact before the presumption of undue influence will be deemed to apply between spouses. Why should the evidential onus lie on a spouse in a case involving his or her spouse but not in a case involving an innocent third party? On what ground should the latter be treated so much more rigorously?

In the House of Lords, Lord Browne-Wilkinson discounted the 'special equity' strategy posited by Scott L.J., preferring instead to rely on what he regarded as the straightforward principle of the doctrine of notice. That doctrine he noted: "...lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, 

the earlier right prevails over the later right if the acquirer of the later right know of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice).

Yet even as he moves away from the ‘protected class’ of Scott L.J.’s scheme, he nevertheless proceeds to indicate the existence of a tendency that shares some of the characteristics of the Court of Appeal’s principle. While recognising the ideal of gender equality, and the very real strides made in seeking to achieve that goal, Lord Browne-Wilkinson nevertheless enters a note of realism. “In a substantial proportion of marriages”, he observes, “it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions”. Noting that in certain cases there might exist facts that would put a creditor on inquiry as to the possibility that another party enjoyed an earlier right, he drew particular attention to the risks attendant upon transactions between spouses and other persons in relationships of a sexual and emotional nature. Thus, transactions involving not only spouses, but all persons who share such a relationship, will be treated with particular caution by the courts due to the increased likelihood of undue influence between such partners and, “owing to the informality of business dealings” between them, the “substantial risk” of misrepresentation, even if only negligent.

Where the creditor had actual knowledge of the existence of an intimate relationship involving cohabitation, the creditor will be put on inquiry. This is subject, however, to an important caveat. The transaction must be such that the transaction was not “on its face” to his or her financial advantage of the person providing the guarantee or other security. In general then these principles do not apply where the surety or guarantor is acting for the mutual benefit of the parties, where for instance the transaction is entered into with a view to securing funds for the creditor purchase of

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305 This included, per Lord Browne-Wilkinson, both heterosexual and homosexual partners. This approach is implicitly followed and endorsed by the House of Lords in Fitzpatrick v. Sterling Housing Association [1999] 3 W.L.R. 1113.
improvement of a family home. In general, then, these principles apply when the surety or guarantor is asked to act so as to secure the creditor against debts incurred for the benefit of another person only, as where a wife acts to secure the personal debts of a company solely owned by her husband.

Once the creditor is put on inquiry, it will be fixed with notice of the spouse’s equity unless it takes reasonable steps to minimise the risk of undue influence or misrepresentation. In this respect, and despite his sturdy invocation of the established principles of the doctrine of notice, Lord Browne-Wilkinson departs quite markedly from standard equitable principles. Constructive notice normally arises where a party fails to make such reasonable inquiries as would yield information tending to expose an equitable right otherwise concealed. Lord Browne-Wilkinson, by contrast, indicates that a creditor will be regarded as having taken reasonable steps if the surety is properly appraised by a representative of the creditor as to:

(a.) the extent of the liability,
(b.) the consequences which might befall the surety or guarantor should the debtor default on his loan, and
(c.) the importance of acquiring competent independent legal advice before transacting.

Here there is a very definite shift of emphasis in the landscape of equitable notice. Originally predicated on the requirement to make inquiries of persons who should reasonably be consulted, the focus now switches to the supply of information. The apparent reason for this shift from what Mee calls “knowledge-based” to “duty-based” criteria seems to lie in the perceived impracticality and insensitivity of

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306 This was, so far as the bank was concerned, the ostensible purpose of the loan in Pitt. The bank was given to believe that the money would be used to purchase a holiday home for the family as a whole. As such, the House felt, the transaction was not, on its face, to the disadvantage of the wife. Arguably, as Thompson suggests, [1994] Conv. 140 at p. 144, the bank should at least have been suspicious considering that there was no proposal to secure the loan on the holiday home supposedly to be purchased using the funds.

making inquiries delving into the intimate affairs of couples. Indeed in this regard, Lord Browne-Wilkinson believed it “...plainly impossible to require of banks and other financial institutions that they should inquire of one spouse whether he or she has been unduly influenced or misled by the other”. But if it is so “plainly impossible” then how can there be constructive notice in such a case? No reasonable inquiries can be made. Therefore, as Mee comments “…as a matter of logic, the lender can never be regarded as having constructive notice”.

Mee suggests that what the House of Lords effectively did was to create an alternative that obviated the need to make intrusive inquiries in order to escape liability. Instead of taking the risk of causing unnecessary upset and offence by making “troublesome inquiries” into its client’s intimate affairs, the creditor would be afforded the alternative option of taking steps to minimise the risk of equitable wrong occurring. In so doing the creditor may well be providing a useful preventative service (although see above at p. 51ff. for comments on the true efficacy of the steps required,) but the outlined criteria add a wholly new dimension to the traditional doctrine of notice which has no ground in either precedent or principle. The test adopted is not then a notice strategy in the original sense of the term but something very different. Never before did the equitable concept of notice require a party to take steps beyond the making of inquiries.

The strategy of notice, at any rate, generally tends to apply where there is more than one transaction, where for instance A transfers land to B, B then creating a further transfer in C’s favour. The doctrine of notice operates so as to make C take the land subject to any prior equity held by A, unless C can satisfy the Court that he is neither a volunteer nor a person with notice of the equity. In both O’Brien and Pitt however, there was in truth only one transaction, that between the lenders and the persons giving the guarantees. The equity that is said to effect the lender is not then a prior

308 [1994] 1 A.C. 180 at p. 196
310 Ibid.
equity but one that arises simultaneous to the transaction involving the lender. Lord Browne Wilkinson however seems to treat this single transaction as involving two discrete events, an approach that, according to Mee is a fiction designed to facilitate the use of the notice strategy. If in fact there is only one transaction, as he suggests, it is not clear that the doctrine of notice can apply at all. The original basis for its application was in cases where a purchaser for value took a legal interest in realty by virtue of a transaction with a person who was affected by an equity arising from a previous transaction involving the same property. Here, one deals not with two transactions consecutively made but rather with only one transaction involving the creation of a charge on one side and the giving of credit on the other. It is arguable that the doctrine does not apply in such a case. The financial institution benefits directly as a result of the tainted transaction, and should be viewed in a different light from the purchaser to whom property is transferred subsequent to the inequitable dealings taking place.

*The face of the transaction.* The decision gives rise to a number of other equally pressing dilemmas. With regard to the requirement that an advantage not be evident 'on its face' it is worth referring to the decision of the House of Lords in *C.I.B.C. Mortgages v. Pitt.*\(^{311}\) There, a wife who, with her husband, had executed a mortgage over their family home in consequence of pressure exerted on her by her husband. The husband had indicated to the plaintiff that the money would be used to purchase a second home for the family,\(^ {312}\) but in fact intended to use and actually used the money to invest in a risky share venture. As the transaction was ostensibly to the joint benefit of the couple the plaintiff was not “put on inquiry” as to any equitable wrong and the mortgage stood. There was indeed no protest at the time from Mrs. Pitt. She did not read the documents that were presented to her to sign.


\(^{312}\) In other words the measure was, although on its face alone, allegedly to the joint benefit of the parties. In genuine cases of advances made for the benefit of both spouses or partners it would seem that the requirements laid down in *O'Brien* need not be taken. Cretney notes how the courts in England and Wales now treat surety arrangements (where the contracting party is set to make no gain from the arrangement) quite distinctly from joint advances. See Cretney “Mere Puppets, Folly and
Indeed owing to her husband’s deceit, Mrs. Pitt, on the face of the documentation, apparently stood to benefit from the transaction. Thus the implication of notice that would otherwise arise was negated. This, despite the fact, as Fehlberg\(^\text{313}\) observes, “...that a wife who provides security as a result of pressure by her husband is also unlikely to have much, if any, control over how she appears in the documentation”.

“It is unfair...,” she continues, “...and somewhat ironic that ‘the face of the transaction’ being a matter beyond the control of the wife should form the basis for denying her relief”. Indeed, as Thompson suggests\(^\text{314}\) the less honest the debtor is with the mortgagee regarding the precise purpose of a loan, “the greater the prospect of the mortgage being deemed enforceable against the wife”.

**The Effect of O’Brien: Proprietary or Personal?** A further problem highlights the serious confusion thrown up by the use of the doctrine of notice, as extended, in these matters. However useful it is in the case of unregistered land, the doctrine is apparently\(^\text{315}\) completely inapplicable in the case of land registered under the Registration of Title Act 1964.\(^\text{316}\) One of the avowed aims of that Act and its predecessor, indeed, was to do away with the sometimes cumbersome inquiries and the uncertainties posed by the doctrine of notice in favour of a register which would as closely as possible reflect the various rights and interests in the land.\(^\text{317}\) A mere equity such as that held by a person who has been the subject of undue influence or misrepresentation is not strictly registrable, although it may be entered on the register as a caution or inhibition restricting registration of conflicting interests. The

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\(^{313}\) Fehlberg, “The Husband, the Bank, the Wife and her Signature” (1994) 57 *M.L.R.* 467 at p. 473.


\(^{316}\) See Mee, (1995) 46 *N.I.,L.Q.* 147 at p. 152 who observes that the “analogy with the doctrine of notice breaks down completely in cases involving a guarantee secured by a charge over registered land”. See also Thompson, [1994] *Conv.* 140 at p. 144.

\(^{317}\) Thus section 32 of the Registration of Title Act 1964 states very clearly that the register shall be a complete guide to the interests in the land so registered. Section 35 underlines this point, noting that any land so registered may be taken “free from any equities”. The registered transferor of land would thus be entitled to enjoy the title to land so transferred subject only to interests noted on the register itself and to such other ‘overriding interests’ as are stipulated in section 72 of the Act.
purchaser, however, will take the legal estate subject to all the rights (including an
equity of the type being discussed hereat) of any person in actual occupation of the
land at the time of purchase, provided they have not failed to inform the purchaser of
these rights when asked if such rights exist. Yet Lord Browne-Wilkinson seems
totaly to have ignored this issue, apparently regarding it as irrelevant to the inquiry,
despite the fact that, according to Sparkes, the land in O'Brien was indeed registered
land.

Dixon and Harpum, on the other hand, suggest that the fact that land is registered
is irrelevant for these purposes. They do so by discounting the proprietary nature of
the test in O'Brien suggesting instead that it operates so as to place a personal
obligation on the creditor so effected. Thus, they suggest, "notice’ as used in
O'Brien is not the same ‘doctrine of notice’ so beloved of property lawyers and now
largely replaced by the registration of title”. The question instead is “whether the
transaction... is vitiated because the creditor is a party to the fraud or undue influence
by reason of the facts of which he has notice”. The problem with this, otherwise
perfectly plausible explanation, as Mee points out, is that generally to be deemed
‘privey’ in equity to the wrongdoing of another, constructive notice will not normally
suffice. Beyond the confines of the principles of land law, “it is difficult to see why
constructive notice should be the decisive criterion”. That said, however, Dixon and
Harpum’s suggestion involves no more of a divergence from principle than the
strategy introduced by Lord Browne-Wilkinson or that suggested by Mee. It is
suggested here that of all the strategies, that suggested by Dixon and Harpum is the
one that should be applied. While retaining the element of ‘fault’ as a prerequisite to
relief, it avoids the vaguaries of the registration system positing a criterion that is

318 Section 72(1)(j) of the Act of 1964.
319 Sparkes, "The Proprietary Effect of Undue Influence", [1995] Conv. 250 at p. 252. Sparkes notes, indeed, that the bank had registered the mortgage as a registered charge over the land.
321 Ibid. at p. 423.
322 Ibid. at p. 424.
323 Mee, op. cit. at p. 154
equally applicable whether or not land is registered. The analogy with notice, while perhaps not well-founded in principle, is a useful and well-tested one.

The position in Ireland. Yet, despite the myriad of problems thrown up by O’Brien, the notice strategy posited therein has eventually, it would seem, been accepted in Ireland, North and South. For some time the law in Ireland was considerably vexed on the precise strategy to be adopted. The case law on the point, prior to the decision in Bank of Nova Scotia v. Hogan, seemed at best to be equivocal, often pointing in several conflicting directions at once. In Bank of Nova Scotia v. Hogan the defendant wife had deposited title deeds in property that she owned with the plaintiff bank as security for the debts of her husband. The defendant alleged that she had done so as a result of her husband’s undue influence over her. In fact this plea was not made out and, as such, the exposition of principles in the case is strictly obiter. Had she indeed proved this element of the case, the Supreme Court nonetheless would have been satisfied that the security in favour of the bank was well-charged. Adopting as its guide the notice strategy favoured in O’Brien, the decision of Murphy J. in the Supreme Court seems primarily to have relied on the

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324 Northern Bank Ltd. v. McCarron unreported, Chancery Division, Master Ellison, February 23, 1994. Although, see Mee, (1995) 46 N.I.L.Q. 147 at pp. 147-148 doubting the “precedential value” of that decision, being a ruling of a Master of the High Court.

325 In Ireland, there is some implicit legislative support for adopting a notice strategy, the Family Home Protection Act, 1976 providing a defence to the voidness of conveyances under that Act where the purchaser takes ‘without notice’ having given ‘full value’ for the house purchased. (Section 3(3) of the Act of 1976). Some care is needed, however, to avoid to close a comparison. For the purposes of the Act, for instance, the concept of ‘notice’ is somewhat wider than under the provisions of section 3 of the Conveyancing Act, 1882, which contain a statutory definition of notice. Under the latter-mentioned Act, knowledge possessed by a solicitor will only be imputed to the client where the solicitor acquired the knowledge in the course of carrying out inquiries on the specific client’s behalf. For the purposes of the Act of 1976, however, all knowledge of the solicitor, however and whenever acquired, may be imputed to the client in question.

326 Unreported, High Court, Keane J., December 21, 1992, (H.C.), [1996] 3 I.R. 239 (S.C.). When one considers that, for historical reasons, most of the land in this country, outside Dublin, is now registered, the limits of Lord Browne-Wilkinson’s test, if it were to be applied in Ireland, are obvious.

327 In Provincial Bank v. McKeever [1941] I.R. 471, Black J., while seemingly rejecting the agency and coercion simpliciter strategies, is highly unclear as to whether either actual knowledge or constructive notice was the prevailing criterion in this area. In a similarly confused vein McMackin v. Hibernian Bank [1905] I.R. 296 at 306, speaks of both “full knowledge and full notice” being required. See O’Dell, “Contract Law” in Byrne and Binchy, Annual Review of Irish Law 1996, (Dublin: Round Hall, 1997) at p. 220ff.

giving of independent legal advice to Mrs Hogan as “afford[ing] the bank a defence on a claim by her in respect of an equity to set aside the transaction if such equity had existed”.

Again the ‘special equity’ principle is strongly doubted. Though the reasoning of Scott L.J. in O’Brien seems to have been highly persuasive in Geoghegan J.’s decision in *Smyth*[^329^] in *Hogan* both Keane J (in the High Court) and Murphy J. (in the Supreme Court) followed the prevailing trend[^330^] in favour of discounting the validity of the ‘special equity’ in favour of wives. In doing so, however Murphy J. seems to have confused the decisions of the Court of Appeal and that of the House of Lords in *O’Brien*, doubting[^331^] what it wrongly perceived to be the latter’s endorsement of the special equity principle. With respect, the House of Lords did no such thing. While Lord Browne-Wilkinson did suggest that a creditor would be put on inquiry where an intimate relationship existed between the parties, he expressly discounted the principle set out in *Yerkey v. Jones*.[^332^]

Another difficulty with Murphy J.’s decision is in ascertaining the extent of application in Ireland of the principles laid down in *O’Brien*. The learned judge adopted Lord Browne-Wilkinson’s comments regarding the doctrine of notice and the fact that a creditor when put on inquiry must either “make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not


exist". Otherwise the creditor will be deemed to have had constructive notice of the equity in question such that it will not be entitled to assert its security. Murphy J., however, makes no mention of the steps that may be taken to avoid this. He did however note that the "availability of appropriate independent legal advice to Mrs. Hogan would afford the Bank a defence” in the face of any equity that Mrs. Hogan might have had had she proved the existence of undue influence, a point that may indicate, albeit implicitly, a more comprehensive acceptance of O’Brien in Ireland. Nonetheless, it is at least arguable that Hogan begs more questions than it answers.

As the English courts have fleshed out the principles first laid down in O’Brien, some of the limits of the O’Brien approach have become more evident, with judges being anxious to confine the circumstances in which banks will become liable. One particular tendency concerns the restriction of liability for defective legal advice given. Royal Bank of Scotland v. Etridge (No. 1) suggests that the solicitor giving the advice may be regarded for these purposes as agent of the bank, thus rendering the bank liable for the solicitor’s erroneous advice. Yet the general thrust of the case law is to reject such an implication of agency. Indeed the agency principle was rejected inter alia by a differently constituted Court of Appeal in the same cases in Royal Bank of Scotland v. Etridge (No. 2), in Midland Bank v. Serter and in Barclays Bank v. Thomson.

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333 Ibid. at p. 248.
334 Ibid. at p. 249.
335 [1997] 3 All E.R. 628. See the discussion in Price, “Undue Influence: Nullus Finis Litium”, (1998) 114 L.Q.R. 186. Price disputes the conclusion in Etridge making the very perceptive point that under it, the more the bank did to secure advice for the surety or guarantor, the greater the likelihood of its being fixed with notice. He nonetheless finds it difficult, in strict principle, to counter the imputation of agency.
Once the bank has advised a surety or guarantor to obtain independent advice, and receives an assurance\(^{339}\) to the effect that the solicitor has given such advice, it is entitled to assume that such advice is given honestly and competently.\(^{340}\) This will be the case even where the bank has engaged its own solicitor to advise the surety although Irish law is now quite clear in that advice will not be considered independent when the person giving it is acting for both parties.\(^{341}\) In England and Wales, however, in such a case the solicitor may be and has been regarded as having acted “exclusively for the signatory... and not the bank”.\(^{342}\) This is despite the fact that it was the bank that initially secured the services of the solicitor. This conclusion seems to involve what Price dubs “a modern legal fiction” terminating the relationship of agency between the adviser and the bank for the purposes of the giving of advice alone, a conclusion that jars somewhat with principle.\(^{343}\) Some judges have relied upon the privacy of the lawyer-client relationship to buttress this perspective noting not only that interference is unnecessary but even unwarranted, the giving of advice being “a matter for the solicitor’s professional judgment and a matter between him and his client”.\(^{344}\) Where a bank is dealing with a client through his or her solicitor it is entitled, furthermore to assume that the solicitor has given all appropriate advice. In fact, Hoffman L.J. suggests that to inquire further, in such cases, by communicating directly with the client, would involve the commission of “a professional discourtesy”, presumably in implying that the solicitor has not performed his or her job properly. It seems then that a bank can secure effective protection of its interests simply by referring a party to a solicitor, even if that solicitor is the bank’s or alleged wrongdoer’s solicitor. It seems also that it will be

\(^{339}\) Usually in the form of a certificate.


\(^{343}\) See the discussion in Price, *ibid.*, (1998) 114 L.Q.R. 186 at p. 188.

safe even where the solicitor fails to give or is simply not competent\(^{345}\) to give clear, comprehensible advice.

There is some merit in the suggestion that a professional creditor should be required to brief every mortgagee or surety of the risk he or she is taking in every case, not merely where an inference of undue influence arises.\(^{346}\) The spectre which Lord Browne-Wilkinson paints of the banking system grinding to a crushing halt, should it be required to step outside the parameters laid down in *O'Brien*, is fanciful to say the least. Most bank branches now employ a full-time mortgage advisor. Compared to the time that is devoted to the average debtor, the bank would surely need to spend comparatively little of its time advising sureties and co-mortgagors. A lender which itself benefits from the receipt of additional security could hardly be heard to complain if it is required to perform the relatively simple task of appraising the mortgagor or surety of his or her rights and liabilities.

\(^{345}\) In *Midland Bank v. Massey* [1994] 2 F.L.R. 342, for instance, the solicitor advising the plaintiff was clearly not in a position to advise her regarding the financial prospect’s of her partner’s business ventures. As such, Chandler suggests that the bank should have been fixed with notice, on the ground that it ought to have known that a solicitor would not have been in a position to give such advice, and that it failed to advise the plaintiff of this possibility. Chandler, “Undue Influence and the Function of Independent Advice”, (1995) 111 L.Q.R. 51 especially at pp. 52-53.

\(^{346}\) The principles in *O'Brien* have, per Cretney “come to be recognised as good banking practice”. Cretney, “Mere Puppets, Folly and Impudence: Undue Influence in the Twentieth Century”, [1994] *Restitution Law Review* 3 at p. 6. Indeed a voluntary code regarding the advice to be given to sureties and guarantors has been adopted by the banks in Britain and in Ireland. The British code, recommends in Clause 14, in terms that cleave quite closely to the judgment in *O'Brien*, that:

> (1) Banks and building societies will advise private individuals proposing to give them a guarantee or other security for another person’s liabilities:

(i) that by giving the guarantee or third party security, he or she might become liable instead of or as well as that other person;
(ii) whether the guarantee or third party security will be limited as to amount, of, if this is not the case, what the limit of liability will be;
(iii) that he or she should seek independent legal advice before entering into the guarantee or third party security.

(2) Guarantees and other third party security documentation will contain clear and prominent notice to the above effect”.

The decision in *Bank of Ireland v. Smyth*, a case involving the validity of a consent under the Family Home Protection Act, 1976, tends to suggest that such an approach will ultimately have to be taken by the Irish banking sector, at least where spouses are involved. By virtue of the Supreme Court decision in that case the written consent required under the Family Home Protection Act 1976 to a proposed conveyance (including a mortgage or charge) of the family home, will not be valid unless the spouse ostensibly consenting fully understands and fully and freely consents to the proposed conveyance. This arises regardless of whether the consenting spouse has any proprietary or other interest in the subject matter of the conveyance. Thus a lender in this country is already obliged to take such reasonable steps as are necessary fully to inform a spouse not joining in the conveyance of a family home of the consequences thereof. Given such requirements the debate thrown up by *O’Brien*, insofar as it relates to dealings with the matrimonial home, is rendered virtually academic.

The deep confusion that is thus engendered largely stems from the failure to grapple with the complex intertwined relations that evolve in such situations. The fallacy of the 'two-transactions' approach underlines the largely unrealistic approach to such cases, and again points to both the dominance of the discrete contractual analysis and to its potential to mislead. The resulting standard represents a heady mixture of conflicting policies supported by mutated principle, the notice strategy having evolved overnight into something that it had never been theretofore, a duty-based criterion. Though the special equity seems to have been firmly discounted, it has arguably been resurrected in qualified form by means of the criteria posited by Lord Browne-Wilkinson.

The solution to this confusion it is suggested, is the adoption of the equitable fraud test as propounded by Dixon and Harpum amongst others. A financial institution will

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be regarded as liable then if it can be said that, by failing to see that potentially vulnerable persons are not being exploited, or by failing to take steps to empower those persons, it can be said to have compounded the wrong of the primary wrongdoer. This test both avoids the awkward proprietary implications noted above and reasserts the argument made above that it is to wrongful conduct and not mere ‘impaired consent’ that the doctrine of undue influence is directed.

III. Unconscionability

The concept of unconscionability is perhaps the most elusive of the equitable doctrines. Its exact boundaries remain somewhat obscure - in fact it appears in several overlapping guises, but in Ireland probably most frequently as the doctrine of ‘improvident transactions’ or ‘unconscionable bargains’. It is suggested that in practice these many guises conceal what is effectively the same entity, the essence of which is that a bargain may be set aside where one party has knowingly taken advantage (passively or actively) of another party’s inherent weakness. For a bargain to be deemed to be improvident or unconscionable then, the following conditions must be satisfied:

348 Witness, for example, the remarks of the New Zealand Court of Appeal which observed, in Wilkinson v. ASP Bank Ltd. [1998] 1 N.Z.L.R. 674 at p. 698 that “the jurisprudential basis of O’Brien remains uncertain”.

349 As Delany notes “there remains a degree of uncertainty about the exact requirements which must be established to support a claim of unconscionability”. Delany, Equity and the Law of Trusts in Ireland, 2nd ed. (Dublin: Round Hall, 1999), at p. 602. See also Cooke P. in Nicholls v. Jessup [1986] 1 N.Z.L.R. 226 at p. 228 who speaks of the “degree of vagueness” encountered in cases involving unconscionable bargains.

(a) The party claiming unconscionable dealing (A) is in a position of disadvantage or inherent weakness.\textsuperscript{351}

(b) The stronger party (B) is or ought to be aware of the presence of this weakness,\textsuperscript{352} and has taken wrongful advantage thereof.

(c) The transaction is, in the court’s opinion, profoundly disadvantageous to A and entered into without adequate independent advice.

Two features of this formulation are of special note. Despite the considerable debate concerning the grounds of intervention in undue influence, it is relatively well-settled that the doctrine of unconscionability is fault-based.\textsuperscript{353} “Unconscionable dealing”, according to Deane J. in \textit{Commercial Bank of Australia v. Amadio},\textsuperscript{354}

“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 or good conscience that he should do so”.\textsuperscript{355}

The words of Peter Millett Q.C. in \textit{Alec Lobb (Garages) Ltd. v. Total Oil (G.B.) Ltd.}\textsuperscript{356} are equally emphatic on this point:

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\textsuperscript{351} See the definition put forward in \textit{Blomley v. Ryan} (1956) 99 C.L.R. 362 at p. 405, cited in text below at p. 83.


\textsuperscript{354} (1983) 151 C.L.R. 447 at p. 474.

\textsuperscript{355} See also Deane J. in \textit{Amadio, op. cit.}, at p. 461 who speaks of “the will of the innocent party” being “the result of the disadvantageous position in which he is placed” of which position the other party “unconscientiously tak[es] advantage”. Sullivan M.R. in \textit{Slator v. Nolan} (1876) I.R. 11.Eq. 367 at p. 409 also speaks in terms of one party taking “undue advantage” of the other. In the Canadian case of \textit{Morrison v. Coast Finance Ltd.} (1965) 55 D.L.R. (2d.) 710 at 713, Davey J.A. considers that the gain must have resulted from “an unconscientious use of power by a stronger party against a weaker”.

\textsuperscript{356} [1983] 1 W.L.R. 87 at pp. 94-95.
"In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself..."

The ‘fault’ upon which this action is grounded, however, may be passive as well as active in nature. The party taking the advantage need not have imposed upon or influenced the weaker party in the slightest. Indeed the transaction, as in Grealish v. Murphy, may be initiated quite spontaneously by the vendor without any suggestion on the purchaser’s part and yet be deemed improvident. The passive acceptance of a benefit in unconscionable circumstances is enough to activate the doctrine.

The second notable feature relates to the matters to be proved by the party alleged to have acted unconscionably. In a case of alleged improvidence the onus is on the party taking the advantage to prove that the transaction is in every sense ‘fair, just and reasonable’ and that the value given is a ‘real’ or ‘market value’. If the transaction cannot be shown to be fair and reasonable both in its terms and in the dealings that gave rise to it, it is deemed unconscionable and may be set aside. Here then one finds a dual focus with matters of substantive justice as well as matters of procedural propriety being considered. The law is not concerned merely with the procedural improprieties of the dealings but additionally with the substantive result of the contract. Duress and actual (but not presumed) undue influence may lie notwithstanding the giving of full consideration. A finding of unconscionability by contrast depends in essence upon the existence of some transactional imbalance in the result as well as in the initiating process. That said, a bargain will not be upset by reason only of such substantive unfairness: something more is required.

358 As Capper notes “[p]assive acceptance of an undeserved benefit will often suffice instead of active influence”. Capper, “Unconscionable Bargains”, op. cit., at p. 64. See also the New Zealand case of Bowkett v. Action Finance Ltd., [1992] 1 N.Z.L.R. 449 and the Privy Council in Hart v. O'Connor [1985] 1 N.Z.L.R. 159 at 171, where Lord Brightman noted that “victimisation” for these purposes may “consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances”.
359 Fry v. Lane (1888) 40 Ch. D. 312.
360 See for instance Barton v. Armstrong [1976] A.C.104, where despite the presence of full consideration the Privy Council found that there had been duress.
361 Hart v. O'Connor, op. cit.
The status of ‘disadvantage’. With both undue influence and unconscionability one is dealing with vulnerable parties. With undue influence, the vulnerability arises from the relationship between the parties. Where there is alleged unconscionability, by contrast, the vulnerability arises for reasons unassociated with the exploiting party.\(^{362}\)

The party claiming relief must first be shown to have been in a position of disadvantage at the time of the agreement, of which, moreover, the stronger party was aware or ought to have been aware at the time. This may include, per Fullager J. in *Blomley v. Ryan*\(^{363}\), a situation of “poverty or need of any kind, sickness, age,\(^{364}\) sex\(^{365}\), infirmity of mind\(^{366}\) or body, drunkenness,\(^{367}\) illiteracy,\(^{368}\) lack of education, lack of assistance or explanation”.\(^{369}\) Such disadvantage may it seems be relative, or indeed context-specific. A person being quite competent in the conduct of his or her

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\(^{367}\) In *Blomley v. Ryan* itself the purchasers appear to have exploited to their benefit the vendor’s liking for rum. See also *White v. McCooey*, unreported, High Court, Gannon J., April 26, 1976.

\(^{368}\) In *Garvey v. McMinn* (1846) 9 Ir. Eq. R. 526, the plaintiff’s illiteracy, combined with her want of money, contributed to her state of disadvantage vis-à-vis the defendant.

\(^{369}\) See *Nicholls v. Jessup* [1986] 1 N.Z.L.R. 226 at p. 232, where McMullin J. described the defendant as lacking professional advice, “as one who was ignorant about property rights, was unintelligent and muddleheaded” and that “her judgment in matters of business was likely to be swayed by wholly irrelevant considerations”.

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normal working life may nonetheless be deemed to be at a disadvantage when it comes to dealing in economic or property affairs.\textsuperscript{370}

The earliest examples of the application of the latter doctrine, however, involve a class of individuals who might not typically fit the stereotype of ‘disadvantaged’. A line of eighteenth and nineteenth century cases concerned transfers at undervalue of (future) reversionary interests by expectant heirs and other reversioners and remaindern\textsuperscript{371}. In many of these cases the vendors had barely reached the age of majority and the youth of such persons “was treated as an important circumstance”.\textsuperscript{372} The prospect of their rights vesting in possession at some as yet undetermined point in the future was in many instances no match for the temptation of ready money. Thus many expectant heirs foolishly signed away their future interest for inadequate recompense. Equity did not however confine itself to incidents of youthful folly. As Kay J. observed in \textit{Fry v. Lane}\textsuperscript{373} the Court of Chancery would grant relief “even where the remainderman was of mature age and accustomed to business”. Indeed, “[e]ven the exuberant or ill-considered dispositions of feckless middle-aged women” Gavan Duffy J. remarks, rather imprudently, in \textit{Grealish v. Murphy}, “have had to yield to the same principle”.\textsuperscript{374}

It undoubtedly might be said that the judiciary’s zeal sprang from their concern to shield the landed gentry from attempts by the \textit{nouveaux riches} and bounty hunters\textsuperscript{375}

\textsuperscript{371} See for instance \textit{Twistleton v. Griffith} (1716) 1 P. Wms. 310 at p. 313. Lord Cowper’s judgment in that case contains a prime example of eighteenth century paternalism. He saw “no inconvenience in the objection” that the Chancery’s intervention in cases where reversioners or remaindernen had sold their interests would make it more difficult for an heir to sell his reversion. “...[T]his might force an heir to go home and submit to his father or bite on the bridle and endure some hardship”. Either way it would be good for character: “he might grow wiser and be reclaimed”.
\textsuperscript{372} \textit{Fry v. Lane} (1888) 40 Ch. D. 312, per Kay J. at p. 320.
\textsuperscript{373} (1888) 40 Ch. D. 312. at p. 320.
\textsuperscript{374} [1946] I.R. 35 at p. 50.
\textsuperscript{375} An alternative strategy employed to divest the landed gentry of their wealth - marriage - is discussed in Chapter 5 below at pp. 105ff.. But see also Clark, who disputes Lawson’s claim that the doctrine of unconscionability saw its origins solely in the cases involving expectant heirs. Clark, “The Unconscionability Doctrine viewed from an Irish Perspective”, (1980) 31 \textit{N.I.L.Q.} 114 at p. 121 citing \textit{Evans v. Llewelin} (1787) 1 Cox C.C. 333.
of the late eighteenth century to acquire property. In fairness, Equity, as Lawson observes “had never been content solely to protect expectant heirs and reversioners”. The doctrine had from an early stage extended its net to those in straitened circumstances generally, to those ignorant in business matters and to the old and infirm. In *Evans v. Llewellin* for instance several deeds and conveyances were set aside as having been improvidently obtained. One of the plaintiffs, being “a person in mean circumstances and totally ignorant of his rights until the moment of the transaction taking place...was not competent to protect himself and therefore the Court is bound to afford him protection”. Bargains made with persons in an aged or infirm state were similarly subject to the doctrine as in *Baker v. Monk* where the vendor was an elderly lady of small means and the purchaser, by contrast a ‘substantial tradesman’.

As the last mentioned case implicitly suggests, however, the ‘disadvantage’ that is envisaged in this context is most typically relative in nature. Absolute poverty or destitution is not required, nor is it necessary that a party’s ignorance be such as to render him incapable of contracting. In fact, this particular element of the doctrine might fairly be said to involve “some inequality in the bargaining powers of the


377 By the same token, the doctrine was not, despite its origins, confined to the sale of interest in expectancy or even to dealings in real property. The transfer of an interest in possession could be the subject of the Court’s scrutiny: *Filmer v. Gott*, (1774) 4 Bro. P.C. 230. *Longmate v. Ledger* (1860) 2 Giff. 157, 66 E.R, as could a settlement of moneys: *Everitt v. Everitt*, (1870) L.R. 10 Eq. 405; or even of expected prize-money: *How v. Weldon and Edwards* (1754) 2 Ves. Sen. 516.


381 (1787) 1 Cox. C.C. 333.


384 (1864) 4 De G.J. & S. 388.

385 A rather more extreme instance is to be found in the 1774 case of *Filmer v. Gott*, (1774) 4 Bro. P.C. 230. In that case, an elderly woman conveyed her entire estate to her nephew for less than one twentieth of its market value. The aunt was ill and confined to bed at the time of the conveyance, which was moreover executed in the dark!

parties”, a factor that, Capper suggests, “matters as much as any specific disadvantage the [victimised party] labours under”. Thus in Buckley v. Irwin for instance one encounters a person of extremely limited competence in business affairs transacting with “two sharp-eyed and experienced dealers”. In Slator v. Nolan the vendor was a reckless bankrupt, the purchaser an experienced businessman with some legal training. In Nicholls v. Jessup the plaintiff was the manager of a real estate agency, the defendant a part-time nurse inexperienced and incompetent in business affairs. Megarry J.’s restatement in modern terms, in Cresswell v. Potter of the criterion of disadvantage posited by the doctrine of improvident bargains underlines this relative conception of disadvantage. The ‘poor and ignorant’ alluded to in older cases were the precursors of ‘members of a lower income group’ and the ‘less highly educated’ respectively of modern times.

The requirement of transactional imbalance. Generally, a bargain will only be deemed unconscionable where there is a significant transactional imbalance in its resulting terms or in the respective benefits and disbenefits accepted by the parties under the contract. Indeed, almost by definition, it is highly unusual for a transaction to be deemed improvident where there is no significant disparity.


Capper, ibid. at p. 50. See also the observations of McIntyre J. in Harry v. Kreutziger (1978) 95 D.L.R. (3d) 231 at p. 237, in particular that “it must be shown that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker party which would leave him in the power of the stronger...”. In a similar vein, some older cases speak of protecting a contractual party where he is not ‘on equal terms’ with his opposite number. See also Rae v. Joyce (1892) 29 L.R. (Ir.) 500. [1960] N.I. 98.

(1876) I.R. 11 Eq. 367.


See Alec Lobb (Garages) Ltd. v. Total Oil (G.B.) Ltd. [1985] 1 W.L.R. 173, where the price paid was found not to have been anything other than fair and reasonable in all the circumstances. Thus the relief requested was denied.

history of mental illness and the fact that the same solicitor had acted for both parties to the impugned transaction. Despite his initial skepticism concerning the transaction he found that there had been no significant undervalue in the sale under scrutiny. Though a higher price might have been obtained on the open market, the plaintiff had chosen to proceed with a private sale at the price paid in order to keep his income below that required for him to keep his old age pension. Thus there was "nothing left to indicate that [the plaintiff] was unequal to protecting his interests at the time he entered into the transaction".  

The contractual imbalance is usually, though not exclusively, found in the presence of some significant undervalue of the goods or property that are the subject of the contract. In Rooney v. Conway for instance land valued by the defendant himself as worth at least Stg.£2000 was sold to him for a quarter of that price. Yet monetary undervalue is not the sole concern here. It may be the case, for instance, that the terms of the impugned agreement are not sufficiently protective of one party such that the bargain overall appears considerably skewed to one party’s predominant advantage. Take Grealish v. Murphy, perhaps the best contemporary Irish example of the application of this doctrine. Mr. Peter Grealish, a farmer of some wealth but little corresponding intellect, was in his sixties, and being illiterate, barely numerate and mentally deficient needed “decidedly more protection than the ordinary western farmer and cattle dealer”. In short, the judge observed, somewhat uncharitably, 

22, 1978. See also Nyland v. Brennan, unreported, High Court, Pringle J., December 19, 1970 where the price given was held to have been reasonable, and the bargain thus, not ‘unconscionable’.

[1970] I.R. 214 at p. 220. See also the New Zealand case of Jenkins v. N.Z.I. Finance Ltd. [1991] 3 N.Z.B.L.C. 102, where relief was refused partly on the ground that the agreement in question imposed no significant detriment on the plaintiff and her husband.

Unreported, Chancery Div., Hutton J., March 8, 1992 [1982] N.I.J.B. (No. 5). See also Fry v. Lane (1888) 40 Ch. D. 312, where £170 was paid for consols worth £475. A striking example is to be found in Zabolotney v. Szyjak (1980) 5 Man. R. (2d) 107 (Q.B.) where a farmer sold for Can$8,600 an interest in a farm worth Can$65,000. Despite the gross disparity, the allegation of unconscionability was not made out to the satisfaction of the Court, which noted that the farmer was at the time fully capable of managing his own affairs.

See also Filmer v. Gott, (1774) 4 Bro. P.C. 230 where an elderly woman conveyed her entire estate to her nephew for less than one twentieth of its market value.

[1946] I.R. 35

Ibid. at p. 37.
that “he is afflicted with a worse than Boeotian\textsuperscript{400} headpiece and a very poor memory; a long life has not taught him sense”.\textsuperscript{401} Realising in part his difficulties the plaintiff employed the defendant, Murphy as a \textit{factotum} and general manager for his two farms, the understanding being that on Grealish’s death his young helper would take the fee simple in remainder in the larger of the two farms. To this end, Grealish executed a settlement retaining for himself a life interest in the farm, but assigning the remainder to Murphy in fee simple. Murphy for his part entered into several covenants relating to the proper management of the estate including one imposing a duty to account for profits received on Grealish’s behalf. The Court nonetheless was satisfied that this was an ‘improvident settlement’. The plaintiff had:

“surrender[ed] irrevocably his own absolute title for a life interest in consideration of personal covenants backed up by no adequate sanctions; the farm itself was hypothecated to secure the newcomer, beside whom Peter [the plaintiff] was a Croesus;\textsuperscript{402} and Peter was to be left for the remainder of his life very much at the mercy of a rather impecunious young man, who had no ties of blood and was still unproved as a friend”.\textsuperscript{403}

\textbf{Is transactional imbalance enough?} It is generally accepted however that transactional imbalance alone will not normally render a contract unconscionable. There must, in addition, be some element of fault on the stronger party’s behalf. The stronger party, in particular, must be aware of the disadvantage to which the weaker party is subject.\textsuperscript{404} Absent this element, it seems, there can be no unconscionability. In Hart \textit{v. O’Connor},\textsuperscript{405} the Privy Council refused to grant relief to a man suffering from senile dementia, who had parted with property. As the defendant had neither known nor had cause to suspect that the plaintiff was so afflicted, there was nothing unconscionable in his taking a benefit.

\textsuperscript{400} Meaning ‘dull’ or ‘crass’.
\textsuperscript{401} \textit{op. cit.} at p. 37.
\textsuperscript{402} Meaning a person of great wealth.
\textsuperscript{403} \textit{op. cit.} at p. 45.
\textsuperscript{404} Hart \textit{v. O’Connor}, \textit{op. cit.}
\textsuperscript{405} [1985] 1 N.Z.L.R. 159. On appeal from the New Zealand Court of Appeal.
This perhaps is the most elusive aspect of the formulation, the precise extent and quality of the fault required being generally somewhat vague. Indeed in some older cases where unconscionable bargains were struck down the element of fault seems decidedly slim. In *Evans v. Peacock* where a bargain was set aside despite there having been “nothing dishonourable or immoral in the stronger party’s conduct”. A similar result was reached in the keynote Irish case of *Grealish v. Murphy* although again the defendant had done nothing to procure the improvident deed in question. In fact “the plan was not originated by [the defendant] but by [the plaintiff] and [him] alone...Any picture of [the defendant] as an adventurer inveigling his witless victim into a trap...would be a caricature”. The arrangement in question was the brainchild of the plaintiff. It “had been expressly envisaged [by the plaintiff] from the outset before Murphy can have acquired any influence whatsoever”. While negating any possible implication of undue influence having been exerted, this fact did not foreclose the possibility of the bargain being struck down for improvidence.

Is disadvantage coupled with transactional imbalance enough then? With regard to the sale of reversionary interests, it was once thought that gross undervalue alone would suffice to ground relief. As Meaghar, Gummow and Lehane point out “…[s]o tender was the concern of Equity that by the mid-nineteenth century the position had been reached that inadequacy of price alone was sufficient ground for setting aside such transactions; there was no necessity to show other badges of fraud usually

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407 See also *Everitt v. Everitt* (1870) L.R. 10 Eq. 405, where a settlement upon trustees was struck down for unconscionability. This was despite the fact that “the deed was ‘the most honest thing in the world’ so far as the settlor and her solicitor were concerned”, and the trustees had acted properly in all respects. Likewise, in *Longmate v Ledger* 2 Giff. 157, a bargain was struck between an aged man and his creditor, the latter being so weak and eccentric as not to be “competent to exercise a prudent care for his own interests”. Although the defendant was acknowledged not to have “used any of the arts to induce the vendor to enter into this contract” the bargain was set aside.
409 Ibid. at p. 49.
410 Ibid. at p. 48.
associated with unconscionable transactions". Insofar as reversionary interests are concerned it is no longer possible, by reason of undervalue alone, to claim relief. The Sale of Reversions Act 1867 forecloses such an option but only in the case of an interest in reversion. It is suggested that in other cases, however, a shortfall in value alone will generally be of no aid to the litigant otherwise than in exceptional cases where “from its grossness it is of itself evidence of fraud”. This is particularly the case where per Grant M.R. in Evans v. Peacock the parties “stand upon a precisely equal footing”. Stuart V.C., in Longmate v. Ledger, a case from 1860 concerning the transfer of an interest in possession suggests that in such case the fact of undervalue “of itself, might not be sufficient to invalidate the transaction”.

That is not to say that the courts will never act where there is gross undervalue but no more. In Grealish v. Murphy Gavan Duffy J. noted that the Courts tend to be “very much slower to undo a transaction for value”. This observation, while foreclosing the

411 Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies*, 3rd ed., (Butterworth’s, Australia, 1992) at §1608, at p. 402. Lord Romilly M.R. led the way in this regard, suggesting in several mid-nineteenth century cases that, at least so far as the sale of reversionary interests were concerned, significant undervalue would suffice on its own to attract the protection of the Chancery Courts. See Salter v. Bradshaw (1858) 26 Beav. 161, Bromley v. Smith (1859) 26 Beav. 644, Webster v. Cook (1867) L.R. 2 Ch. 542 and the discussion in Clark, “The Unconscionability Doctrine”, op. cit. at 123-125. See also Grant M.R., in Gowland v. De Feria (1810) 17 Ves. Jun. 20 at pp. 24-25, who suggests that the doctrine of unconscionable bargains itself “is an exception to the general rule...in all these cases the issue is upon the adequacy of the price”.

412 The Sale of Reversions Act 1867 precludes a “purchase, made bona fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate” made on or after 1st of January 1868 from being “opened or set aside merely on ground of undervalue”. The Act extended its remit to “every kind of contract conveyance or consignment under or by which any beneficial interest in any kind of property may be acquired”.

413 Even in such cases, undervalue, per Lord Selborne in Earl of Aylesford v. Morris, (1873) L.R. 8 Ch. 484 at p. 490, remained “a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in these cases”. Certain factors additional to the fact of undervalue, thus, took many potential litigants outside the remit of the Act. Thus in Fry v. Lane, (1888) 40 Ch. D. 312, Kay J. set aside as improvident the sale of a reversionary interest at undervalue made by “two ignorant men” neither of whom were on equal terms with the purchaser. The same solicitor had acted for both sides and in doing so “did not properly protect the vendors, but gave great advantage to the purchasers”. On a review of the case law Kay J. ruled that “where a purchase from a poor and ignorant man at a considerable undervalue the vendor having no independent advice, a Court of Equity will set aside the transaction”, such circumstances taking the case beyond the purview of the Act.


415 2 Giff. 157 at p. 163.

option in most cases, implicitly indicates that there may be some circumstances in which gross undervalue may be sufficient in itself to ground relief. It would seem, then, that the equitable doctrine is a good deal more flexible than some of the formulations would suggest. Capper\textsuperscript{417} notes that on this island there is "a marked tendency" amongst the Irish Courts to invoke the unconscionability ground "even where there is no real evidence of wrongdoing on the part of the purchaser".\textsuperscript{418}

The decision in \textit{Rooney v. Conway} seems to bear this out. An elderly man had transferred his farm to a young man not of his family for less than a quarter of its true price. Though there was, according to Clark, "no evidence of improper or unconscionable behaviour\textsuperscript{419}" on the young man’s part, the court found that the bargain was unconscionable. It appears then that the doctrine can prove quite flexible. While the mere fact that a contract is more favourable to one party than to the other will usually not suffice,\textsuperscript{420} a significant undervalue coupled with a marked inequality of bargaining power may suffice in some cases to ground relief.\textsuperscript{421} Thus in extreme cases like \textit{Slator v. Nolan}\textsuperscript{422}, where the bargain was so skewed in favour of the stronger party that the judge was compelled to "shrink[ ] back in absolute amazement at the transaction", little may be required to affect the stronger party’s conscience. In such a case, it seems, it would be unconscionable simply for the stronger party to \textit{take} the contemplated benefit.

\textsuperscript{417} Capper, "Unconscionable Bargains", \textit{op. cit.}, at p. 54.
\textsuperscript{418} See for instance the comments regarding \textit{Grealish v. Murphy}, \textit{op. cit.} at p. 86. In \textit{Slator v. Nolan} too, the "defendant’s only wrongdoing", per Capper, "Unconscionable Bargains", \textit{op. cit.}, at p. 54, "seems to have been to state his terms knowing that the defendant, because of recklessness and want of advice, would accept them".
\textsuperscript{419} Clark, \textit{Contract Law in Ireland}, 4\textsuperscript{th} ed., (Dublin: Round Hall, 1998) at p. 300. See also Capper, "Unconscionable Bargains", \textit{op. cit.}, at p. 55, who also doubts whether the defendant’s conduct was unconscionable. Considering the amount of work that the defendant had performed, it was arguably quite reasonable for the elderly man to act as he did.
\textsuperscript{420} See \textit{Pye Estates (Oxford) Ltd. v. Ambrose} [1996] \textit{Restit. L.R.} 181 where Arden J. noted that the mere fact that a transaction is more favourable to one party than to the other is not of itself a ground for relief.
\textsuperscript{421} See Capper, "Unconscionable Bargains", \textit{op. cit.}, at p. 55: "where the inequality in the parties’ bargaining power is particularly pronounced and the sale particularly improvident it may be unconscionable for the defendant just to take the benefit".
\textsuperscript{422} (1876) I.R. 11 Eq. 367.
Independent Advice. A purchaser will generally be unfettered by Equity if it can be shown that the vendor had adequate independent advice.\(^{423}\) The party advised need not necessarily follow the advice given, as in *Pye Estates (Oxford) Ltd. v. Ambrose*\(^ {424}\) where independent legal advice to the effect that the grant of an option was “commercially very ill-advised” was ignored. Arden J. thus refused to set aside the option so granted. As noted above in relation to undue influence, it is important not to overstate the curative effects of such advice,\(^ {425}\) although in practice its presence or absence can be quite significant.\(^ {426}\) One view is that independent advice ensures that the weaker party acts of his own free will, that its function is to liberate the weaker party from his infirmity for the purposes of considering the transaction. Lord Hatherley (dissenting) in *O’Rorke v. Bolingbroke*\(^ {427}\) observed that Equity comes to the rescue whenever the parties to a contract have not met upon equal terms, the corollary being “that the Court must inquire whether a grantor, shown to be unequal to protecting himself, has had the protection which was his due by reason of his infirmity”.\(^ {428}\)

Whether independent advice necessarily supplies that protection is a moot point. O’Brien C.J. in *Rae v. Joyce*\(^ {429}\) seems to suggest that the presence of such advice is only one of a number of elements to be taken into account in considering granting relief. It may be, as in *McCormack v. Bennett*\(^ {430}\) that a person at a disadvantage may

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\(^ {425}\) See the comments of O’Brien C.J. in *Rae v. Joyce* (1892) L.R. Ir. 500 at pp. 521-522.

\(^ {426}\) Capper, “Unconscionable Bargains”, *op. cit.*, at p. 59 contrasts two cases, one from New Zealand, the other Canadian. Both involved separation agreements that in their terms proved improvident in the extreme for the wives involved. (*Moffat v. Moffat* [1984] 1 N.Z.L.R. 600, *Wooldridge v. Doiron* (1993) 109 D.L.R. (4th) 407). In *Moffat* the wife had declined to obtain independent legal advice. Hardie Boys J., apparently with some reluctance, ruled in favour of the wife. In *Wooldridge*, by contrast, the plaintiff wife had been advised by her own lawyer to reject the bargain. As a result, the court held, there had been no unconscionability. The absence of any independent advice in *McQuirk v. Branigan*, unreported, High Court on Circuit, Morris J., November 9, 1992 was likewise considered a significant factor in Morris J.’s decision to set aside a transfer of property by an elderly lady to her grandson.

\(^ {427}\) (1877) L.R. 2 App. Cas. 814 at p. 823.

\(^ {428}\) [1946] I.R. 35 at p. 49.

\(^ {429}\) (1892) L.R. Ir. 500.

be deemed to have acted “entirely of his own free will” notwithstanding the absence of independent advice. “The presence of full and satisfactory independent advice”, according to Finlay P., is not then “the only way of proving that a voluntary deed, even though it may be on the face of it improvident, resulted from the free exercise of the donor’s will”. By the same token the presence of independent advice alone, however competent it may be, will not always suffice to displace the inference of unconscionability. As Clark observes, a donor or vendor may be so mentally incompetent that no amount of advice will displace the consequences of his disadvantage. The contract then “is in effect being avoided because of such incapacity”; even the best advice in the world would not “the binding character of that contract”.

Although it is not strictly necessary that legal advice be obtained, (unless intricate issues of law need to be clarified), such advice as is given must be independent and competent. Some of the cases in this area involve scenarios where a solicitor acted for both parties and therefore was not competent to give advice that was independent and uncompromised. Such advice will, furthermore, not suffice unless given with full knowledge of all the material facts and with due regard to the mental or physical weaknesses of the vendor. In Grealish v. Murphy for example the solicitor advising the donor mistakenly took “his client to be a competent judge” of character. His

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431 Although even this may be unhelpful. On even the most expansive construction of the term ‘free will’ it cannot be said that it is strictly the case that its presence alone will save a transaction from judicial scorn. A mind acting independently, unfettered by external personal pressure may nonetheless labour under an infirmity, its judgment may be clouded. Grealish is surely a testament to the fact that a spontaneous initiative may notwithstanding be struck down for improvidence. In strict terms Equity’s relief in this field issues where a person at an obvious disadvantage enters into an unfair bargain: couching the doctrine in terms of free will is thus unhelpful and misleading.

432 Clark, “Unconscionable Bargains” op. cit., at p. 136. Clark cites Grealish v. Murphy [1946] I.R. 35, as support for this proposition. An equally valid proposition is that the advice given in the latter case was simply not adequate in all the circumstances, having regard to the particular disadvantage under which the plaintiff laboured.

433 Kelly v. Morrisroe (1919) 53 I.L.T.R. 145 (Ir. C.A.) the plaintiff sought advice from a former employer. See also Evans v. Llewelin (1787) 1 Cox. 333, where the fatal element seems to have been not that the expectant heir lacked legal advice but that he had not been afforded the option of consulting his ‘friends’.


solicitor “should have been equipped to advise him with a just appreciation of his mental debility and his special need of protection”, which was not in fact the case. The plaintiff’s solicitor was not appraised of certain material facts not least that the plaintiff’s faculties were so markedly deficient. He had thus vastly overrated the cognitive faculties of his client. The advice given, then, though independent and competently dispensed, was not sufficient in the circumstances to appraise the plaintiff of the risks inherent in his scheme in particular the fact that the settlement was irrevocable.

The precise basis for relief. While the various criteria on which equity acts in this arena are now well settled, it is not yet clear precisely what the relative importance of each is and whether there can be unconscionability where one criterion has not been satisfied. Several commentators have thus suggested that there is an “unacceptable degree of imprecision” in this area of the law. It would seem however, that the Irish Courts have proved more open than their British counterparts to retaining a strong degree of flexibility in this field. While it is generally acknowledged that Fry v. Lane has, in England and Wales, served to retain judicial scorn for cases in which all the required elements are present, the Irish courts are noted generally to have rejected any formula that might restrict their jurisdiction in cases. Thus some commentators suggest that it would seem to be possible, in theory at least, to grant relief where the bargain has been extremely improvident even where the stronger party is not shown to have been at fault. Yet mindful of the weight of authority and commentary to the effect that the doctrine is firmly fault-based, the better view might be to suggest that where a transaction is especially improvident in its result the fault of the stronger party may lie simply in his receiving a benefit in such circumstances. The criteria in other words may be seen as complementary: one element may be so strong as effectively to render it remarkably easy to infer the presence of the other elements, or otherwise ignore their weakness.

A key element of the relief however, is ends-results oriented. In this respect at least equity seems to avoid a solely procedural approach that focuses on the impairment of consent alone. Relief generally will not issue where the bargain, in all the circumstances is “fair, just and reasonable”. Another key aspect is the rejection of the liberal-individualistic conceit that persons generally should look after their own interests. Instead equity identifies a series of persons who though generally capable of making contracts, are regarded as requiring special protection. This may even include, per Costello J. (obiter) in O'Flanagan v. Ray-Ger, persons as experienced in business as the deceased party in that case. In the face of such needs the stronger party cannot stand idly by. The law invests him with an obligation to see that the transaction is fair to his counterpart, a requirement that clearly inverts the standard liberal notion that a purchaser need look only to his own interests.

IV. Inequality of Bargaining Power

Lord Denning draws from a similar strand of thought in his judgment in Lloyd's Bank v. Bundy\textsuperscript{437} where he attempts to synthesise all instances of contractual exploitation recognised by law under a single conceptual rubric. He observed that most cases of duress, undue influence, undue pressure and unconscionability could be reduced to an overarching ground of relief. A ‘single thread’ ran through all these cases namely ‘inequality of bargaining power’.\textsuperscript{438}

“By virtue of [this principle] English law gives relief to one who, without independent advice, enters into a contract upon terms which are unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs

\textsuperscript{437} [1975] Q.B. 326.

\textsuperscript{438} See also D.S.G. Retail Ltd. v. P.C World, Paul Dwyer and David Dwyer, unreported, High Court, Laffoy J., January 13, 1998. Here Laffoy J. noted the large disparity in the respective bargaining power and economic strength of the parties as grounds for refusing an application for an interlocutory injunction in a passing off case. Because of their weaker position, she observed, the consequences of the proposed injunction would be significantly more deleterious to them than the refusal to grant such relief would be to the plaintiffs. See also Irish Times, Law Reports, March 16, 1998.
and desires, or by his own ignorance and infirmity coupled with undue influences or pressures brought to bear on him by or for the benefit of another”.

The presence of independent advice alone would not necessarily save a transaction but its absence, Lord Denning comments, would be fatal. The principle did not, however, depend on any wrongdoing on the stronger party’s part. The mere fact of inequality coupled with the substantive unfairness of the bargain and the lack of independent advice in its making would be enough to trigger remedial action.

There is some support for Lord Denning’s proposition in some of the older authorities on improvident transactions. In Longmate v. Ledger\textsuperscript{439} for instance Stuart V.C. points to “...the settled doctrine” of the Chancery Court that “…in order to have a valid contract or conveyance of property, there must be a reasonable degree of equality between the contracting parties”. Though Lord Denning again takes up the mantle in Clifford Davis-Management v. W.E.A. Records\textsuperscript{440} and Matthew v. Bobbins\textsuperscript{441}, his ‘single thread’ was ultimately fated to unravel at the hands of the Law Lords. In National Westminster Bank v. Morgan\textsuperscript{442} Lord Scarman roundly condemned this development.\textsuperscript{443} Far from being all-embracing, he noted, the principle “...by its formulation in the language of the law of contract it is not appropriate to cover transactions of gift where there is no bargain”. Even in relation to transactions for value the proposition was not well-founded. While the fact of unequal bargain was doubtless “a relevant feature” in such transactions it could never become an appropriate basis in its own right. “It does not…” Carter and Harland conclude, “…suffice that the parties were of unequal bargaining power and that the

\textsuperscript{439} 2 Giff. 157 at p. 163.  
\textsuperscript{440} [1975] 1 All E.R. 237.  
\textsuperscript{441} [1980] E.G. Dig. 421.  
\textsuperscript{442} [1985] 1 A.C. 686.  
\textsuperscript{443} See also Clark, “The Unconscionability Doctrine viewed from an Irish perspective” (1980) 31 N.I.L.Q. 114 at p. 139, who agrees that the construction of an overarching principle in this manner is “undesirable”.
stronger does not show that the contract was fair; rather the stronger party’s conduct must (at least) be shown to be unconscionable or oppressive”.

Indeed aside from the fact that there was no foundation in law for this innovation, Lord Scarman felt that it was neither necessary nor desirable “…in the modern law to erect a general principle of relief against inequality of bargaining power”. Parliament, he noted, had put in place several restrictions on freedom of contract “…as are in its judgment necessary to relieve against the mischief”. This being “essentially a legislative task” he doubted the propriety of the court’s adding new restrictions.

The debate over Lord Denning’s remarks is only a small portion of what Wheeler and Shaw term “the perennial conflict between broad-based standards and rule-based frameworks”. Its analogue in the realm of torts is the debate over the ‘Neighbour Principle’ first posited by Lord Atkin in Donoghue v. Stevenson, still a live concern in the House of Lords. On the one hand are rules based on “closed categories of beneficiaries satisfying static tests of entitlement;” on the other “open-textured standards benefitting an evolving class of beneficiaries defined according to policy criteria”.

The Law Lords are perhaps justified in their circumspection. Broad-textured principles harbour much potential for unpredictable and undesired results that carefully delineated rules may more effectively avoid. There may also be sound economic grounds for caution. A special category of contractors may benefit in particular cases from the special protection of the court but there may be certain

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446 This comparison is also made by Carr, (1975) 38 M.L.R. 463 although Clark, “The Unconscionability Doctrine,” op. cit., at p. 139, suggests that the likeness is not complete, the neighbour principle being subject to exceptions. (Although his reference to the inapplicability of the neighbour principle to economic loss would seem no longer to be valid: see Junior Books v. Veitchi Ltd., [1983] 1 A.C. 520).
latent long-term implications of a less desirable nature. Commercial contractors, particularly those offering themselves as mortgagees, may be dissuaded from contracting with the former precisely because of the additional risk which this special protection poses to any security taken.

Nevertheless the House of Lords arguably overreacted in Morgan. Whether it was Lord Denning’s intention entirely to recast the contract law in this area is questionable. It was, as Cheshire and Fifoot point out, “…not an essential part of the approach in Bundy that all existing categories should be swept away”. They suggest that the new formulation merely supplements the law in creating a residual category of relief applicable when none of the standard grounds for relief applied. Indeed, it is arguable that on closer observation Lord Denning’s restatement resembles no more than an expanded restatement of the doctrine of improvident bargains, which in the wake of Cresswell v. Potter and the concept of relative disadvantage posited therein, could hardly be described as earth-shattering. The prerequisite ‘disadvantage’ referred to earlier of necessity implies inequality in the respective bargaining stances of the parties. On one reading then the Bundy principle may have done in substance nothing more radical than imply that the categories of disadvantage are never closed, a proposition of which the Privy Council itself has approved.448

There is, it must be said, a certain air of unreality about the debate that surrounded Lord Denning’s remarks. The disadvantage or inequality which fetters a potential litigant in contracting for fair terms is no less a fetter to proceeding for judicial relief than it is to fair contracting. A potential litigant’s poverty or other disadvantage is not ‘miraculously suspended’ by a trip to his solicitor. Access to justice in contract cases requires resources the very lack of which plays a large part in the inception of unconscionable bargains. Ironically then, those most in need of the court’s protection may be the least able to avail of it. Put in this light the controversy over Bundy seems markedly sterile.

Conclusion

Even with the formalisation of the principles of equity in the eighteenth and nineteenth centuries, the doctrines of equity remain remarkably murky and uncertain. It is no surprise then to witness the degree of uncertainty concerning the precise role of undue influence and the grounds upon which its intervenes. Nor is it perhaps especially surprising to encounter the somewhat vague confines of the doctrines of unconscionability. As a result, however, the ability of the commentator to draw definitive conclusions from a study of these doctrines is rendered especially difficult.

Yet despite the sometimes nebulous nature of these doctrines certain general points can be formulated. Generally speaking, Equity has embraced with greater vigour a variety of the more insidious and in many respects the more common forms of exploitation and compulsion that arise in the course of social interaction. It avoids the stereotypical depiction of compulsion, with its overt threats and manifest fear and pressure, and concentrates instead on the more subtle exercises of power and persuasion, in particular those that are part and parcel of ongoing relations.

These forms of exploitation, indeed, are all the more potent by virtue of the subtle manner in which they operate. Each of the equitable fields outlined above, in particular, seems implicitly to reject static analyses of power imbalance. The focus instead reveals a greater sensitivity and flexibility towards the dynamics of power and influence than traditionally exhibited by the common law. The self-referentially legal standards of propriety of duress are rejected in favour of a more broad-textured standard of wrong, albeit one that may be so wide and vague as to defy easy definition. In particular, significant regard is paid to the dynamic nature of power within ongoing relations. The discrete paradigm of contracting is rarely encountered in this context, the lion’s share of cases involving an allegation of undue influence within a relation of trust and confidence. Undue influence is rarely encountered where there is a static imbalance of bargaining power between two largely independent parties but most typically as a result of the dependence flowing from an
ongoing relationship of trust and confidence. While allegations of unconscionability arise less frequently in cases involving parties in ongoing relations, the source of the weakness being typically unrelated to any prior dealings between the parties, the latter mentioned doctrine also leans somewhat towards a relational perspective. Relative status, for instance, is an essential element of the latter-mentioned doctrine, being based as it is on the presence of disparities in bargaining power. An enquiry then as to the wider context in which the parties find themselves is not merely relevant in this context: contextual factors are indeed an essential aspect of the doctrine.

That said, some aspects of these doctrines, and of the commentaries that seek to make sense of them, are troubling. Of particular note, is the suggestion of Birks and Chin and Mee, amongst others, that the doctrine of undue influence is based primarily on the presence of impaired consent. Whether intended or otherwise, this suggestion smacks of an approach that is dangerously liberal individualistic in its leanings. The implication is that equity acts simply because a party is dependent, subject to influence or in some way disadvantaged. This chapter has sought to underline that in relation to both undue influence and unconscionability, the element of impaired consent alone will not and should not suffice. To argue otherwise is to contend that equity acts simply because a party is dependent or subject to the influence of another, whether the party upon whom they are dependent acts properly or otherwise. The underlying premise to which such contentions lend themselves is definitively one of a liberal-individualist bent, one that holds that self-realisation is best achieved as an independent, atomised individual. Trust and confidence, dependence and influence -

449 Bigwood, “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?”, (1996) 16 O.J.L.S. 503 at 514ff. argues that while both undue influence and unconscionable dealings share a common concern with wrongful exploitation of weakness, each deals with vulnerabilities of a different origin. In the case of undue influence the vulnerability arises from the relationship between the parties. By contrast the disadvantaged status of the weaker party in unconscionability cases typically pre-exists the inception of the contractual dealings. The weakness in the latter case then is typically not related to any prior relationship with the stronger party but arises from factors independent and antecedent to their relationship.

the fundamental hallmarks of the relation - are viewed with suspicion. If the doctrines of equity are not to give way to this agenda, the elements of wrong suggested by the qualifying terms ‘undue’ and ‘unconscionable’ and ‘improvident’ - be they based on substantive disadvantage in results or otherwise - cannot be abandoned.

This is especially important in the context of family relations, to which this discussion turns in Chapter Five. Much of what has been discussed in the foregoing chapters has focussed on the approach of the Anglo-American/Commonwealth contract law to coercion. Irish judicial pronouncements on consent and compulsion, by contrast, have predominantly tended to arise in cases involving questions of family law, especially marriage and adoption. As will be seen, these judgments have exhibited a radically different approach to consent and compulsion, one that certainly may be confined to its unique familial context, but that nevertheless raises some fundamental questions about how compulsive practices are dealt with in a relational context. Of particular concern is the apparent success in that arena of the undercurrents implied by the discourse of Birks and Chin - the abandonment of the qualifying concepts of wrongful behaviour or unfairness in favour of the largely liberal-individualistic criterion of impaired consent.
Chapter Five
Liberal-Individualism and Coercion to Marry

Given that so much of recent jurisprudence on contractual undue influence involves inter-spousal pressure it is perhaps surprising that developments in Family law1 (and in particular the rules concerning Marriage,) have received comparatively little attention in the contractual realm. In fact, while many of the concepts and concerns encountered in the preceding chapters are found also in Family law, the two disciplines retain considerable doctrinal autonomy and have developed largely independently of each other.2 It has already been noted that Family law (and in particular marriage) is, in legal discourses, set apart from mainstream contract. The essential fallacy of this approach has already been underlined at length.3 Contracts are a lot more like marriage than either family jurists or contract lawyers perhaps care to admit.

The supposed distinction between marriage and contract, despite the objections noted earlier, enjoys much favour. It is said that while contract law structures our ‘productive’ lives, marriage and Family law proffer a legal framework for our

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1 This term is used with caution. In his preface to Duncan and Scully’s Marital Breakdown in Ireland: Law and Practice, (Dublin: Butterworth’s, 1990), Keane C.J. (then of the High Court) commended the authors on avoiding the words family law in their title suggesting that it obscured the reality of marital breakdown. “The expression”, he remarked (at p. v), “has a comfortable resonance: it carries with it vague suggestions of disagreeable, not to say unseemly quarrels, which a wise father figure smooths away”.

2 This is partly due to the different fora in which, up until 1870, these two areas of law were administered. Prior to 1870, matrimonial matters were the preserve of the Ecclesiastical Courts of the Church of Ireland. Jurisdiction was transferred to the High Court only with the passing of the Matrimonial Causes and Marriage Law (Amendment) (Ir.) Act, 1870 (33 & 34 Vict. c. 110). See also the comments below in Volume I, Chapter 2 at p. 79.

3 See generally Volume I, Chapter 2 above.
'affective' or intimate lives. While Contract is primarily concerned with developments in the world of commerce, Family law, by contrast, delves into a realm of some personal and emotional profundity, namely that of intimate emotional and sometimes sexual relationships. The most profound and durable of interactions and relationships occur and develop within the family. It is often said that family interaction is typified by the presence of what certain sociological commentators call 'primary relations'. Rather than being regarded in respect of a specific attribute, characteristic, quality or skill, the individual is known to kin in terms of the totality of that individual's humanity and personality. An employer may view him as an employee, a merchant may see him as a consumer of goods, but his family view him in a much wider and less precisely defined light. Family interaction is characterised by a lack of specificity in exchange. Relationships tend to be less formal than in the commercial realm. More is left on trust. Indeed contract law itself is often prepared to accept that many arrangements made between family members, particularly those of a domestic nature, are not intended to be contractually binding, a result which in the commercial arena requires wording of the very clearest nature to that effect.

This preeminence of the affective in family discourses perhaps explains what is arguably an important attribute of modern family law. At least until the 1970s, family law was largely under-intellectualised. Family theory is still undoubtedly the

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8 See the criticisms of Dewar, "Concepts, Coherence and the Content of Family Law", in Birks, Examining the Law Syllabus: Beyond the Core, (Oxford: Oxford University Press, 1993). Dewar notes (at pp. 81-82) that family law "is a legal subject that is under-conceptualised and fails to provide a coherent intellectual challenge". See also the comments of Martin, "Judicial Discretion in Family
poor relation of contract theory. Thus, even today, doctrinal coherence in family law often gives way to what Dewar terms ‘normal chaos’. By this, Dewar sets up what might fairly be characterised as a post-modern view of family law as “chaotic, contradictory or incoherent”, fragmentary and diffuse in its aims and objectives, and containing sometimes incompatible rules reflecting diverse and often irreconcilable priorities. That this is so, he says, is merely to be expected. Family law “engages the passion as no other part of our legal system does”. It “engages with areas of social life and feeling – namely love, passion, intimacy, commitment and betrayal – that are themselves riven with contradiction or paradox”. Small wonder then that like its subject matter, family law might sometimes defy rationality.

**Deconstructing Family Law: Debunking the ‘Purity’ Thesis**

This view of the family as directed towards the affective has, however, arguably skewed certain analyses of the family. So pervasive is this image that some socialist thinkers, normally rather suspicious of the family, were not averse to adopting it as a model for the true socialist society. James Connolly, for instance, saw the family as a prototype for a society in which the strong would look out for the interests of the weaker members of society.

“...[A]s in the family the strong does not prey upon the weak, as in the family the weakest physically share equally the common store of all with the most

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Law”, (1998) 16 I.L.T. 168, who opines that excessive judicial discretion in the field has led to doctrinal incoherence in the family law.

9 As Dewar, *ibid.* comments, family law “has low status among academics as well as among practitioners who too easily regard it as an interesting supplement to property law...”.


gifted and the physically strongest, as in the family the true economy consists in utilising and conserving the heritage of all for the good of all...".13

The family is regarded as a haven of altruism from the ruthless world of commerce.14

These idyllic conceptions of the family jar with commentaries that seek dispel the myth of what O'Donovan calls the ‘cornflakes family’.15 There is, indeed, a great weight of evidence that clearly demonstrates that family life often falls far wide of the ideal posited by Connolly and others. A myriad of research studies16 for instance attest to the widespread occurrence of intra-familial violence and abuse, physical, sexual and emotional. Indeed, such is the extent and gravity of such maltreatment that it has become trite to report that a person is at greater risk of death or serious injury from a close relative than from a stranger.17

The assertion that the family was impervious to economics is equally dubious. In fact the shape and priorities of family law were and still remain much more heavily dependent on economic priorities and interests than some deign to admit. This

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13 Quoted in Labour's Constructive Programme for an Organised Nation (Dublin: The Labour Party, 1941), at p. 36.
14 The irony is that some liberals too see the family as a bulwark against perceived evils, arguing that the family is "the main defence of freedom of the individual against the threat of collectivism". Maclean, "Delegalizing Child Support" Chapter 8 in Maclean and Kurczewski (eds.), Families, Politics and the Law, (Oxford: Clarendon Press, 1994), at p. 142. An interesting, if uncharacteristic example is that of Amiel, "Same-sex marriage is OK", in Maclean’s, July 10, 2000 at p. 13.
17 Dobash and Dobash, Violence against Wives, (Open Books, 1980), at p. 247 conducted a survey of reported violent crimes recorded by the police authorities in Glasgow and Edinburgh in 1974. A striking 25% of all reported incidents involved violence against one's wife. All in all, 34.5% of all reported incidents involved intra-familial violence. Considering the under-reporting of intra-familial violence, the likelihood is that the true figure is much higher. Familiarity is also a significant factor in sexual crimes, especially rape. Over the three years prior to 1999, 87% of victims of rape reportedly knew their attacker. Reid, "Rapists known by 87pc of victims, says Minister", Irish Independent, November 27, 1998.
ghettoisation of marriage and the family in legal discourses serves to disguise the distinctly economic origins and interests of both. The original tenets and processes of Family Law are in fact intimately intertwined with economic concerns that transcend purist family discourses.

In former times the class with whom the law most preoccupied itself - the landed aristocracy - held most of its wealth in the form of realty. At the time there was little resembling a market in land. Rather than being bought and sold as a commodity, it tended to rest in the hands of aristocratic landlords as an investment yielding annual rental income. Such property was frequently settled in complicated transactions between several members of a family. Therefore the integrity of the investment depended on the integrity of the family unit, which in turn lay in the stability and integrity of the marriage bond. This tendency stemmed back to medieval times, when marriage was strictly "by arrangement; no sensible family would allow the possession of valuable lands to be jeopardized by casual alliances".  

Fears abounded that property could thus be alienated or put in the hands of the unscrupulous by virtue of an ill-advised or predatory marriage. This in turn led to the inception of several measures designed to shore-up the family’s control over the disposition of property. The kernel of such evasive action came in the guise of what is commonly called ‘Lord Hardwicke’s Act’ of 1753, enacted as its short title suggests ‘for the Better Preventing of Clandestine Marriages’.  

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18 Reynolds (citing Chamberlin) “Marriage in the Middle Ages II”, at www.millersv/~english/homepage/ duncan/medfem/marr.html. This did not necessarily entail an absence of romance and courtship, although these “tended to follow the marriage” rather than precede it (Smith cited in Reynolds, op. cit.).

England and Wales\textsuperscript{20} of certain requirements of publicity designed to forewarn of ill-advised or predatory marriages that threatened the maintenance intact of family property. Its Preamble, uncharacteristically short for its time, simply notes, without further elaboration, that “great mischiefs and inconveniences have arisen” from such marriages. Undoubtedly, however, the prime motivating concern was the prevalence of bounty hunters, primarily male adventurers who sought out and seduced heiresses with a view to obtaining their hands in marriage. This end achieved, all property to which the heiress was entitled would vest in her new husband.\textsuperscript{21} Such a disposition of family wealth angered many landowners, anxious to maintain a tight grip on the distribution of Family property. Not surprisingly then, the concealment of marital intentions was integral to the success of the adventurer’s scheme. To defeat this end, the Act stipulates certain prerequisites to the validity of marriage, focusing mainly on the requirement of publicity or prior adequate notice of marriage.\textsuperscript{22} Failing the satisfaction of these formalities, a marriage would be “absolutely null and void to all intents and purposes whatsoever”.\textsuperscript{23}

\textsuperscript{20} The Act did not apply in Ireland (not then being part of the U.K.) nor, by virtue of section 18 thereof, to Scotland. The latter fact allowed the Act to be circumvented to a significant degree. Parties seeking, for whatever reason, to circumvent the new requirements simply crossed the border to marry. (Hence the infamy of the Scottish town of Gretna Green, just across the border with England, as a venue for clandestine marriages).

\textsuperscript{21} Marriage then had the effect of suspending a woman’s power to own property. This was only remedied in the late nineteenth century with the passing of the Married Women’s Property Act, 1882.

\textsuperscript{22} This could be achieved, for instance, by the publication of banns. Banns would be read “in an audible manner” in the local parish church of both or each of the intended parties to the marriage on each of the three Sundays prior to solemnization. The parties could, alternatively, obtain a licence or, alternatively again, a special Episcopal licence but again safeguards were introduced to fetter subterfuge on the part of the couple. Where either party was under the age of twenty-one, not being a widower or widow, such marriage could not be validly contracted without the consent of the father of such minor party, if alive, and if not the guardian(s) thereof. Section 11. Provision was also made for the requirement of maternal consent where the mother was unmarried. The requirement of parental consent was replicated in the Marriages (Ireland) Act 1844, sections 19 and 20 and in the Marriages Act, 1972 section 7 but eventually abolished by the Family Law Act, 1995 section 3 and the Schedule to the Act. The measures when introduced in Ireland did not however render invalid a marriage contracted without the necessary parental consent. See \textit{D.C. v. N.M.} [1997] 2 I.R. 218 which established that section 7 of the Marriages Act, 1972 was directory only. See generally on these points Ryan, “The Fundamentals of Marriage” in Shannon (ed.), \textit{The Family Law Practitioner}, (forthcoming), (Dublin: Round Hall, 2000).

\textsuperscript{23} Sections 8 & 11 of the 1753 Act.
The essentially economic concerns of the legislators become ever more apparent when one considers the introduction of similar legislation in Ireland, almost a century later. Detailed formalities akin to those laid down by Lord Hardwicke are prescribed for the validity of Marriages contracted according to the rites of the several Protestant churches and congregations, (Church of Ireland, Methodist, Lutheran, Presbyterian, Quakers) and of the Jewish Faith. By contrast no such formalities were applied to Roman Catholic Marriages a curious situation considering the inescapable fact that the latter religion attracted the lion’s share of this island’s religious adherents then as now. One possible explanation is that the Roman Catholic population of the time possessed little in the line of wealth or valuable property. Thus, from a legal and economic perspective, marital status was perhaps not quite so pressing an issue. That this may be so is borne out further by the provisions of the earlier Irish Marriage Act of 1735. This allowed marriages of minors to be annulled where they had been contracted without parental consent, provided a decree was sought within a year of solemnisation. The provisions, however, applied only where certain minimum requirements as to property ownership or income had been met. The economic motivation could not have been more overt.

The economic underpinnings of marriage were doubly stressed by the very real significance vested at that time in the action for breach of promise of marriage. The

24 Marriage (Ireland) Act 1844 (7 & 8 Vict., e. 81).
25 Indeed, these requirements remain largely unchanged even to this day.
26 Section 3 of the 1844 Act expressly excludes Roman Catholic Marriages from its remit. The resulting distinction prompted the Constitutional Review Group of 1967, amongst others, to question the constitutionality of the Marriage Act’s formal provisions.
27 This term is used deliberately. It is not by any means being suggested that the institution of marriage as a religious bond mattered less to the Roman Catholics of the time than to their contemporaries of other denominations: only that the legal status thereof had little or no bearing on the average Catholic’s wealth.
28 9 Geo. II, c. 11.
29 Otherwise the marriage was perfectly valid, a point discussed by Tolstoy, “The Validation of Void Marriages”, (1968) 31 M.L.R. 656
30 The infant had to be entitled to at least £100 per annum income from property or be possessed of real estate to the value of at least £500. Alternatively, where the infant’s parent received the aforementioned income per annum or was possessed of at least £2000 worth of personal property, the Act applied.
31 It has now been abolished - see the Family Law Act, 1981 section 2. This is also the case in England and Wales: see the Law Reform (Miscellaneous Provisions) Act 1970, section 1.
fact that one could sue for damages for such a breach underlines the financial interests that were regularly intertwined in a decision to marry. As Collins\textsuperscript{32} comments "such a claim for damages was predicated on a view of marriage which emphasized the dimension of property transfer rather than personal sentiment, a focus appropriate to the world of Jane Austen\textsuperscript{33}, but anachronistic by the time of Mr. Pickwick".

The shift in the forces of production experienced during the industrial revolution, however, changed all this. Technological advance facilitated new techniques of production for which large amounts of liquid capital were necessary. A new form of investment opportunity became available, the integrity of which depended less on the strict control of family affairs than was the case with realty. As it gradually took a foothold, the maintenance intact of the family unit became less and less crucial to the security of the investor.\textsuperscript{34} And with the economic importance of the nuclear family to its individual members dissipated by the encroachment upon its functions first by the factory, then by the State (in the provision for instance of education and social security) the economic significance of the family unit itself was diluted considerably.\textsuperscript{35} The implications of this will be dealt with more thoroughly later. Suffice it to say for the moment that the decline in the economic significance of marriage and the family and the corresponding relaxation of many of the rules applying thereto are not merely co-incidental.

\textsuperscript{33} One is reminded of Ms. Austen's telling description of 'Mr. Darcy' in \textit{Pride and Prejudice} at p. 11: "...Mr. Darcy soon drew the attention of the room by his fine, tall person, handsome features and noble mien - and the report was in general circulation within five minutes after his entrance of his having ten thousand a year".
\textsuperscript{34} See generally Glendon, \textit{The New Family and the New Property}, (Toronto: Butterworth's, 1982).
Marriage as the model of Relational Contract

The centrepiece of family law has traditionally been marriage. Nowadays the centre of gravity in this field is gradually shifting to the child and as such marriage has been eclipsed somewhat. Not to such an extent however, to displace the supposition of a symbiotic relationship between the family and marriage. The Irish Constitution continues to assert, with an air of self-evidence, the derivative nature of marriage, indicating that it is this very institution “on which the Family is founded”. Arguably, as Westermarck observes, it is “marriage that is rooted in the family rather than the family in marriage” but this aetological confusion merely underlines the overwhelming significance that is still ascribed to marriage in this jurisdiction. Marriage carries with it enormous symbolic power. O’Donovan for instance evokes “…the sacred character of marriage [that] calls on a past, understood and shared tradition and on an eternal future, a perpetuity”. Others refer to the elevated status that marriage confers. It is worth repeating Lévi-Strauss’s description of the linguistic diminutives applied to the ageing French bachelor, who would often be

35 See the discussion of Dominian, Marital Breakdown, (Harmondsworth: Penguin, 1968) at p. 8 and p. 10ff.
37 Clive, for instance, argues that as a legal concept marriage should, by rights, be obsolete. He argues that rather than being preoccupied with the form that a particular relationship takes, the law should take as its touchstone the substance of inter-personal relationships. Clive, “Marriage: An Unnecessary Legal Concept”, in Eekelaar and Katz, Marriage and Cohabitation in Contemporary Societies, (Toronto: Butterworth’s, 1980) at pp. 71-81.
described oxymoronically as ‘un vieux jeune homme’. The hadiths of Islam too stress the elevated realm of marriage: “the prayer of a married man is equal to seventy prayers of a single man”. Marriage is said then to have a transformative power - it alters the total social status of the individual. The person, to borrow from Weber’s description of the status contract, “would become something different in quality or status from the quality he possessed before”.

Marriage is the perfect example, indeed the archetype of the relational contract. It has long been accepted, in law, that marriage is not simply a contract. It marks instead the beginning of “a unique and very special life-long relationship”. It is, then, “something more than a mere contract”. An entirely new status is conferred on the parties thereto, so much so that the traditional western model of marriage dictates that the female party to the marriage to change her surname to that of her new husband. Full presentation is absent from the minds of the contracting parties. In fact the terms of the marital contract (if they can be so called at all) tend predominantly to lack specificity. If the ‘contract’ is to be sundered for instance, there will typically be no pre-ordained allocation of resources - in fact a contract made in contemplation of a

42 ‘An old young man’ – present author’s translation.
46 See also Sottomayer v. deBarros (1879) 5 P.D. 94 at p. 101 and N. (orse. K.) v. K. [1986] I.L.R.M. 75 per Finlay C.J. at p. 82.
47 See Weitzman, The Marriage Contract; Spouses, Lovers and the Law, (New York: The Free Press, 1981) at pp. 9-13. “The married woman’s loss of an independent identity is most clearly symbolized by the loss of her name...” ibid at p. 9. Weitzman identifies this tendency as a rather recent phenomenon, tracing it only back to the nineteenth century. The authority she cites, however, confirms that once in place, the rule was remarkably coercive in form. In Forbush v. Wallace 405 U.S. 970 (1972) for instance, the U.S. Supreme Court endorsed the constitutionality of an Alabama statute requiring a wife to use the name of her husband on her driving licence. The practice seems to have had some detractors however. In rural Gaeltacht regions in the late nineteenth and early twentieth centuries it was still common for women to retain their maiden names on marriage, as evidenced by the use thereof in Peig Sayers, Peig: A Scéal Féin, (eds. Ní Mhainnin and Ó Murchú), (An Daingean: An Sagart, 1998), and in Ó Grianna, Cith is Dealdn, 11 * ''  ed.” (Corcaigh: Cló Mercier, 1989).
48 Something which has only recently become a possibility in this jurisdiction: see Constitution of Ireland 1937, Article 41.3.2 as amended by the Fifteenth Amendment of the Constitution Act, 1995. The Family Law (Divorce) Act, 1996 now establishes a detailed scheme for divorce, although the first contemporary divorce in this State was granted under the provisions of the Constitution itself: see R.C. v. C.C. [1997] I L.R. 334.
future separation is, on certain authorities, said to be void as contrary to public policy.\textsuperscript{49} Irish Family Law looks instead to a series of processes whereby marital disputes can be resolved. The nuptial contract provides a framework rather than a definitive set of rules.\textsuperscript{50} It makes provision for contingencies but not in the form of substantial solutions to future problems but by providing procedural mechanisms for the resolution of disputes. The law openly implies that so long as the arrangements are amicable, there will be little need for legal intervention. In fact most of the legal provisions are geared towards not the continuance of but rather the end of the relation.\textsuperscript{51}

The extent to which the model of contractualism is relevant here, then, is limited. The most than can be said is that marriage is a status brought into being by contract.\textsuperscript{52} The legal content of that status, however, is typically settled not by the parties themselves, as contractualism would demand, but by legal norms external to the parties.

\textbf{The Family and Liberal Theory: The Public-Private Dichotomy}

Classical liberalism, then, has always had an uneasy relationship with the family. Family law in one sense is quintessentially illiberal. The arrangements that parties are entitled to make are carefully proscribed, many of the terms of the marriage contract being determined by law rather than by the will of the parties.\textsuperscript{53} Attempting to explain

\textsuperscript{49} McMahon v. McMahon [1913] 1 I.R. 428.


\textsuperscript{51} Archbold, for instance (“Divorce - A View from the North” Chapter 3 of Shannon (ed.), The Divorce Act in Practice, (Dublin: Roundhall, 1999, at pp. 41-69, observes that the commencement of proceedings for divorce tends to mark not the start but rather the end of a long process of legal steps designed formally to bring to an end the marital relations between the parties. “Divorce”, she notes (at p. 54), “is the final, rather than the central act of the legal drama”.

\textsuperscript{52} See Reese v. Reese 40 NYS2d. 468 (1943) at p .470.

\textsuperscript{53} The provision of such rules may arise as a matter of necessity, parties in the throes of marital bliss not generally being predisposed to thrashing out contractual terms. A bride and bridegroom will rarely stop to contemplate the legal relation between them. Parties in amity, after all, are rarely astute as to their strict legal rights. This is not to suggest, however, that the law operates to provide default rules:
the contract of marriage by reference to ‘freedom of contract’ is nigh impossible. By contrast with commercial contracts, law had a rather set view of what an ideal family should look like. In this sense the law, at least formerly, was heavily prescriptive. The parties to a marriage were once legally expected, for instance, to reside together.\textsuperscript{54} Thus, an agreement providing for separate spousal residences immediately upon marriage\textsuperscript{55} was declared void in \textit{Brodie v. Brodie}\textsuperscript{56} as being contrary to public policy.\textsuperscript{57} A similar fate befell contracts that provided for ‘companionate’ marriage only, that is, a marriage where it was agreed that there would be no sexual relations between the parties. In \textit{Scott v. Scott}\textsuperscript{58} such a contract was declared void on the ground that it had displaced a fundamental feature of marriage although the courts might be willing to enforce such a pact where the parties are elderly.\textsuperscript{59}

A further noteworthy feature is that neither spouse may legally waive his or her right to maintenance or that of a child of the marriage.\textsuperscript{60} The latter aspect accords perfectly with the standard contractual doctrine of privity. The former is less easily explained but underlines rather the very distinctly unclassical nature of the marriage contract.\textsuperscript{61}

\textsuperscript{54} What Gutknecht and Butler regard as “a defining attribute of the family”: “Family, Self and Society: Managing Change and Transitions”, in Gutknecht and Butler (eds.) \textit{Family, Self and Society: Emerging Issues, Alternatives and Interventions}, 2\textsuperscript{nd} ed. (New York: Lanham, 1985) at p. 4.

\textsuperscript{55} And not, obviously, as part of an agreement to separate taking immediate effect.

\textsuperscript{56} [1917] P. 271. See also the decision of Van Zyl J. in the South African case of \textit{Van Oosten v. Van Oosten} [1923] C.P.D. 409 suggesting, in like fashion, that such an agreement “defeats the while object of marriage”. See also \textit{Cartwright v. Cartwright} 3 D.M. & G. 982. See also \textit{Marlborough v. Marlborough} [1904] 1 Ch. 165.

\textsuperscript{57} It is now acknowledged that cohabitation cannot be enforced by a court of law. In \textit{T.F. v. Ireland}, [1995] 1 I.R. 321, Hamilton C.J. (at p. 375) that cohabitation “though undoubtedly a significant aspect in any marriage, can no longer be enforced and must be based on consent”.

\textsuperscript{58} [1959] P. 103.

\textsuperscript{59} \textit{Morgan v. Morgan} [1959] P. 92. See also \textit{Briggs v. Morgan} (1820) 2 Hag. Con. 324, (1820) 161 E.R. 758 and \textit{Brown v. Brown} (1820) 1 Hag. Ecc. 523, where suits for a declaration of nullity on the grounds of impotence were rejected. In each case the court concluded that the petitioners having married women who were then considered elderly, could not then complain that they had to remain “content to take [their wives] tanquam sororem” (as if she were a sister) per Nicholls J. in \textit{Brown}.

\textsuperscript{60} See section 27 of the Family Law (Maintenance of Spouses and Children) Act, 1976.

\textsuperscript{61} It may be regarded effectively as undermining the bargaining power of financially poorer spouses as in \textit{Combe v. Combe} [1951] 2 K.B. 215 (CA) where a wife’s agreement to forego maintenance rights in exchange for was deemed invalid for lack of consideration. As the wife could not legally displace these rights, her agreement to do so was without consideration. The creation of a spousal option has
Perhaps the most telling aspect of this restrictive tendency however is marked by the difficulty involved in terminating a marriage. “Other contracts”, as Field J. of the U.S. Supreme Court remarked in *Maynard v. Hill*, 62 “may be modified, restricted or enlarged, or entirely released upon consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities”. Even with the introduction of divorce in Ireland, the requirements for the dissolution of marriage are strict and exacting. A divorce may only be granted by a court, and then only after the parties have lived apart for at least four of the previous five years, and where adequate provision has been made for all members of the applicant’s family. Certain aspects of the relation even survive divorce: there is in Irish law no ‘clean break’ on divorce, and support obligations can be renewed and varied at any time, 63 despite the fact that the parties are no longer married to each other. 64

But this picture of intense public control has a striking counterpart, being the perhaps equally strong tendency to view the family as a peculiarly private institution. Indeed at the heart of the relationship between the family and the state lies a remarkable dichotomy. As Dalton 65 points out, the family is in the peculiar position of being simultaneously treated in law as a ‘private institution’ to be ring-fenced from the ‘detrimental effects’ of State intervention, and yet also as an institution the integrity of which is an intensely public matter.

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62 125 U.S. 190 (1888) at pp. 210-211.
63 Family Law (Divorce) Act, 1996, section 22. This is subject to the condition that the party seeking to vary the provision for support has not remarried.
On the one hand, the family is regarded as a most especially private and sacred institution, to be guarded with great zeal from undue State intrusion. The family, in many respects, resembles what O'Donnell and Jones\(^66\) call a ‘micro-sovereignty’, a mini-jurisdiction privileged from state interference in its internal affairs in all but the most pressing of circumstances. It thus enjoys a wide margin of appreciation in its conduct\(^57\) and organisation. In particular, considerable autonomy is afforded to the family in making decisions relating to the welfare of its members, a point that has led one liberal commentator to remark that marriage “is one of our last protections against the intrusive state”.\(^68\) Thus the freedom to regulate family size is reserved at least to the marital family\(^69\) as is the right to determine the fate of family property.\(^70\) The education and care of the children of a marital family is within the primary remit of the family\(^71\) with the result that the parents of a child have the sole right jointly to determine the religious affiliation\(^72\) and mode of schooling\(^73\) of the child. This suggests strongly the influence of liberalism although ironically it is more likely the


\(^{67}\) Note for instance the initial reluctance expressed by Evershed M.R. in Zamet v. Hyman [1961] 1 W.L.R. 1442 (C.A.) at 1444 to deal with a case arising out of “what are indeed strictly domestic affairs and involving a family dispute”.

\(^{68}\) Amiel, “Same-sex marriage is OK” in Maclean’s, July 10, 2000, at p. 13 remarks that, while she is not an “old-fashioned conservative”, “I’m interested in preserving marriage for one basic reason: it should be one of our last protections against the intrusive state”. She claims that the gradual abolition of marriage facilitates greater state intrusions into the private lives of individuals. “The whole point about marriage is that it is a parallel area of sovereignty for individuals and that is why the state [in this case Canada] presumably dislikes it”. The introduction of same-sex marriage, she argues, would stem the pressure to diminish the privileges that marriage enjoys.

\(^{69}\) McGee v. A.G. [1974] I.R. 284. In the U.S. see Griswold v. Connecticut 381 U.S. 479 (1965). There, however, the rationale seems to be more directed towards individual than family rights as the decision in Eisenstadt v. Baird (405 U.S. 438 (1972)) underlines. In that case the U.S. Supreme Court acknowledged that the right to control fertility extended to individuals not married.


\(^{71}\) See Constitution of Ireland, Article 42.1


\(^{73}\) See Constitution of Ireland, Article 42.2 and 3. While the State has a duty to ensure that the child receives a minimum standard of education, it is precluded from designating the venue in which the child receives such an education. A rather feeble attempt was made to define what is meant by a ‘minimum standard of education’ in In the matter of Article 26 and the School Attendance Bill, 1942 [1943] I.R. 334.
product of rather less liberal Roman Catholic teaching on the family. Either way, however, the Constitution positions the parent as ultimate ‘proprietor’ of the child, largely free from State influence.

This view is subject to certain conditions. For instance, the freedom to regulate family size does not extend to privilege the procuration of an illegal abortion. Similarly, the freedom to engage in conjugal relations can be abridged where necessary to preserve certain countervailing state interests, such as the security of prisons. This serves, however, merely to underline the point that compelling reasons must be put forward before privileges reserved to the family will be curtailed. In this light, the rigorous conditions laid down in the Adoption Act, 1988 which must be satisfied before the child of married parents may be adopted are particularly instructive.

Practical concerns also contribute to this tendency. Current legislative policy dictates that every effort should be made to foster agreement in private family disputes outside the confines of the Court. Recognising that the parties are more likely to adhere to an agreed settlement than to an imposed one, solicitors are placed under a specific obligation to inform clients considering family proceedings of the existence of alternative dispute resolution mechanisms. Both the Judicial Separation and Family Law Reform Act, 1989 and the Family Law (Divorce) Act, 1996 contain mandatory provisions requiring parties in dispute to be informed of the existence of alternatives to adversarial legal proceedings, in particular the possibility of

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75 Per Walsh J. in *McGee v. A.G.* [1974] I.R. 284 at p. 312. Although in *A.G. v. X.* [1992] I.R. 1 at p. 88, O’Flaherty J. suggests tentatively that the authority of the family might extend to such the making of such a decision, noting that the High Court’s injunction in that case preventing a girl from travelling to the U.K. to terminate her pregnancy constituted “…an unwarranted interference with the authority of the family”.


77 See also *In Re Article 26 and the Adoption Bill, 1987* [1989] I.R. 656. It is possible that were it not for the rigorous safeguards put in place by that Act that it would not have passed constitutional scrutiny.
mediation. The English Family Law Act 1996 exhibits a similar concern to keep families, to the greatest extent possible, out of the courtroom, to disengage from unduly placing family affairs in the legal arena.

At its most extreme, the concept of the family as an impregnable unit generally free from the interference of law has in the past at least, facilitated abuses of the most alarming kind. In Smart’s words the family can become “the focal point at which a range of ideological practices meet, [an] ideological and economic site of oppression which is protected from scrutiny by the very privacy which family life celebrates”.

As late as 1990 in Ireland, for instance, a man who forced his wife to engage in sexual intercourse with him without her consent was exempt from prosecution for rape. This ‘marital rape exemption’, eventually abolished by section 5(1) of the Criminal Law (Rape) Act, 1990, was justified sometimes by reference to the technical fiction that the parties to a marriage become ‘one person’ on marriage (the doctrine of ‘uni-personality’). An alternative ground was Hale’s ‘contractual theory’, the suggestion that by their marrying the parties had implied a blanket

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79 See further the commentary in Chapter 2 below at pp. 113-116.


81 See also Dewar, “Family, Law and Theory”, (1996) 16 O.J.L.S. 725 at p. 732, who notes that the “stance of legal non-intervention has distinct consequences for women (and children), who are particularly vulnerable to the unrestrained exercise of power, and to uncorrected inequalities, in the private sphere”.

82 Though, curiously, he could be tried for the lesser offence of sexual assault or, where relevant, aggravated sexual assault.


84 The wife’s “very being or legal existence…was suspended during marriage or at least incorporated and consolidated into that of her husband”. Warren v. Georgia 255 Ga 151, 336 S.E. 2d. 221 (1985) drawing from Blackstone.

85 Each of these explanations is discussed and dismissed in turn by the Supreme Court of Georgia in Warren v. Georgia 255 Ga 151, 336 S.E. 2d. 221 (1985).

86 Hale P.C. 629.
consent to all requests for sexual intercourse. It is suggested however that a rather
darker premise lies at the ultimate root of this rule, one which draws on the mediaeval
concept of the wife as the property of, a chattel of her husband to be used by him as
he willed.  

Similarly, it appears that up to the end of the nineteenth century at least it was still
considered legally acceptable for a man to chastise his wife by means of violence if
thought necessary. While, formally such conduct is no longer deemed acceptable in
legal circles, there is, nevertheless, much evidence of state reluctance to intervene in
incidents of violence occurring within the home between spouses or partners. Despite
being of a quality, frequency and intensity rarely experienced in assaults between
strangers in public venues (which probably receive more coverage than the former,) a
great body of academic research attests to the notorious phenomenon of state
reluctance to intervene in the case of incidents of so-called ‘domestic’ violence.
Much has been written on past police inactivity in the face of such incidents. Police
were found generally to have regarded such events as ‘private’ spousal matters not to
be dealt with as ‘crime’ as such but rather matters to be dealt with by welfare

The Court had to consider whether a wife should be allowed to sue for loss of consortium owing to
injuries sustained by her husband through the negligence of the defendant. Prior to the decision in
McKinley, only husbands were allowed to recover damages. While the majority extended the remit of
the tort to cover wives as well as husbands, Egan J. argued that the ground for relief is founded on a
mediaeval concept of wives as the property of their husbands and that this being repugnant to modern
concepts of spousal and gender equality, that the action should be struck down in its entirety. The
present writer makes some similar comments in relation to the marital ground of nullity that renders a
marriage voidable due to an inability to consummate the nuptial union. This too, it is argued, can only
coherently be explained by reference to mediaeval discourses that view women in proprietary terms:
neither sexual gratification nor fecundity adequately account for the existence of this ground. See
Ryan, “When Divorce is Away, Nullity’s at Play: A New Ground for Annulment, its Dubious Past
and its Uncertain Future”, (1998) 1 Trinity College Law Review 15 at p. 34, where the present author
tentatively suggests that the voidability of marriage for inability to consummate had its origins in
medieval notions of the wife as property of her spouse.

88 Maeve Casey, Domestic Violence against Women - the Women’s Perspective, (Dublin: Federation of
Women’s Refuges/UCD, 1993), at p. 7, Dobash and Dobash, Violence against wives, (Open Books,
1980) at p. 60. See also Bauer and Laume, “’’Abuse, late Victorian English Feminists and the
legacy of Frances Power Cobbe” Int. Jo. of Women’s Studies 1983, Vol. 6 (3) at pp. 56 and 199. Per
Casey “[a] woman’s status as a wife excluded her from the legal process, and gave her husband
extraordinary discretion in determining punishable offences”. Ibid. at p. 7. Provided the chastisement
‘did not exceed tacit limits’ there was little objection to wife-beating.

89 See for instance the materials cited in the text above at fn. 16.
officials. Reported incidents of violence often went un-recorded – in Edwards’ words ‘no-crime’.

Yet Marriage and the Family, while on the one hand being treated as the most private of institutions, are simultaneously deemed to be of great public importance and worthy of considerable public concern. The State thus can be seen to take an active interest in preserving the stability and integrity of the marital family both as an institution as well as the well-being of its constituent members. Family law, for instance, controls with a rigour unknown to the field of contracts, the entry into and exit from civil marriage and adoption. In particular, recent developments in both the legislative and judicial realm on the validity of marriage exhibit a greater zeal in relation to these entry requirements, in particular with the element of consent, which far outstrips anything seen to date in contract cases. Once formed, the law also dictates, as noted above, many of the terms of the nuptial union.

Traditionally, family law was reticent about intervening in the affairs of the family without invitation. This passivity has however given way, in the past decades, to a greater willingness actively to initiate proceedings, especially pertaining to the welfare of children. In particular the State has imposed upon itself a positive duty to see that all children receive adequate care and protection. Where this is found to be

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91 With a view to maintaining the stability of marriage, for instance, the law prohibits contracts that contemplate future separation, the logic being, it seems, that the provisions of such agreements might create an incentive for separation. Where one party agrees to pay maintenance to another in the case of future separation, such agreement will be void as being contrary to public policy. Marquess of Westmeath v. Marquess of Salisbury (1830) 5 Bli. (n.s.) 339, H. v. W., 3 K. & J. 382. In a similar vein, a rather unorthodox spouse-swapping arrangement received short shrift in H. v. H. (1983) 127 Sol. Jo. 578.
92 Article 41.3.2 requires that the parties to a marriage be living apart for four of the previous five years before a divorce will be granted. Even where this is established, the parties must satisfy the court that there is no reasonable prospect of reconciliation and finally that ‘proper’ provision has been made for the spouses and children of the marriage.
93 The minimum age for marriage, for instance, has been raised to 18 and new notice requirements added by the Family Law Act, 1995, (sections 31 and 32 respectively).
94 Section 3 of the Child Care Act 1991 imposes a positive duty on the board to identify children not receiving adequate care and protection. Special provisions apply to homeless children (section 5) and children who have been abandoned or lost (section 4).
lacking the State must act to rectify the situation, if necessary, by removing the child from its family home. In this respect, even the time-honoured distinction between public law and private law family proceedings is no longer sacrosanct. Even where a parent initiates proceedings regarding the welfare of a child, it is open to the court to direct the relevant health board to investigate the child's circumstances with a view to deciding whether it should intervene by means of a care or supervisions order. The legislature has, moreover, enacted special provisions to protect the safety and welfare and the accommodation of family members generally that again allow the State to impose legal solutions regardless of the will of parties.

Part of the State concern certainly lies in the fact that family members, left unsupported, may become a burden on collective financial resources. Indeed one of the avowed aims of the then British government in establishing the Child Support Agency, a body noted for its pro-active initiative in pursuing absent parents for child maintenance, was the desire to reduce the U.K.'s social security outlay. Family law measures are rarely neutral in their impact on the exchequer. Hence as O'Donovan observes, citing Eekelaar, “clear-cut differences between family values and commercial values are problematic”.

95 See the provisions of the Child Care Act, 1991. A child may be the subject of a care order under section 18 of the Act, which allows the child to be taken from its parents (by force if necessary) and placed in the care of the local health board. Section 19 makes provision for the supervision of a child left in its home environment. The most potent measures are those contained in Section 12 that allow the Gardai to enter any place without a warrant with a view to removing a child who is believed to be in immediate risk of serious harm or injury.
98 See the Family Home Protection Act, 1976.
Clearly, however, wider interests are at stake. Leslie and Korman\textsuperscript{101} identify six functional requisites necessary for the survival of societies, “certain minimum tasks” that a society must perform, consciously or otherwise, if it is to remain intact. In each case the family, as a social institution, plays an integral if not the primary role in fulfilling these requirements. For instance, in the provision of food, clothing and shelter, the family unit promotes continued biological functioning. In the exercise of child-bearing and child-rearing it facilitates the creation, care and socialisation of new members of society. The family in primitive communities performed certain economically important productive and distributive functions. The familial-hierarchical structure continues to be an important source of order and discipline just as the emotional support that emanates from the family proves integral in maintaining the motivation for survival. Thus the family is, with good reason, often regarded as the ‘basic social institution,’ most notably in the Article 41 of the Constitution where it is deemed to be “the natural, primary and fundamental unit group of Society and...a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”.

From more critical quarters, however, come warnings about over-reliance on this dichotomy. Several commentators have argued that the fact of non-intervention in family affairs should not be taken to imply that the State is value-neutral relative to the family.\textsuperscript{102} Others have argued that non-intervention should not be assumed to be consequence-free. The conduct of the State, as much by its inaction as its action, has tangible implications for the well-being of the family and its members.\textsuperscript{103} The distinction between the ‘public’ and ‘private’ approaches, while validly observed, should not be taken to suggest that the State by adopting the latter approach has no policy interest in the family. The policy of non-intervention is itself a policy choice with real consequences for those to whom it applies.

Voidness or Voidability?

A related issue, the relevance of which might not be immediately obvious, is the effect of a finding of duress in family law proceedings. While there has been some debate about this conclusion duress at contract law is generally regarded as rendering a contract voidable only. An absence of consent to marriage by contrast renders the marriage void ab initio in this jurisdiction (although strangely it may be ratified by subsequent conduct). The divergence between contract and family law in this respect may be no more than an historical accident, a product of the division of labour between the temporal and ecclesiastical courts prior to 1870. As suggested above, however, the divergence may be more deliberate. The fact of voidness reflects a key difference between the law of contracts in general and the law

106 See Tolstoy, “Void and Voidable Marriages”, (1964) 27 M.L.R. 385. See Fulwood’s Case (1638) Cro. Car. 482 at p. 488, Tarry v. Browne, (1661) 1 Sid. 64 at p. 65, Harford v. Morris, (1776) 2 Hag. Con. 423 atp. 436. Although see contra Parojcic v. Parojcic [1959] 1 All E.R. 1 at p. 3, where Davies J. remarks that he was “inclined to think that the effect of duress on a marriage is the same as it is in contract, viz., to render it not void but voidable”. He nonetheless, felt that it was “unnecessary to express a concluded opinion on the matter” (at p. 4). See also Mahadervan v. Mahadervan [1962] 3 All E.R. 1108 at p. 1111, and 12 Halsbury’s Laws, 3d ed. 225. This matter has been put beyond doubt, in England and Wales at least, by the enactment of the Nullity Act 1971, now the Matrimonial Causes Act 1973, section 12(c) of which states that duress renders a marriage voidable only. In Australia, however, legislative provisions deem a marriage contracted under duress void ab initio: see the Marital Marriage Act 1961-76 section 23(1)(d).
107 Though not in England and Wales where duress renders a marriage voidable. See the Matrimonial Causes Act 1973, section 12(c) of which states that duress renders a marriage voidable only.
108 Although it is hard to dispute the argument that “ratification of nothing is unthinkable and impossible” (Wiley v. Wiley (1919) 123 NE 252 at 285), it is nonetheless well-established that a void marriage may be ratified. This dates back to the Decretals of Pope Gregory IX, 1227, Bk. IV, tit. 7., ch. 2, and is reaffirmed in Ayliffe, Parergon Juris Canonici, (1726), Poynter, Doctrine and Practice of the Ecclesiastical Court, (1824) at p. 138, Roger, Ecclesiastical Law, (1840) at 564 and Shelford, The Law of Marriage and Divorce, (1841) at p. 214. See Tolstoy, “The Validation of Void Marriages”, (168) 31 M.L.R. 656.
109 Until 1870, the Ecclesiastical Courts of the Church of Ireland had sole jurisdiction in matters matrimonial. See 28 Hen. 8, c.2. With the Disestablishment of the Church of Ireland (Act of Disestablishment 1869,) there followed legislation transferring to the High Court of Justice sole jurisdiction over such matters. (Matrimonial Causes and Marriage Law (Amendment) (Ireland) Act 1870 (33 & 34 Vict. c. 110).
of marriage, this being that in the latter case the doctrine of privity applies with much less force. Voidability is obviously the more private solution - only a privy party may seek to set aside a voidable contract. With marriage, the law has traditionally proved much more keenly sensitive to the externalities, and in particular the relational consequences, that may be created by the nuptial contract. In other words, it is recognised that persons other than the privy parties may be affected by a marriage being solemnised. Any person, for instance, with locus standi, can obtain a declaration that a marriage is void for duress, even where the parties to the marriage are deceased. The interest in its validity was typically thought to be more universal, less private. By declaring an agreement void as opposed to voidable, one acknowledges that interests wider than those of the parties alone are at stake. Voidness, in other words, pierces the veil of privity.

The Legal Construction of the “Family”

The prescriptive dimensions of the law are underlined, in particular, by the debate surrounding the legal construction of the term ‘family’. Despite its seemingly innocuous nature, the term is the subject of great controversy, legal, social and

110 Most notably illustrated by the decision in Tweddle v. Atkinson (1861) 1 B. & S. 393. A and B agreed to pay C, B’s son, an amount of money on C’s marriage to A’s daughter. C later sued A’s estate for the promised sum. The Court refused to order payment, partly on the ground that consideration did not flow from C, but additionally because C was not a party to the contract and could not, therefore, assert its terms. See also Dunlop v. Selfridge [1915] A.C. 847 and Chapter Two at p. 101, and fn. 115 thereat.

111 Bates, for instance, suggests that the voidable nature of forced marriages in English law “emphasise[s] the role of the affected party as opposed to that of the State”. Bates, “Duress as grounds for nullity – a new perspective”, (1980) 130 N.J.L.J. 1035 at p. 1035.


113 By the same token, it is recognised that persons other than the parties to the marriage may be affected by a declaration that it is invalid. See Henchy J. in N. (orse. K.) v. K. [1986] I.L.R.M. 75 at p. 88.

114 Although again, the fact that the parties have not sought to assert its voidness (especially if they were aware of their right to do so) may be evidence of ratification.

115 The voidness of a bigamous marriage is a case in point. Were such marriage merely voidable the public policy against polygamy would quickly be set at nought. The rights of first spouses (for want of a better name), in particular, would be diluted.

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political and not a little uncertainty.\textsuperscript{117} It is well settled that the term, as used in legal documents and devises has no set meaning.\textsuperscript{118} Indeed as Lord Langdale, M.R. noted in \textit{Blackwall v. Bull}, the word ‘family’ ‘... is capable of so many applications that if any one particular construction were attributed to it in wills, the intentions of testators would be more frequently defeated than carried into effect’.\textsuperscript{119} It is certainly not a term of art.\textsuperscript{120} Its precise meaning, instead, depends on the context in which it is found.

This is not to suggest that the law is either objective or neutral about how the term is defined. The formalist pretence that the law simply caters to a pre-existing ‘family’ cannot be sustained with any enthusiasm by any jurist who cares to observe the current debate about the legal confines of family. Law, being an integral part of the complex totality of social relations is itself not merely reactive but also partly constitutive. By its edicts it helps to prescribe and delimit the social understanding of family. This is evidenced most explicitly by the terms of section 28 of the British Local Government Act 1988.\textsuperscript{121} The latter proscribes, \textit{inter alia}, the ‘promotion’ by local authorities and grant-maintained schools of the ‘...acceptability of homosexuality as a \textit{pretended} family relationship’. The prescriptive agenda is clear:

\begin{itemize}
  \item [\textsuperscript{117}] Dewar notes a similar trend in family law generally, with intra-familial relationships being the subject of some doctrinal conflict and confusion. Even the status of ‘parent’ has not escaped, with social and biological concepts of parenthood vying for prominence. Dewar, “The Normal Chaos of Family Law” (1998) 61 M.L.R. 467 at pp. 481-483.
  \item [\textsuperscript{118}] See for instance the comments of some of the Law Lords in \textit{Fitzpatrick v. Sterling Housing Association} [1999] 3 W.L.R. 1113. Lord Nicholls (at p. 1125C) observes for example that the term has “several different meanings”, Lord Clyde (at p. 1133) noting that the precise meaning in each case “depends on the context in which the term is used”.
  \item [\textsuperscript{119}] (1836) 1 Keen 176 at p. 181. See also \textit{per} O’Bryan J. (of the Supreme Court of Victoria, Australia), in \textit{Re Brewis; Brewis v. Brewis} [1946] V.L.R. 199 at p. 202: “...the word ‘family’ is a word of most uncertain import. It can mean many things according to its context and in some contexts it is impossible to say in what particular sense it is used”. See also McQuaid J. \textit{Charlottestown v. Charlottestown Association for Residential Service} (1979) 100 D.L.R. (3d) 614 at pp. 621-622 (Prince Edward Is., Canada)and \textit{per} Kindersly V-C. in \textit{Green v. Marsden} 1 WR 512 at p. 513.
  \item [\textsuperscript{120}] See \textit{per} Wickens V-C. in \textit{Burt v. Hellyar} (1872) L.R. 14 Eq. 160 and \textit{per} L. Slyn in \textit{Fitzpatrick v. Sterling Housing Association} [1999] 3 W.L.R. 1113 at p. 1119D.
  \item [\textsuperscript{121}] Inserting section 2A into the Local Government Act, 1986. While its Scottish counterpart has been abolished, attempts to do likewise south of the border in England and Wales have twice been defeated in the House of Lords, most recently in a vote on July 24, 2000.
\end{itemize}
the legislation attempts to ring-fence the ‘family’, to prescribe its limits with a view
to maintaining a particular image of the ‘ideal family’ (whatever the reality of family
life for many persons in the U.K.).\textsuperscript{122}

This tendency manifests itself most obviously in the broad rejection of the non-
marital family as a ‘family’ for Irish legal purposes. Article 41.3.1 of the Constitution
clearly indicates that the family to which the State must direct its protection is solely
that based upon the institution of marriage. That this was so was confirmed by the
decision of the Supreme Court in \textit{State (Nicolaou) v An Bord Uchtála}.\textsuperscript{123} There the
Court was unanimous in its conclusion that an unmarried father and his infant child
were not members of a family recognised by Article 41 of the Constitution. The
passage of time has not eased this harsh view, the Supreme Court having reiterated
the exclusive nature of the constitutional family in \textit{V.K. v. J.W.}\textsuperscript{124} and \textit{W. O’R. v. E.H.}\textsuperscript{125} Legislative measures have tended to be equally exclusive, although there are
some notable exceptions.\textsuperscript{126} Maintenance and support obligations, taxation benefits
and reliefs and succession rights, though applying to all children regardless of the
marital status of their parents,\textsuperscript{127} are otherwise reserved to spouses. Joint adoption

\textsuperscript{122} Some children at least, do grow up in non-conventional family units, sometimes with one or both
biological parents who are gay or lesbian and living in same-sex relationships. There is a growing
practice also of allowing teenagers having difficulties with their sexuality to be fostered by same-sex

\textsuperscript{123} [1966] I.R. 567.

\textsuperscript{124} [1990] 2 I.R. 437. This case, which concerned the right of a natural father to be heard in a hearing
considering the adoption of his child, was successfully appealed to the European Court of Human
unmarried, did indeed have a right to a family life which right had been breached by the failure to
afford him an adequate opportunity to object to the adoption of his child. Article 8 of the European
Convention on Human Rights requires that the contracting parties respect, \textit{inter alia}, the ‘family life’
of all individuals.

\textsuperscript{125} [1996] 2 I.R. 248.

\textsuperscript{126} The Status of Children Act, 1987 and the Domestic Violence Act, 1996: see also the very wide
definition of ‘family’ for the purposes of section 9 of the Non-fatal Offences against the Person Act
1997. The Civil Liability (Amendment) Act, 1996 section 1 also extends the remit of the action for
wrongful death to persons living with the deceased for at least two years ‘as husband and wife’, a
phrase that confines its application however to non-marital \textit{heterosexual} couples.

\textsuperscript{127} Status of Children Act, 1987.
rights and special provisions relating to the breakdown of intimate relationships are equally exclusive.

There are of course certain benefits, both practical and symbolic, which might be said to flow from confining the legal remit of ‘family’ to unions based on marriage. It may be the case, as the Commission on the Family argues, that some persons “may be choosing deliberately not to have a legal basis for their relationship” (although not everyone enjoys the luxury of such a choice). Additionally, though it has not always been so, the status of marriage enjoys in this age a degree of certainty and clarity which cohabitative status clearly lacks. Nowadays, at least, it can quite easily be established that a person is married. Marriage sees its origin in a specific event (the wedding) an explicit and public exchange, the result of which must be evidenced by signature of the Register of Marriages, and kept on file by the State. Cohabitation by contrast, is a much more open-textured status. It is not clear to what extent and for how long the parties should be living together, the degree of financial interdependency they must enjoy and so on. Evidence of marriage then can avoid

128 Although it is now possible for a single, unmarried person to adopt a child, two unmarried persons may not jointly adopt. (section 10(1)-(3), Adoption Act, 1991).
132 Observing the history of marriage in these islands, it might well be said that this has not always been so. Prior to 1753, the marital status of many parties was not easily established in law. Some persons, indeed, were unsure as to their marital status. See Gillis, For Better, For Worse: British Marriages 1600 to the Present, (Oxford: Oxford University Press, 1985) and Stone, Uncertain Unions: Marriage and Divorce in England, 1660-1857, (Oxford: Oxford University Press, 1995). In the civil law tradition generally, irregular marriages were formerly quite common. Parties could be deemed to be married through cohabitation alone without the need for a ceremony. See Clive, The Law of Husband and Wife, 4th ed. (Edinburgh: Green, 1997) at p. 40ff.
133 In the case of Protestant weddings there are strict rules regarding publicity prior to the marriage. A failure to observe these formalities, provided both parties know of such failure, will result in the marriage being null and void. See Ryan, “Fundamentals of Marriage”, in Shannon, (ed.), The Family Law Practitioner, (forthcoming), (Dublin: Round Hall, 2000).
134 Although a failure to so register (or the entry of false details upon the register) will not affect the validity of the marriage: see B. v. R. [1996] 3 I.R. 549.
embarrassing enquiries of an intimate nature that must often be made to establish cohabitative status. (That said, the authorities in many states are finding it increasingly necessary to peer behind the veil of marriage to establish, for instance, whether a marriage has been contracted with a view to obtaining favourable immigrant status).  

Nevertheless in other legal realms the term ‘family’ is understood in a less restrictive sense than that adopted heretofore under Irish law. The jurisprudence of the European Court of Human Rights for instance has acknowledged that in certain circumstances such a non-marital unit will constitute a family for the purposes of the Convention on Human Rights. With the Government now proposing to incorporate the latter charter into Irish law it is likely that a similarly more descriptive trend will soon gain a foothold in this jurisdiction. In Britain both the legislature and the Courts have shown greater latitude in defining and eliciting the legal boundaries of family, in particular in recognising for certain purposes the family status of cohabiting non-marital heterosexual couples with or without children. Some persons have been recognised as the ‘family’ of an intimate partner, the presence of a still valid marriage to another person notwithstanding. The House of Lords has even recently

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135 Recent court cases both in Ireland and the U.K. testify to the prevalence of ‘green card’ marriages. In one recent case a British woman had married seven times in the space of fourteen months, allegedly with a view to securing entry to the United Kingdom for her multiple spouses. See Amelia Gentleman, “Serial Bride Faces Jail over Migrant Scam”, The Guardian, November 5, 1998. In the face of such incidents, the authorities in the United States for instance have begun to scrutinise the bona fides of immigrant spouses more rigorously. In the film “Wedding Banquet” for instance the bride-to-be in a marriage of convenience is seen being drilled in the finer points of the life of her husband to be, the tutor being the latter’s true lover, right down to the intimate matter of ‘boxers or briefs’.


137 See Haughey, “Human rights convention expected to be incorporated into Irish law”, Irish Times, March 29, 2000. The Government had originally suggested October, 2000 as the expected completion date for the incorporating legislation. It is clear now that that deadline will not be met.

138 Couples with children were accorded a family status, for the purposes of rent control legislation, quite early on: see Hawes v. Evenden [1953] 1 W.L.R. 1169. Couples without children came later: see Dyson Holdings v. Fox [1975] 3 All E.R. 1030.


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recognised a cohabiting homosexual couple as a family for the purposes of rent control legislation.\textsuperscript{140} This trend arguably represents a withdrawal of family law’s prescriptive role, a tendency that perhaps underpins what, it is argued below, is a growing privatisation in marital and family discourses.

**Individualistic Currents.** Yet even putting this aside, other problems remain that have very specific relevance to the relational perspective adopted herein. The first concerns the extent to which the family is viewed as a distinct unit rather than a set of individuals. This question directly implicates the power dynamics internal to the paradigmatic family. In the Irish constitutional context a distinction is regularly made between the rights of the family as a unit (protected by Articles 41 and 42) and the rights of the constituent members of the family (dealt with under Article 40.3 as ‘personal rights’).\textsuperscript{141} Conceptualising the family in terms of its unity may be seen as having certain suspect ramifications. It suggests that the only dangers that the family and its members should fear are those that arise from without.

The possibility of an attack on the constitution of the family, in other words, is exteriorised - located outside the confines of family. In this regard, the Supreme Court’s decision in *B.L. v. M.L.*\textsuperscript{142} is highly significant. In the High Court, Barr J.\textsuperscript{143} ruled that the provisions of Article 41.2 - ostensibly safeguarding the position of the women and mothers working at home - may be invoked to create a property interest arising from domestic (non-financial) contributions made by a full-time homemaker within the home. In refusing to endorse this perspective, the Supreme Court suggest quite strongly that Article 41 is intended to combat only external threats to the institution of the family. Referring to Article 41.2, Finlay C.J. notes that neither subsection thereof “purports to create any particular rights within the family, or to grant any individual member of the family rights, whether of property or otherwise,

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\textsuperscript{142} [1992] 2 I.R. 77.
against other members of the family". Instead, he surmised it "...deals with the protection of the family from external forces".  

A different approach is justifiably taken by the Court of Criminal Appeal in *D.P.P. v. J.T.* In that case the wife of a man convicted for the sexual abuse of his mentally disabled daughter had given evidence against him at his trial. The Court rejected the argument of the appellant that this constituted an attack on the autonomy and integrity of the family. It noted that far from precluding such a step, the latter concerns dictated it: the offences alleged were themselves a violation of the rights of the [Family] unit the protection of which "necessarily include[s] an obligation to enforce protective provisions even against members of the family who are guilty or alleged to be guilty of injuries to members of the family". This second approach, while still respecting the integrity of the family as a unit, rightly acknowledges that such integrity depends also on the vindication of the rights of its individual members.

While this alternative tendency is arguably properly applied in *J.T.*, the theory behind it nonetheless underlines what Maine foresaw as the "emergence of the self-determining, separate individual from the network of family and group ties". Despite the legal rhetoric of family unity, it is clear that the individual has become the definitive point of reference in legal discourses, having been "steadily substituted for the family as the unit of which civil laws take account". As an illustration of this phenomenon, Glendon notes how the rights to use birth control established in

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143 Ibid. at pp. 82-101.
144 Ibid. at p. 108.
145 (1988) 3 Frewen 141. See also *Trammel v. U.S.* 445 U.S. 40 (1980) where the absolute rule precluding a wife from testifying against her husband (even voluntarily) was declared to have been abolished.
146 This matter is now the subject of the Criminal Evidence Act, 1992 sections 21-25. These provisions allow a person to give evidence against his or her spouse in cases involving violence or sexual abuse/assault. In certain circumstances a person may even be compelled to give such evidence.
147 Ibid. at p. 158.
148 Ibid. at p. 159.
Griswold v. Connecticut as flowing from the right of marital privacy, became in Eisenstadt v. Baird a "right of the individual, married or single".

Over-Nucleation. Even where the family as a unit is the focus of the inquiry, wider relational issues may yet be ignored. The definition of ‘family’ for many purposes is ‘over-nucleated’, in other words focusses on the nuclear family at the expense of the wider extended family. The nuclear family came to the fore during the industrial revolution, the greater mobility of labour required dispersing family members and thus dissembling the extended family. In McCombe v Sheehan Murnaghan J. concluded, that the term ‘family’ for the purposes of rent control legislation comprises only the nuclear ‘family of procreation’. Unless the contrary was shown, he noted, the term as used in legislation must bear the same meaning as in the Constitution - that is, he said, ‘parents and children’. Thus on the death of the

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151 381 U.S. 479 (1965). See also McGee v. A.G. [1974] I.R. 394 concerning legislation precluding persons from, inter alia, importing contraceptive devices. The Supreme Court struck down this legislation as unconstitutional, partly on the ground that its provisions infringed the autonomy of the marital family in matters of family size, partly on the more individual ground that the provisions potentially endangered the plaintiff’s bodily integrity.


153 Ibid. at p. 453: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”. The use of the term ‘person’ is highlighted for its negation of what one might have assumed was a collective and not simply a personal decision.


157 In that case the Rent Restrictions Act, 1946.

158 A strong current of Irish authority exists to the effect that the primary meaning of ‘family’ in deeds and wills is the children of the disponer. Sinnott v. Walsh (1880-1881) 5 L.R. Ir. 27, In re Mulqueen’s Trust 7 L.R. Ir. 127, In re Battersby’s Trusts [1896] 1 I.R. 600. See also Re Terry’s Will (1854) 19 Beav 580 per Romilly M.R. at p. 581; Burt v. Hellyar (1872) L.R. 14 Eq. 160 per Wickens V-C.; Re McGrath’s Will (1899) 20 N.S.W.L.R. (B. & P.) 55; Re Cundy [1899] N.Z.L.R. 53 per Edwards J. at p. 58; and Re McKeown [1942] 3 D.L.R. 96 (Man. K.B.) per Donovan J. at p. 797. It seems to have been accepted that this might even include children born outside wedlock, at least where devisor
statutory tenant, his sister was debarred from succeeding as tenant under the relevant legislation. This narrow approach to the legislation was later overturned in Jordan v. O’Brien.\footnote{159} Indeed in the meantime and before there had been several decisions recognising a wider scope for the term in the context of rent control legislation.\footnote{160} Any doubts that might have lingered were dispersed by the explicit (and relatively wide) definition in the Housing Act 1960, now contained in the Housing (Private Rented Dwellings) (Amendment) Act 1982 (No. 6 of 1982).\footnote{161}

Despite these developments in the specific field of rent control legislation, the shadow of McCombe has arguably prevailed in a wider context for much longer. It was not possible until 1998, for instance, for a person to apply for an order facilitating access to a grandchild or other relative (not being the child) of that person. Only the parents or guardians of a child could seek such an order.\footnote{162} This has since been remedied by the Children Act, 1997\footnote{163} although it is still not possible for a


\footnote{160} Section 7(2): “For the purposes of this Part, a person shall be deemed to be a member of the family of a tenant if -

(a) such person is the tenant's father, mother, grandfather, grandmother, step-father, step-mother, father-in-law, mother-in-law, son, daughter, son-in-law, daughter-in-law, nephew, niece, grandson, granddaughter, step-son, step-daughter, brother, sister, half-brother, half-sister, uncle or aunt.

(b) such person is adopted under the Adoption Acts 1952 to 1976 or is the illegitimate offspring of the tenant (being the mother or reputed father of the offspring) or is a person who was in bona fide residence with the tenant for not less than six years before the tenant's death where the tenant was in loco parentis to that person”.

Of particular note is that section 7 includes as a possible beneficiary an ‘illegitimate’ child.

\footnote{162} Section 11 of the Guardianship of Infants Act, 1964.

\footnote{163} Section 9 of the Children Act, 1997 inserted a new section 11B into the Guardianship of Infants Act, 1964. This new provision came into operation on January 9, 1998.
grandparent to seek custody rights (unless the latter has been appointed a guardian by will,\textsuperscript{164} deed or by order of the Court).\textsuperscript{165}

**Marriage and Consent**

Just as with the concept of family, the politics of marriage give rise to complex social and cultural controversies that are not easily resolved. The conditions upon which marriage will be permitted flow broadly from the definition laid down in *Hyde v. Hyde and Woodmansee*:\textsuperscript{166}

"Marriage as understood in Christendom is the voluntary union for life of one man and one woman to the exclusion of all others".\textsuperscript{167}

To the inhabitant of the western world these criteria may seem self-evident. Yet each of the conclusions which we may extrapolate from this formula are in turn the subject of some controversy. While marriage is certainly *contemplated* in most cases as a union for life,\textsuperscript{168} most jurisdictions actually allow for some form of divorce, although the limits placed upon that facility vary from state to state. Polygamy is practiced amongst a significant proportion of the world's social and religious groupings\textsuperscript{169} and

\textsuperscript{164} Section 7 of the 1964 Act allows a guardian to appoint a substitute guardian by will (with ambulatory effect only).

\textsuperscript{165} Section 8 of the 1964 Act allows the District or Circuit Court to appoint a person as guardian of a child.

\textsuperscript{166} (1866) L.R. 1 P. & D. 130 at p. 133.

\textsuperscript{167} See also Costello P., *B. v. R.* [1995] 1 I.L.R.M. 491, (HC) at p. 495: "Marriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life".

\textsuperscript{168} Though *Shi’i* Muslim law recognizes a type of trial short-term marital contract known as the *mut'a*: Khadduri, "Marriage in Islamic Law: The modernist viewpoints", (1976) 26 *Am. Jo. of Comp. Law* 213 at 214.

\textsuperscript{169} Although his research is now considerably dated, the work of Murdock is especially enlightening in this regard. In Murdock, "World Ethnographic Sample", *American Anthropologist* 59, 686 (August, 1957) found that of a total sample of 554 societies, 77% favoured polygyny (the taking of plural wives) as a social norm, with a further 0.8% approving of polyandry (the taking of plural husbands.) Eshleman notes that it is important to maintain a careful distinction, however, between "the ideology and actual occurrence" of polygamy. Polygamy is only possible where there is an unbalanced sex ratio and/or where the person taking plural spouses can afford to do so. Thus, for many societies, polygamy, though socially approved, may not be accurately descriptive of the reality of family living patterns. Polygamy is not unheard of even in the Western world. Witness the conflicts that have arisen even between western socio-cultural groupings. The practice of polygamy amongst Mormons, for example,
forms of same-sex marriage have been introduced in some European and U.S. jurisdictions.

At first glance, however, the consensual nature of marriage implied by Lord Penzance in *Hyde* might not seem to provoke so much controversy. It is widely accepted in the western world that the consent of the parties to a marriage is an essential constituent of its validity. Both the Irish and the U.S. Constitutions recognise as a personal liberty the freedom to marry, which subject to certain conditions may be invoked against the State. The State may not, for instance, refuse to recognise a marriage on the grounds that the parties are of mixed religion or of mixed race or that one or both of the parties is financially incapable of maintaining a family.

especially in the Utah territory, led to several legal battles involving first the validity of this practice (*Reynolds v. U.S*) and second, the extent to which the corresponding living arrangements were detrimental to children born of these plural marriages. (*In re Black* 283 P. 2d. 887 (Supreme Court of Utah, 1955) and *Sanderson v. Tryon*, 739 P. 2d. 623 (Supreme Court of Utah, 1987). See further Nader, “The Law v. Plural Marriages”, 31 Harv. L. Rec. 10 (1960). It is the subject of some religious debate in Islam. While the Qu'ran at one point seems to allow the taking of plural wives (*Q. IV*, 3 & 4), other parts seem to disapprove of the practice, *Q. IV*, 129, for instance, suggesting that the practice is inequitable. Khadduri, “Marriage in Islamic Law: The modernist viewpoints”, (1976) 26 Am.Jo. of Comp. Law 213 at p. 217 suggests that Mohammed intended that marriage be gradually transformed “from a polygamous to a monogamous relationship”. The most favoured reading is that polygamy is permitted in *Shar'ia* law provided that the husband has adequate means to support plural wives. The facility is so restricted in Syria, (Law of Personal Status, 1953), and Egypt, (Law of Personal Status, 1962), though Tunisia has abolished the right to take plural wives outright, (Law of Personal Status, 1956, Article 18). Morocco, however, allows the parties to decide for themselves whether their relationship will be monogamous or not. See Khadduri, *op. cit.* at pp. 215-216.

To date these include Denmark, Sweden, Norway, Finland, Iceland and the Netherlands.


See Kenny J. in *Ryan v. A.G.* [1965] I.R. 294 and Fitzgerald C.J. in *McGee v. A.G.* [1974] I.R. 284. Both of these pronouncements were *obiter* but should nonetheless generally be accepted as authoritative. at p. 313. See also *Donovan v. Minister for Justice* (1951) 85 I.L.T.R. 134. Kingsmill Moore J. noted that there was nothing unconstitutional in a provison requiring the approval of the Garda Commissioner where gardai wish to marry, a decision that was probably incorrect. See further the commentary in Kelly, Hogan and Whyte, *The Irish Constitution*, 3rd ed. (Dublin: Butterworth’s, 1994,) at p. 996 citing proceedings instigated by a male and female prisoner in separate prisons asserting their right to marry each other while incarcerated. The proceedings were discontinued when the State agreed to allow them to marry (*Irish Times*, January 25, 1978). In the U.S., see *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Zablocki v. Redhail* 434 U.S. 374 (1978). The European Court of Human Rights, in *F. v. Switzerland* (1988) 10 E.H.R.R. 41 has also recognised a right to marry.

By the same token a restriction placed on married couples of mixed religion that is not equally applicable to married couples of the same religion will probably be deemed unconstitutional. In *M. v. An Bord Uchtála* [1975] I.R. 81, Pringle J. struck down as unconstitutional section 12 of the Adoption Act, 1952. This stipulated that a couple could only adopt a child where both of the prospective parents shared the same faith as the child. This effectively precluded a couple of mixed religion from adopting, as manifestly despicable a penalty on mixed marriage as one could find.
The corollary to this of course is that a State cannot by its laws conspire to force a person to marry against his will. Just as the freedom to associate guaranteed by Article 40.6 implies a corresponding freedom to *dissociate*,¹⁷⁶ so too by analogy the right to marry implies a freedom *not* to marry which in more concrete terms translates into the requirement of ‘full, free and informed consent’ posited in *N. v. K.*¹⁷⁷ A State that endorses a marriage entered into under duress arguably would be guilty of complicity in the coercive endeavour and therefore in breach of the implied guarantee recognised above.

Two broad approaches may be discerned in relation to consent, each in its own way reflecting a concern for the integrity of the institution of marriage. One approach, of which the decision of Hanna J. in *Griffith v. Griffith¹⁷⁸* is a good example, holds that owing to the importance of the institution, great caution must be exercised in determining that a particular marriage is void for absence of consent.¹⁷⁹ In particular, the onus of proof upon a person seeking a declaration of nullity¹⁸⁰ should be as exacting as possible. Indeed, despite recent developments in this field, the presumption in law that a marriage is valid until the contrary is clearly shown¹⁸¹ still stands.¹⁸² The courts should proceed, according to older authority, only on “...strict and thoroughly satisfactory proof...”¹⁸³ examining the “...whole of the evidence with

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¹⁸⁰ There is indeed a general presumption that, until proved otherwise, an apparent marriage is valid. In other words, where there has been a solemnisation of marriage, the onus generally will be on the person alleging the invalidity of the marriage to prove such invalidity. See *Griffith v. Griffith*, [1944] I.R. 35 at pp. 38-39 and per Griffin J. in *N. (orse. K.) v. K.*, [1986] I.L.R.M. 75 at p. 89, the latter noting that when “ a marriage has been celebrated in a proper form between apparently competent partners, there is a presumption of law in favour of its validity”. On presumption of validity see also the Caribbean case of *Bess v. Bess*, (1986) 39 W.I.R. 148, outlining the strong presumption, where a marriage has been celebrated, that the formalities were properly observed.
¹⁸¹ *Browning v. Reane* (1812) 2 Phil. Eccl. 69.
great vigilance and jealousy...".\textsuperscript{184} The onus of proof it was suggested, is "severe and heavy".\textsuperscript{185} Indeed, in \textit{U. (falsely called J.) v. J.}\textsuperscript{186} Lord Penzance goes so far as to suggest that the burden of proof approximates to that in a criminal trial.\textsuperscript{187} A marriage, he opined, should only be declared invalid "...when the last trace of reasonable doubt as to the truth and \textit{bona fides} of the case has been removed".

As a corollary, the circumstances in which an ostensible consent would be found to be defective, in this scheme, were very tightly defined. A possible rationale for this minimalist approach is that the stigma of birth outside wedlock was in former times such that it was better at all costs that a couple, however reluctant their consent, remain married. Shades of such reasoning may be discerned from the decision of the Pennsylvanian Orphan’s Court in \textit{Re F.A. Marriage Licence.}\textsuperscript{188} This case concerned an application to marry made by two persons who were partially mentally disabled. In the course of its judgment approving their application the Court noted, albeit incidentally, that if they did not so rule the likelihood was that the parties would live together anyway and have children. The implication was clear: faced with the prospect of a non-marital cohabiting relationship, beyond the remit of legal regulation even a less than ideal marriage was thought preferable.\textsuperscript{189} In particular, the fear of rendering children ‘illegitimate’\textsuperscript{190} was at least a contributory factor in some decisions on the validity of marriage.\textsuperscript{191} The fact of marriage, in other words, was

\textsuperscript{184} Per Sir Hubert Jenner in \textit{Wright v. Elwood} 1 Curt. 662 at p. 666.


\textsuperscript{186} (1867) L.R. 1 P. & D. 460 at p. 461.

\textsuperscript{187} See also Denham J. in \textit{S. v. K.} unreported, High Court, Denham J., July 2, 1992.

\textsuperscript{188} 4 Pa. D.& C. 2d (1955).

\textsuperscript{189} See also the comments of Marshall J. in \textit{Zablocki v. Redhail}, 434 U.S. 374 (1978), noting, in a case involving the constitutionality of provisions prohibiting the marriage of persons having minor issue not in their custody to whom they were under a court imposed obligation to support, that in such circumstances "the net result of preventing the marriage is simply more illegitimate children".

\textsuperscript{190} This unfairly negative term is used merely to underline the attitude once prevailing in relation to non-marital births. It underlines the fact that the child initially under common law was regarded as \textit{fillius nullus}, the child of nobody.

\textsuperscript{191} See for instance, Tucker L.J.’s rather blunt words in \textit{Chaplin v. Chaplin} [1948] 2 All E.R. 408 at p. 411. This case concerned the application of a period of limitations upon actions for the avoidance of voidable marriages under the English Matrimonial Causes Act 1937, section 7(1)(d)(ii). Noting that the unusually short period that then prevailed could not be extended further, he observed that even if it could be, it would be "wrong for this court to extend that period in a way which might, in some cases, involve bastardising children that had been born of the union which it was sought to avoid". See also
recognised as having externalities, of affecting not only the immediate actors but also implicating family relationships more generally.

Judges were also well aware no doubt, of the prospect of annulment law becoming a surrogate for the then prohibited remedy of divorce. At the time an annulment was the only legal method whereby two living parties who had gone through a ceremony of marriage could obtain a declaration entitling them to remarry under the law. The determination in such a case was to be, *per* Hanna J. in *McK. v. McK. and McM. v. McM.*, "...unequivocally and beyond doubt established according to the legal principles applicable thereto. Otherwise discontented spouses could find an easy road to circumvent, not only the law, but also the established public opinion which exists in this country against divorce, and 'make marriage vows as false as dice's oaths'". The public interest in marriage is underlined, in particular, by the fact that notwithstanding agreement between the parties as to the desirability of a particular legal outcome, the courts will not grant either a declaration of nullity or a divorce by reason only of such agreement. In fact, Scots law entitled the Lord Advocate to intervene in either a suit for divorce or for a declarator of nullity with a view to defending the marital bond. He may, in particular adduce evidence in support of his claim. Alive to the possibility of collusion, calls for a similar judicial facility have been made in this country.

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The Irish Council for Civil Liberties, *The Case for Divorce in the 1990s: A Study of the Arguments* (Dublin: Irish Council for Civil Liberties, 1995) at p. 4 "...expanding the nullity grounds has consequences for the children of the marriage, for they become children born outside marriage".


193 Marriage, of course, is legally terminated by the death of either party.


197 The Courts may refuse to grant a declaration of nullity in circumstances where the parties have colluded with a view to obtaining a particular result. See *Churchward v. Churchward* [1895] P. 7 and *E.P. v. M.C.* [1985] I.L.R.M. 34.

The second and more qualitative approach is characterised by a greater exclusivity in the determination as to when a marriage is valid. Here again the ostensible rationale is the preservation of the integrity and stability of the marital union but with very different results. In contrast with the ‘easy entry-difficult exit’ pattern observed above, here the criteria for entry that are set, particularly in relation to consent, are significantly more exacting. There may be a certain qualitative element involved here, particularly at a time when marital breakdown is on the increase. Another perhaps more tenable reason is that marriage is an institution of such profundity, with such serious consequences that it is not lightly to be entered into. As Finlay C.J. observed in *N. v. K.*, "[t]he entry into a valid marriage is not only the making of a contract but is also in law the acquisition of a status. The status thus acquired and the related concept of a family receives special protection from provisions of the Constitution". Considering this elevated status, coupled with the then existing Constitutional prohibition on divorce, the Chief Justice implicitly suggests that the circumstances in which a consent to marriage will be recognised as valid ought be more exacting than those applicable in the contractual realm. “Consent to the taking of such a step”, he continues, “…must therefore…be a fully free exercise of the independent will of the parties”.

In the same case Griffin J. observed that “…a contract of marriage is almost certainly the most solemn and serious contract into which any party may enter during the course of his or her lifetime”. Noting this and the permanence and indissolubility of the institution it was, he opined, “of the utmost importance that the contract of marriage should be entered into with the full, free and informed consent of the contracting parties”.

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200 [1986] I.L.R.M. 75, at p. 82
201 Ibid.
202 Ibid. at p. 90
203 Ibid.
In establishing the absence of such consent, the burden of proof still lies on the person pleading invalidity. The presumption that a marriage is valid until the contrary is proven remains intact.\(^{204}\) The standard of proof, at least until recently, likewise remained high. As late as 1992, Denham J. alluded to the "severe and heavy burden" placed upon the Petitioner in nullity cases, a burden which she equated with that of a ‘quasi-criminal trial nature’.\(^{205}\)

This standard of proof, nonetheless, has more recently been diluted considerably to a point where it is fair to say that it complies with the normal civil standard of balancing the probabilities in the case. In \(N. v. K.\) McCarthy J., for instance, concluded\(^{206}\) that proof “on the balance of probabilities” would be sufficient to vitiate a marriage,\(^{207}\) a point he reiterated in \(U.F. v. J.C.\).\(^{208}\) The more recent decisions of \(K.W v. M.W.\),\(^{209}\) \(O'R v. B\)^\(^{210}\) and \(A.B. v. E.B.\)^\(^{211}\) cautiously suggest a similar conclusion. \(S.C. v. P.D.\)^\(^{212}\) however, probably represents the most unequivocal indication of change. In that case McCracken J. rejected the proposition of an intermediate standard of proof, higher than that in civil but lower than that in criminal cases,\(^{213}\) in favour of the balance of probabilities test. While again warning that a marriage should not lightly be declared invalid, the learned judge concluded that the civil standard should be applied. Thus, while the \textit{caveat} is entered both in \(N. v. K.\) and \(O'R. v. B\)^\(^{214}\) that some caution should be exercised to avoid collusive claims, the


\(^{206}\) Albeit \textit{obiter} as the point had not been argued in court.

\(^{207}\) [1986] I.L.R.M. 75 at pp. 93-94.


\(^{209}\) Unreported, High Court, July 19, 1994.

\(^{210}\) [1995] 2 I.L.R.M. 57 at p. 75


\(^{212}\) Unreported, High Court, March 14, 1996.

\(^{213}\) Such a solution was likewise ruled out by the Supreme Court in \textit{Banco Ambrosiano v. Ansbacher & Co.} [1987] I.L.R.M. 669 in relation to civil fraud cases, the Court opting instead for the normal civil standard of proof.

broad approach of the modern cases seems to be towards exhibiting a lesser anxiety in declaring a marriage invalid than that which prevailed in former times.

The Irish caselaw as it has developed in this field has broadly speaking seen a gradual shift from the dominance of the first perspective to a situation in which the second, most notably in N. v. K., has prevailed. In the process, Irish family law has experienced a radical reformulation of the principles upon which an apparent consent to marriage will be deemed to be invalid. Of particular note is the striking departure from the use of specific well-established grounds, such as duress, misrepresentation and mistake to a more broad-textured wholly consent-based ground of invalidity.

From *Griffith* to *N. v. K.* and beyond

The Earlier Authority: *Griffith* to *Singh*

Earlier Irish and English authority on the issue of consent, most notably that preceding the decision of Murnaghan J. in *B. v. D.*,215 is marked by a circumspection similar to that experienced in the English Contract law of the time. As in the latter field, a marriage would be invalid where entered into under duress, a material mistake or misrepresentation. In each of these cases, however, relief will be granted in restricted circumstances only. Misrepresentation and mistake, for instance, will be actionable only216 where there is a consequent misapprehension regarding either (1) the nature and purpose of the ceremony217 or (2) the identity of the respondent. The former is especially restricted: a mere error as to personal characteristics would not

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216 See *Swift v. Kelly*, 3 Knapp. 257 at p. 293.
217 Effectively the petitioner had to show that he or she did not know that what had been celebrated was in fact a marriage ceremony. In *Valier v. Valier* (1925) 133 L.T. 830 the respondent believed the ceremony was one of betrothal only. In *Mehta v. Mehta* [1945] 2 All E.R. 690 the petitioner believed that the marriage ceremony was one of religious conversion. See also *Ford v. Stier* [1896] P. 1, *Hall v. Hall* (1908) 24 T.L.R. 756 and *Kelly (ors. Hyams) v. Kelly* [1932] 49 T.L.R. 99. A mere error as to the consequences of marriage was not enough - see *Kassim v. Kassim* [1962] P. 224 where the petitioner incorrectly believed that an English marriage would be no barrier to him taking plural wives.
The error had to relate to the totality of the respondent’s identity, a distinction that in practice was as difficult to maintain as it was illogical.

In a similar vein, it was clear that the duress had to be of a particularly strong degree and quality to vitiate an apparent consent to marriage. The reasons for this have been rehearsed above. As Haugh J. observed in *Griffith v. Griffith* petitions for annulment involve “…interests [which go] above and beyond those of the immediate parties”. There was for one the inevitable stigma that would then attach to the children of a void marriage, who as a result of its invalidity would be rendered illegitimate in law, with all of the attendant disadvantages that then flowed from that status. Moreover, there was the “…duty owed to the public in general support of the marriage tie;” “…lax and easy declarations” gave rise to a “grave public mischief” against which the Courts were urged to guard. The High Court, Haugh J continued, was “not a court of convenience to release ill-assorted spouses from marriages irksome to one or another”. In other words, annulment was not a surrogate for the then prohibited facility of divorce.

As a result, the circumstances in which a particular instance of force or compulsion would be deemed to amount in law to duress were strictly limited. The elements essential to such a finding were summarised in the judgment of Sir Jocelyn Simon P. in *Szechter v. Szechter* as follows:

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220 In *C. v. C.* [1942] N.Z.L.R. 356 for instance, the respondent represented himself to be a famous boxer named Michael Miller. The court concluded that the error related to characteristics famous boxer named Michael Miller. It ruled that in this case the error related to characteristics rather than identity as the petitioner was primarily induced by his alleged attributes and fortune than with the assertion that he was the named boxer. In *Militate v. Ogunwomaju* [1994] Fam. Law 17, by contrast, a deception as to a person’s name and immigrant status was found to have vitiated a marriage. This was despite the fact that the induced error arguably related to the characteristics and not to identity of the respondent. There was no evidence that the petitioner would have married the real Richard Ogunwomaju.


222 Indeed for a relatively contemporary example of such concerns being voiced see the comments of McCarthy J. in *N. v. K.* [1986] I.L.R.M. 75 at p. 94. Note however the enactment of the Status of
"In order for the impediment of duress to vitiate an otherwise valid marriage it must ...be proved that the will of one of the parties has been overborne by genuine and reasonably held fear caused by a threat of immediate danger (for which the party is not himself responsible,) to life, limb or liberty so that the constraint destroys the reality of consent to ordinary wedlock".  

The problems associated with the concept of the ‘overborne will’ have already been noted at a previous juncture and it is only necessary at this point to refer back to the comments made in Chapter Three on this point. Each of the other elements demand some greater exposition. For present purposes the discussion will be confined to cases exemplary of the earlier approach to duress in family law.

1. A Genuine and Reasonably Held Fear. In common with the criteria laid down in modern day English criminal law a fear to give rise to duress in law had to be, per Scarman J. in *Buckland v. Buckland*, "reasonably entertained". The reasonableness of a fear may certainly be a useful tool in determining whether a genuine fear was in fact held. The less reasonable the fear the less likely that someone of sound mind and maturity actually laboured thereunder at the time of the marriage. One may, thus, fairly conclude that an objectively unreasonable fear is most likely not to have been a fear genuinely entertained.

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Children Act, 1987 which abolished most of the differences in law between marital and non-marital children.

223 See *Szechter* is one in a long line of cases, both family and contract, that stress the requirement of an ‘overborne will’ or alternatively of a ‘coercion of the will’. The problem with this formulation is well documented in Volume I, Chapter Three at pp. 159ff. Nevertheless, it has remained rather resilient, not least in the sphere of marital nullity. *Singh* also uses language that seems to indicate that in order for duress to be actionable some sort of suppression of the will must occur. See also Griffin J. in *N. v. K.* [1986] I.L.R.M. 75 at p. 90.


227 See Bradley, “Duress and Arranged Marriages”, (1983) 46 *M.L.R.* 499 at p. 501 where he suggests that the requirement of reasonableness accords with the “tendency of the courts to make the task of ascertaining willingness to marry in individual cases easier by treating consent as a question of law”. (See footnote 12 therein).
While this suggests that the test for duress is an objective one, such a conclusion is not borne out by older authority. In fact personal characteristics and idiosyncrasies of petitioners were regularly considered relevant in considering petitions grounded on duress. Butt J. in *Scott v. Sebright*, indeed, for instance, observed that:

> "whenever from natural weakness of intellect or from fear - whether reasonably entertained or not - either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to more serious danger".\(^{228}\)

This appears resoundingly to undermine the rule in *Szechter* and in fact even a cursory at older case law bears out this dictum. In *Bartlett v. Rice\(^{229}\)*, for instance, the Court noted the “nervous and hysterical character” of the petitioner. In *Hussein v. Hussein\(^{230}\)*, Henn Collins J., approving the dictum of Butt J., again seems to have asserted the subjective nature of the test for duress. Davies poses a rather sophisticated explanation of the apparent judicial contradictions here, but one that is not supported by judicial exposition.\(^{231}\) She argues that requirements of reasonability arose only where the fear was imposed by someone other than the respondent. Where the respondent was responsible therefore, a subjective test was used. This pattern is in fact supported by the pattern of decision-making in the cases then established, but there existed no judicial pronouncement on the issue. While Davies’s arguments are rather compelling, it is submitted that her theory assumes an apparent coherence that it is merely coincidental.

At the very least, it is submitted that the ‘reasonable person’ against whom the actions of the petitioner are judged ought be a hypothetical person whose

\(^{228}\) (1886) 12 P.D. 21 at p. 24.
\(^{229}\) (1894) 72 L.T. 122.
\(^{230}\) [1938] P. 159. See also Manchester’s discussion of *Buckland v. Buckland* in “Marriage or Prison: The case of the Reluctant Bridegroom”, (1966) 29 *M.L.R.* 622. Noting the fact that the petitioner was a dock policeman and thus presumably “not liable to easy intimidation”, Manchester suggests that the test utilised in *Buckland* was in fact a subjective one.
\(^{231}\) Davies, “Duress and Nullity of Marriage”, (1972) 88 *L.Q.R.* 549
characteristics largely correspond to those of the petitioner. Such qualified objectivity would require that the Court examine the case from the perspective of an admittedly fictional reasonable person of the gender, age, intellect and social status of the petitioner, keeping in mind the more immediate circumstances in which the latter may have found him/herself.

2. Immediate Danger. The requirement of immediacy of danger panders to a particular stereotype of duress which, to say the least, is unhelpful. There are no doubt, some situations in which the imminence of danger may be said to be established - a marriage contracted at the end of the point of a gun, for instance, where, as was said in one case "had there been no wedding that day there would have been a funeral". The consequences of a refusal to marry may be no less grave for their being postponed. In this regard another criminal law case is instructive. In R. v. Hudson and Turner two women charged with perjury of evidence at the trial of a notorious gangster pleaded that they had done so because of a threat to cause injury to them if they told the truth. The fact that the threat could not be carried out at the time of the alleged perjury - at which time the parties were in the relative safety of the witness box - was deemed immaterial. The prospect of injury lost none of its potency for being delayed. Thus while there is every merit in stipulating that duress be present and operative at the time of the marriage, the additional requirement of immediacy is patently unwarranted.

232 In this regard, the absurd reasoning in Elliot v. C. [1983] 2 All E.R. 1005, is particularly instructive in relation to the cruder results of a test of objectivity not modified as proposed above. There the state of mind of a young mentally retarded girl, who stood accused of arson, was judged from the viewpoint of what an adult of sound mind would reasonably have foreseen in similar circumstances.

233 Nowadays one might ignore this factor although Manchester notes that youth and gender were key factors in most of the cases he surveys in "Marriage or Prison: The case of the Reluctant Bridegroom", (1966) 29 M.L.R. 622.


235 Lee v. Lee 3 S.W. 2d 672 (1928).

3. Physical and Fatal Injury and False Imprisonment. As with Contract law, prior to the widening of its ambit by the inception of relief for economic duress, duress in marriage law was formerly restricted to cases of a threat to kill another and actual or threatened physical injury or loss of liberty. In a series of cases, marriages contracted with the sole purpose of escaping an oppressive regime have been deemed null and void under the duress ground. In H. (D.) v H. the petitioner, a Hungarian, married a sympathetic French cousin, solely with a view to securing her escape from the then communist state. Having fled the country, the marriage was annulled by an English Court, presumably on the ground that she feared that the regime would incarcerate her or otherwise threaten her physical well-being. This underlines also that the purpose for which the pressure is imposed need not necessarily be to propel the coerced party to marriage. The alleged oppression in each of these cases had little or nothing to do with the petitioners’ marital status.

Absent a fear of danger to life, limb or liberty, relief would generally not be granted. Fear of social ostracisation or alienation from one’s family, for instance, was not sufficient to amount to a ‘fear’ vitiating consent. The absence of any danger of the

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237 See Bartlett v. Rice (1894) 72 L.T. 122: the respondent had produced a pistol and “threatened to blow [the petitioner’s] brains out” if she did not marry him. In Cannon v. Cannon, 7 Tenn. App. 19 (1928), an irate Tennessee father, brandishing a loaded shotgun, threatened to kill the young male petitioner if he did not marry the former’s daughter. The father alleged that his daughter was pregnant by the petitioner (although it subsequently turned out that the bride was not pregnant at all. The marriage was annulled on the grounds of duress. See also Hussein v. Hussein [1938] P. 159, where there were continual threats to kill the petitioner.

238 See Fratallo v. Fratallo 193 N.Y.S. 865 (1922) where the respondent had threatened to kidnap and disfigure his intended bride if she refused to marry him. See also C. v. C., Irish Independent, October 19, 1991 at p.1.


241 [1954] P. 258

242 For a rather modern exposition of this approach, see the decision of the Supreme Court of British Columbia in Parchar v. Bhatti (1980) 17 R.F.L. (2d) 289.
afore-mentioned oppressive consequences was central to the rejection of the petitioner’s plea in *Singh v. Singh*.\(^{243}\) The petitioner in that case, a woman of Sikh parentage, had come to Britain from the Punjab, aged fifteen. Two years after her arrival, her parents arranged for her to be married to the defendant, also of Sikh origin but four years her elder. The intention of all involved was that, in line with Sikh custom, she would be married according to the tenets of her faith in a religious service a week following the ceremony in the civil registry office.\(^{244}\) The petitioner went through with the civil ceremony, but subsequently told her parents that she wished to have nothing more to do with the defendant and refused to go through with the planned religious ceremony. She filed a petition seeking a declaration that the supposed marriage had been contracted without her consent as she had been induced to enter by duress and coercion exercised upon her by her parents.

At first instance the petition was refused. The Court of Appeal agreed, adopting with approval the definition of duress laid down in *Szechter v. Szechter*.\(^{245}\) Here, the Court found, there had been “no suggestion of any danger to life, limb or liberty”.\(^{246}\) The petitioner had quite simply “obeyed the wishes of her parents, having a proper respect for them and the traditions of her people”.\(^{247}\) Megaw L.J. agreed:

> “Where, I ask, in the present case is there any possible suggestion of fear on the part of this young lady? A sense of duty to her parents and a feeling of obligation to adhere to the custom of religion there may be, but of fear, not a shred of a suggestion. Reluctance no doubt; but not fear”.\(^{248}\)

An allied point concerns the effect of a fear not for one’s own safety but for that of another. A Canadian authority from the 1950s suggests that “…it is sufficient if fear


\(^{244}\) In the meantime the parties would return to their respective homes, avoiding all contact with each other.

\(^{245}\) [1970] 3 All E.R. 905.

\(^{246}\) A similar conclusion on the facts motivated the rejection of a plea of duress in the Australian case, *In the Marriage of Suria and Suria*, (1977) FLC 90-305.


\(^{248}\) Ibid. at p. 968.
for some other person is created although in Cooper v. Crane this seems not to have been accepted. In that case the respondent had stated that unless the petitioner marry him he would commit suicide. In the course of rejecting the petition, Collins J. noted that there had been “no threat of violence to the lady herself”, a fact that he clearly saw as relevant in distinguishing the case in hand from cases where the subject of the threat was the petitioner. This however, runs counter to earlier authority. In Harford v. Morris a threat of suicide was accepted as having vitiated the consent of the petitioner. The contrary position in Cooper v. Crane arguably endorses an egocentric tendency that suggests that the petitioner should be motivated only by selfish fears. For this reason alone the stance in Harford, it is suggested, is preferrable.

4. Petitioner Bears No Responsibility. In Griffith v. Griffith, a case regularly cited even in the English reports, Haugh J. observed that a threat of imprisonment would only amount to duress where unjustly imposed. There, a young man had married consequent upon a statement as to paternity subsequently discovered to have been false. The latter had not engaged in sexual intercourse with the respondent in the case, but was nevertheless under the unfortunate misapprehension that he was responsible as charged for the latter’s pregnancy. Thus, not realising that he was in fact innocent of the charge, (a fact of which the respondent was aware,) he feared, with good reason, that unless he married he would be charged with unlawful carnal knowledge of a minor.

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251 (1776) 2 Hag. Con. 423.
253 It appeared that the petitioner had naively believed that pregnancy could result from activity falling short of vaginal intercourse. It was only on his wedding night that he discovered the elementary fact that his innocent behaviour could not have resulted in pregnancy.
Haugh J. ultimately ruled that there had been no real consent in law, the petitioner having been forced to marry under a threat of charges being pursued. He was, however, careful to note in the course of his judgment that had the claim of paternity in fact been true, the petition would have been rejected. The fear had to arise from “external circumstances for which the petitioner was in no way responsible”. Thus it is evident from the statements both in Griffith and in Buckland v. Buckland that where a party compelled to marry a woman he had allegedly made pregnant, on pain of being charged with unlawful carnal knowledge of a minor should the former not comply, such fear created would have been seen as justly imposed and proper if the charge of paternity proved true. “The man is free to elect between scandal and possible punishment on the one hand, or marriage to the girl he has wronged on the other. But the fear imposed must be properly imposed”.

Similar comments as to the propriety of pressure imposed were made in the aforementioned English authority of Singh v. Singh. One might recall that that case involved an arranged marriage between a young Sikh girl and a man of her parents choosing. The petitioner in so doing however, had quite simply “obeyed the wishes of

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254 See also the Canadian case of Hinds v. McDonald (New Brunswick) [1932] 1 D.L.R. 96 (N.B., Canada). A false allegation of paternity landed the petitioner in jail awaiting trial. His only avenue of escape was to marry the respondent, who later admitted that the child she was carrying was not his. He was, per Crocket J., “so frightened and oppressed by the calamity of the situation in which he was placed” that there had been duress sufficient to invalidate the marriage.


256 Ibid.


258 See the comments in Figueroa v. Figueroa 110 NYS2d 550 at p. 553 (1952) that likewise endorse the view that in circumstances where a man was responsible for a pregnancy, it was not only acceptable but indeed socially desirable that he be pressed to marry the pregnant woman. See the discussion in Manchester, “Marriage or Prison: The case of the Reluctant Bridegroom”, (1966) 29 M.L.R. 622 at pp. 633-634. The propriety of forcing parties to marry owing to a pre-marital pregnancy is now largely discounted. As early as 1975, the then Catholic Archbishop of Dublin advised that marriages contracted owing to pregnancy alone were a risky proposition. Alluding to the risk of parties marrying solely because the female party is pregnant, he observes that “the mere fact that the girl is pregnant is not ever a sufficient reason for marriage; nor is the threat of a civil union an adequate cause for allowing in the Church a marriage which otherwise would be judged in the circumstances not to have even a reasonable hope of success”. Archbishop Ryan, Marriage and Pastoral Care: An Invitation to Priestly Concern, (Dublin: Dublin (Catholic) Diocesan Press Office, 1975) at pp. 16-17 (§§6.6-6.9).


her parents, having a proper respect for them and the traditions of her people".  
Megaw L.J. also stressed the legitimacy of the parental behaviour, the young lady having had only what would have been expected of a Sikh girl in similar circumstances: "...[a] sense of duty to her parents and a feeling of obligation to adhere to the custom of religion".

This assertion of the propriety of parental pressure accords with authority from further afield. Fluharty v. Fluharty, a U.S. case from 1937, established that short of violence a parent may quite legitimately persuade, even order a son or daughter to marry. In a similar vein the French Civil Code acknowledges that 'reverential fear' may prompt a party to enter into a perfectly valid contract, reverential fear being defined as a fear of one’s parents or ancestors (provided such fear is not motivated by violence or the threat thereof.) Closer to home, similar pressures were once deemed quite compatible with a consensual marriage. In A.C.L. v. R.L. for instance, Barron J. concluded that a marriage was valid notwithstanding the petitioner had married partly to assuage her parents' anxiety about her non-marital relationship. They had not directly expressed any concerns about her lifestyle but she nevertheless knew that they were not happy. Far from having acted under coercion, he believed, she had "a free choice and expressed it to please her parents". In a similar vein, in P.C. v. D.O'B. Carroll J. argued that the petitioner had accepted her parent's will because of what seemed to be a strong internal desire not to disappoint them. The petitioner upon finding herself pregnant, married "out of concern for her [worried and upset] parents". Though she knew they would want her to marry, her parents had brought

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262 Ibid. at p. 968.
263 193 Atl. 838 (1937).
264 Book III, Chapter II, Article 1114.
265 Unreported, High Court, Barron J., October 8, 1982.
266 She was then living with the respondent and their child.
267 Unreported, High Court, Barron J., October 8, 1982, at p. 9.
268 Unreported, High Court, Carroll J, October 2, 1985
269 Ibid. at p. 7.
no pressure to bear on her. Thus Carroll J. refused a petition for annulment opining that the duress involved was ‘self-imposed’. 270

In common with the contractual concept of duress, then, the authority formerly required an element of impropriety or illegitimacy in the actions or threats that propel a petitioner into marriage. To the extent that the ambit of actionable fear was confined to that concerning injury to life, limb or liberty this criterion remained relatively certain and clear-cut and thus workable, if restrictive. However in recent decades the circumstances in which duress in marriage is recognised have expanded quite dramatically. The result from the point of view of those who espouse the criterion of illegitimacy as the determining factor in these cases is problematic to say the least. The Supreme Court’s ‘solution’ to this dilemma, it seems, has been to abandon outright this criterion, falling back on a rather broad-textured test which centres not on the legitimacy of the alleged vitiating factor but rather on the presence or otherwise of a full, free and informed consent. This new departure has had dramatic consequences, both in abstract theoretical and practical terms, not all of which are as welcome as one might at first think.


Up to the 1970s in the Republic of Ireland it was considered clear that threats falling short of those creating a genuine and reasonably held fear, unjustly imposed, of danger to life, limb or liberty would not suffice to constitute actionable duress to marry. From 1973 onwards, however, several important departures were made from these criteria with the result that now a much wider range of coercive practices than ever before fall within the ambit of duress in family law. Indeed in almost every respect Irish family law has upturned the criteria that we examined above in the context of earlier authority. Although not all judgments have converged in their

270 Ibid. at p. 8.
enthusiasm for such reforms,\textsuperscript{271} it is suggested that the earlier authority cited above is now predominantly obsolete.

\textbf{From Causative Factors to Absence of Consent.} Underlying these developments is a radical change of focus. In the landmark Supreme Court decision of \textit{N. v. K.}\textsuperscript{272} in 1985, Finlay C.J. asserted that “concepts of duress and undue influence, while being the basis for the conduct of an enquiry, remain subservient to the ultimate objective of ascertaining whether...the consent of the petitioner was real or apparent”. The only conclusive issue is whether there existed at the time of the marriage a “full, free and informed consent thereto...” or a “fully free exercise of the independent will”. Thus, as Blayney J. opined in \textit{P.W. v. A. O'C.},\textsuperscript{273} “the nature of the duress is not an essential element”. Instead, the sole question is whether, in all the circumstances, there was an independent and informed exercise of judgment giving rise to a full, free and informed consent. In effect then, for the purposes of Irish marriage law, the Courts in Ireland have adopted the test of ‘impaired consent’ suggested by Birks and Chin\textsuperscript{274} and discussed in Chapter Four.

From this shift of focus several consequences flow. As the focus on actionable causes has yielded precedence to that concerning the presence or absence of consent, full, free and informed, enquiries into the reasonableness or otherwise of a fear entertained became ancillary. Considerations of the nature, gravity and legitimacy of the pressure applied and the purposes for which it was made became similarly obsolete. The test in \textit{N. v. K.} looks not to the nature or gravity or indeed the propriety of the causative factor, but rather directly to the presence or absence of an essential element, namely consent. In short, one looks primarily to effect and only secondarily, if at all, to cause.


A More Subjective Approach. To discern the first tentative signs of change however we must go back to 1973, to the decision of Murnaghan J. in *B. v. D.*\(^{275}\). There, the petitioner alleged that she had been forced into nuptials with the respondent, an domineering and mentally arrogant man “who wouldn’t take no for an answer”. Notwithstanding vain attempts to extricate herself from this patently abusive relationship “she found herself in a groove from which she was constitutionally unable to extract herself”. The Respondent’s exercise of influence had the cumulative effect of propelling her to marry him against her wishes. Admittedly, Murnaghan J.’s decision was measured and cautious. He was “not without misgivings” in declaring the marriage in question null and void, and stressed how it was “imperative to establish what is alleged by strict and thoroughly satisfactory proof”. Indeed, taking account of the petitioner’s maturity and relatively high social standing, he considered that it was “difficult to take the view but that she had consented”\(^{276}\)

Despite this circumspection, Murnaghan J. was willing to base his decision on the presence of a genuine fear causative of marriage without considering the reasonableness of its entertainment. He granted the annulment on the ground that under the circumstances she had not actually consented. In this he revives the spirit of the seemingly neglected dictum of Butt J. in *Scott v. Sebright* cited above. Thus, although the petitioner in *B. v. D.* was noted “not to be a woman of strong personality” the marriage was nonetheless deemed to be void.

In a similar vein, O’Hanlon J. in *M.K. v. F. McC.*\(^{277}\) referred to the youth, “sensitivity and timidity” of an unmarried pregnant petitioner in judging the effect of a parental ultimatum to “marry or leave home” accompanied by “harrowing scenes” which had actually propelled the parties into marriage.

\(^{276}\) At the time she was aged 28 and was employed as a primary school teacher.
It was Griffin J., however, who arguably copperfastened this trend in *N. v. K.*\(^ {278}\) In line with the effect-centred test posited in that case, the learned judge noted that “in considering the effect of pressure on the will of a petitioner, and whether such pressure vitiates the necessary consent, a subjective test must be applied”.\(^ {279}\) The Supreme Court regarded the shy and inexperienced petitioner’s peculiar dependence upon her parents similarly pertinent. Though doubtless in both cases more mature offspring would have realised such *ultimata* as were delivered would probably not have been acted upon once matters had ‘cooled down’. “The test”, Griffin J. continued, “is not whether the reasonable person would have succumbed to the pressure, but whether the pressure alleged was such as to overbear the will\(^ {280}\) of the particular pressure”.

A similar approach seems to have been adopted in England. In *Hirani v. Hirani*\(^ {281}\) the Court of Appeal trumped for a subjective test of duress, replacing the *Szechter* criteria with the simple question: “Is the threat or pressure such as to overbear the will of the individual petitioner so as to destroy the reality of consent”. It may be the case, however, as seen in *O’S v. W.*\(^ {282}\) that a determination that a fear could not reasonably have been held will be instrumental in determining whether it actually operated on the mind of the petitioner.

**Types of Pressure Recognised.** The new approach has also deflected attention from the type and quality of pressure imposed. As a result, the nature and gravity of the fear necessary to undermine the implication of a free consent have changed. In *Hirani v. Hirani*\(^ {283}\) the English Court of Appeal held that a threat to life, limb or liberty was not essential to found a claim of duress provided that the pressure caused was in fact

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\(^ {278}\) [1986] I.L.R.M. 75 at p. 90.

\(^ {279}\) *Ibid.*

\(^ {280}\) On the inappropriate use of such terminology see above, Chapter Three at p. 165ff.

\(^ {281}\) (1983) 4 F.L.R. 232. See also Barton, “Bound by law not love”, *The Times*, June 15, 1999 at p. 43.

\(^ {282}\) Unreported, High Court, Costello J., July 25, 1989.

causative. The Scottish Courts have made similar moves as have the courts in Australia.

In this jurisdiction, the picture is broadly similar. In B. v. D. itself there were some tentative signals of change in this regard. in that case, one finds no explicit threat of violence, certainly no strictly imminent danger of such consequences, as stipulated in Szechter. It might be suggested that threats of violence were, however, implicit in the respondent’s menacing behaviour. Be that as it may, subsequent Irish decisions leave us in no doubt that the requirement of physical danger has been superseded.

Karminski J. in Szechter v. Szechter had promulgated the view that it was “insufficient to invalidate an otherwise good marriage that a party has entered into it in order to escape a disagreeable situation, for example, penury or social degradation”. But are these not the very considerations that prevailed upon the petitioner in W. v. C. to marry? In that case, the latter had become pregnant as a result of an incident of forced intercourse by the respondent, an abusive and forceful man. Her parents were insistent that she marry as was her employer, a school principal, who warned her that she would be sacked if she did not do so. In such circumstances it was evident that she married “in order to resume her profession and place in society”. Of course the petitioner could hardly be regarded as responsible for her predicament. Nevertheless where a petitioner is responsible for a pregnancy (in the sense of it being the result of intercourse consensually entered into,) this fact nevertheless will not debar the latter from relief.

In M.K. v. F. McC. fear of ejection from the family home by irate and hysterical parents, and the untoward financial and social consequences that would ensue saw

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288 Ibid. at p. 699.
“an unwilling [and pregnant] bride and a resentful husband dragged to the altar”. In *D.B. v. O'R.*\(^{290}\) the petitioner married because she was “thinking of [her] child and of getting a home...I suppose I would have chosen what I considered what was in her best interests at the time”.

Even emotional factors may be considered sufficient to negate the implication of free consent. In *O'R. v. B.*\(^{291}\) Kinlen J. granted an annulment on the ground *inter alia* that “the petitioner entered into marriage under duress displayed by the distress of the respondent whenever he tried to break off the engagement”. This was despite the advice of a priest that he not marry and the active disapproval of his mother. Both parties, the evidence showed, were emotional unstable and on the two occasions when the respondent had attempted to end their relationship the respondent had broke down in tears, prompting him to reconsider. It would seem from the evidence that his determination to marry was characterised more by indecision than patent unwillingness yet the judge - all these factors having been taken into account - was still willing to grant an annulment on this ground.

**Duress of Circumstances.** Indeed it seems from *D.B. v. O'R.*\(^{292}\) that the Courts may now go so far as to countenance declaring a marriage null and void because it was contracted under ‘duress of circumstances’.\(^{293}\) This is despite Nozick’s assertion\(^{294}\)

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\(^{293}\) A similar approach is taken in the context of adoption. See *S. v. Eastern Health Board*, unreported, High Court, Finlay P., February 10, 1979, at p.18. The required consents must be obtained in circumstances where “neither the advice of persons engaged in the transaction nor the surrounding circumstances deprived the mother of the capacity to make a fully informed free decision”. See also *G. v. An Bord Uchtala* [1980] I.R. 32.

that pressure should only be recognised as coercive where it arises as a result of interpersonal threats.\textsuperscript{295} In the High Court in \textit{D.B. v. O’R.}, the petitioner was described as “a woman of strong character”\textsuperscript{296} who had been, in one witness’s opinion “an independent child with a mind of her own”.\textsuperscript{297} She had, however, been placed in an orphanage by her parents and lived with them only sporadically during her teenage years. Then aged fifteen, she discovered she was pregnant by the respondent. Her annoyed parents returned her to the care of the orphanage, passing responsibility for their daughter’s predicament to the Sister in charge, Sr. L.

Sr. L. contacted the respondent. He agreed, on the latter’s request, to marry the petitioner. Sr. L. subsequently made arrangements for the marriage. Notwithstanding the reverend sister’s role in this saga it was accepted both in the High Court and on appeal, that she had not coerced the petitioner. It was noted, in particular, that had the petitioner informed Sr. L. that she did not wish to get married, the latter would have accepted this. Carroll J. thus refused the petition at first instance, noting that the petitioner’s “mind was not overborne by Sr. L. or any other person...Circumstances led to her marriage but I am satisfied she intended to marry and her consent was a true consent”.\textsuperscript{298}

For Hederman J. on appeal, by contrast, the evidence could only point to one conclusion - that at the time of the marriage the petitioner was not in a position to give her full, free consent. The learned Supreme Court judge agreed that there had been no interpersonal pressure. But this latter fact, in Hederman J.’s opinion, was

\footnotesize{need for caution in drawing comparisons between Criminal law and private law concepts of duress see Chapter 1 above at p. 27.}


\textsuperscript{297} \textit{Ibid.}

\textsuperscript{298} \textit{Ibid.}
“not sufficient to determine the issue of consent in the instant case”. He turned to look at the circumstances under which the decision was made - the petitioner was genuinely shocked and confused on discovering her pregnancy. Though headstrong, she was peculiarly reliant on and obedient to Sr. L. (she was “like a mother to her”). At that time marriage was just a word to her. She wanted to do the best thing by her baby. Nobody in particular had put pressure on her to marry but the cumulative effect of all of these factors undermined, in the judges’ opinion, her ability to give a full, free and informed consent to marriage.

This new perspective arguably accords with some older authority, in particular the cases that concerned marriages contracted with a view to escaping oppressive regimes. It is at least feasible to suggest that the likes of Szechter and H. (D.) v. H. concerned not inter-personal but circumstantial pressure. The pressure imposed in those cases was the product not primarily of personal action but ultimately of a political regime intent on crushing dissent.

This new perspective perhaps offers the prospect of alternative responses to cases decided by reference to standard principles of nullity. In U.F. v. J.C. and F. v. F. for instance, marriages were annulled on the ground that the defendant in each case had, unknown to the plaintiff, a homosexual orientation. In U.F. v. J.C. the judicial analysis proceeded by reference first and foremost to the apparent inability of the defendants to form and sustain a normal and caring marital relationship. In F. v. F. the prime determinant was the presence of deceit - the plaintiff had married under the mistaken belief that the defendant was heterosexual. In each case it is the plaintiff

300 Ibid. at p. 169.
301 Indeed it expressly overrules Carroll J.’s adoption, in the same case, of the Nozickian distinction between interpersonal and circumstantial pressures. According to Carroll J. pressure sufficient to vitiate a marriage “must be pressure from a person and not pressure of events such as unwanted pregnancy or fear of being poor of having nowhere to live, or of being unable to cope on one’s own...[it must] come from a person”. Cited by Hederman J., [1991] I.L.R.M. 160 at p. 169.
302 This is not to suggest that the servants of the regime, the persons who did in fact incarcerate these persons are free from blame.
who is depicted as the victim. The defendant by contrast is depicted as deceitful or psychologically disturbed. Could it not as feasibly have been argued, however, that the defendant, in marrying, was himself acting under a species of duress of circumstances? The present author has argued elsewhere that if pushed to its logical conclusion, the decision in *D.B. v. O’R.* would allow the respondents in both cases to argue that they were compelled to marry by prevailing social pressures and attitudes. Each party it seems sought to escape the then widespread social stigma that attached to homosexuality by marrying. There is, arguably, no material difference between the social rules and expectations in *D.B. v. O’R.* that dictated the course taken by the plaintiff and those that drove the defendants in the previous two cases to conceal and suppress their true sexuality.

Does every type of social or circumstantial pressure thus vitiate a consent? In the context of adoption circumstantial pressure is also recognised as having the potential to undermine consent. Nevertheless, some judges have proved quite circumspect about such pressures, noting the obvious fact that the circumstances surrounding adoption tend, almost by definition, to involve some element of compulsion. As

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309 It is worth recalling that at the time of both judgments, male homosexual sexual activity was still proscribed by law: *Offences Against the Person Act, 1861*, sections 61-62 and *Criminal Law (Amendment) Act, 1885*, section 11. See the discussion in Ryan, “‘Queering’ the Criminal Law: Some thoughts on the aftermath of homosexual decriminalisation”, [1997] 1 I.C.L.J. 38.

310 See *G. v. An Bord Uchtála* [1980] I.R. 32, S. v. *An Bord Uchtála*, unreported, High Court, Finlay P., February 10, 1979. *Although see Laffoy J. in D.G. and M.G. v. An Bord Uchtála* [1996] I.F.L.R. 263 (H.C.) at p.282 who seems to question this perspective; “The true test”, she observes, “is whether, in the circumstances which prevail at the time she makes her decision, that decision reflects her will or the will of somebody else”, a test that seems to import a necessary requirement of interpersonal pressure.
McWilliam J. noted in *McF. v. G.*\(^{309}\) "in most cases [of adoption] there is stress and anxiety". Thus:

> "the fact that [the mother] might have made a different decision had she come from a differently orientated family, been wealthy or proposing to marry the father of the child does not seem to me to alter the position that, under the circumstances in which she found herself, she gave her consent freely appreciating what she was doing".\(^{310}\)

The decision of Flood J. in *A.C. v. St. Patrick’s Guild Adoption Society*\(^{311}\) is also instructive in this regard. Personal circumstances and opportunities, he observes, play an inevitable part in every decision in one’s life. The simple fact that different circumstances might have yielded a different decision he continues, is not sufficient to render a consent invalid. "We live in a real world where choices have to be made".\(^{312}\) While the decision to marry is usually made in happier circumstances, it is nonetheless the product, to a greater or lesser degree, of circumstances, of constrained choice. By recognising circumstantial pressure the Irish judiciary may have opened a Pandora’s box of marriage litigation.

**Compliance and Consent.** *N. v. K.* underlines another rather more subtle change in the law which mirrors certain aspects of the doctrine of undue influence analysed above in Chapter Four. At that juncture it was noted that undue influence is rarely accompanied by the kind of fear that propels a party under duress to contract. Such is the subtlety of the effects of undue influence that the victim thereof rarely protests or complains or objects at the time of contacting. The victim, in short, labouring under the influence of another, adopts and acts on the judgment of that other, in the process abdicating his own power of independent judgment.


\(^{311}\) [1996] I.F.L.R. 309 (H.C.)
In *N. v. K.* and in *D.B. v. O’R.* one encounters a similar air of compliance. The hysterical scenes observed in *M.K. v. McC.* are notably absent. In the former cases the lion’s share of the evidence seems to indicate that the petitioner was happy and willing to comply with the judgment of their elders. The petitioner in *N. v. K.* for instance, *per* Carroll J. in the High Court, \(^\text{313}\) “acquiesced in her parents’ wishes from the start...she thought they knew what was best”. \(^\text{314}\) Effectively her father decided for her, and she went along with his plans. Certainly she ceded her powers of determination to her parents, but she seemed willing to do so. She was happy, under the circumstances, to let someone else make the decisions. Yet despite Henchy J.’s protestations that “mere compliance with the wishes of another is not duress”\(^\text{315}\) the majority granted the annulment. The petitioner in *D.B. v. O’R.*\(^\text{316}\) seemed similarly content to let Sr. L. make the arrangements for her marriage. She simply “acquiesced in Sr. L’s wishes from the start”\(^\text{317}\).

Thus, in summary, it seems that the factor resulting in an absence of consent need not emanate from a particular person. Protest is not required,\(^\text{318}\) nor is the presence of ‘fear’ in the classical sense. The ambit of marital invalidity is no longer confined to marriages resulting from threats to life, limb or liberty. In addition it seems, and this is confirmed below, that the criterion of impropriety has disappeared from the contractual realm. If this is so to what extent can an external causative factor ever be present in a valid marital consent?

**Legitimacy.** From the judgments cited above, one observes that the criterion of danger to life, limb and liberty is no longer adhered to. However much one might criticise the former state of affairs, it had the clear benefit of providing an objective set of criteria against which the legitimacy of various threats and other forms of


\(^{313}\) While the Supreme Court overruled Carroll J.’s decision on appeal, they accepted her finding of facts.

\(^{314}\) *[1986] I.L.R.M. 75* at p. 79

\(^{315}\) *Ibid.* at p. 86.


pressure could be judged. With the abandonment of this benchmark, considerable uncertainty arises as to precisely what criteria should be applied. Indeed in Scotland, where the Courts have expressly stipulated that pressure, to give rise to a finding of duress, must be illegitimate in nature, distinctions based on ill-defined criteria of propriety have given rise to considerable uncertainty. With the abandonment of the former restrictions regarding the type of pressure that is sufficient to found duress, the Courts lack any objective criterion upon which a determination of legitimacy can be made. In *Mahmood v. Mahmood* for instance Lord Sutherland, in a move reminiscent of Lord Scarman’s distinction between normal commercial pressure and economic duress, distinguishes normal or legitimate parental pressure from true duress. However, as Bradney observes in the context of arranged marriages, “the question of what constitutes illegitimate pressure is even more uncertain than it is in the English law of contract”.

The rather blunt solution of the Irish Courts seems, at first glance, to have avoided such problems. Effectively Irish family law no longer recognises the propriety or otherwise of the pressure imposed, by whatever standard it is determined, to be relevant to a determination of the issue. The sole criterion after all is the presence or absence of consent as defined. The Supreme Court in *N. v. K.* suggest strongly that considerations of the legitimacy of behaviour deflect attention from the primary determination of the presence or otherwise of a full, free and informed consent. In particular Finlay C.J. commented that “if caused to such an extent by external pressure or influence whether falsely or honestly applied as to lose the character of a full free act of that person’s will…” a marriage will be void. Indeed in the same case McCarthy J. went so far as to suggest that “[t]here is no logic in excusing a fear because it is justly imposed. However *bona fide* or well-meaning pressure is, how can it be said that a prospective partner is exercising free will? Analyses of duress, fraud,

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322 [1986] I.L.R.M. 75 at p. 82.
etc....lose sight of the essential question: was there voluntary consent? To the extent that there was any personal influence at all in D.B. v. O'R., there was no suggestion that either Sr. L. or the respondent had conducted themselves in anything but an exemplary fashion. While some of these dicta refer to bona fides rather than legitimacy per se and - as noted above in the context of contractual duress - a threat that is made bona fide is not automatically legitimate. It is implicit however in the judgments of the Courts, and explicit in the first sentence quoted from McCarthy J., that the supposed legitimacy of pressure imposed is no bar to a conclusion that there was an absence of free consent.

The reasoning of the Supreme Court is at least superficially attractive. In apparently abandoning the test of legitimacy, the Supreme Court have in one sense side-stepped the unhappy task of laying down a set of criteria which, unless firmly mapped to concepts of legal wrong, effectively involve the judiciary in making value judgments. Some English and Scottish judges have attempted to add an element of objectivity by referring to the 'normalcy' or otherwise of certain forms of pressure as opposed to the implicit abnormality of the pressure which is deemed to amount to duress. "Such statements," Bradney observes, "imply the existence of a consistent social norm that is not the case in a pluralistic society". These pronouncements, he continues, "conceal the reality of [the court's] decision," namely that a "particular social standard" is being promulgated, and "enshrined in law" without, it might be added the assent of Parliament.

In reality however, despite the apparent abandonment of the legitimacy test, rather similar points can be made about the decision in N. v. K.. By focusing on consent the Supreme Court certainly give the impression that they are proceeding on principle alone and without reference to the propriety of conduct; the test is apparently neutral.

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323 Ibid. at p. 93. See also the judgment of Watson SJ of the Family Court of Australia in In the Marriage of S. and S. (1980) FLC 90-820 where he observes (at 75, 179) that a marriage will be void for lack of consent "howsoever the oppression arises and irrespective of the motivation or propriety of any person solely or partially responsible for the oppression".

324 The Court having concluded that there was none.
in moral terms. It should not, however, be so readily assumed that their decision is thereby rendered value free. The implicit rationale is unmistakably individualist; so serious are the consequences of marriage for the individual parties that they alone must decide their fate unfettered by the influence, however proper, of others. Granted, that may not have been the intention but it certainly is the result. The decision on the facts suggests that parental pressure or other influences emanating from a third party to the marriage will, if causative in the required sense, give rise to the invalidity of the resulting marriage. Indeed the decision leaves in some doubt the extent to which a parent may duly advise a son or daughter in such circumstances. It is clearly unrealistic to expect that parents be required to be impartial: nevertheless on one reading of the decision it might be concluded that the most any third party may do is give non-directive advice.  

Dominating this individualist discourse is the 'private' nature of marriage. The Courts certainly still allude to the seriousness and gravity of marriage but in terms that are quite different from the pronouncements of earlier judges. The consequences, for instance, to which Finlay C.J. and Griffin J. point in *N. v. K.* are clearly personal and not public in nature. Marriage as an institution of *public* import is ignored. Indeed the adoption of an effect-centred approach to familial duress - one focussing on the effect on the consent of the parties - arguably represents the triumph of abstract individualism in the legal realm. Judicial analysis is directed primarily to the individual and his or her state of mind. Context is of evidential interest only.

The irony is quite breath-taking. In contract law the rise to prominence of the test of legitimacy has largely, (though not comprehensively) usurped the detached and effectively unworkable test of 'overborne will' as the determinant of duress. The drawback, outlined above, was that the concept of legitimacy, by being yoked to concepts of legal propriety, tended to reflect the discrete paradigms of contracting

and ignore the relational aspects thereof. Virtually the reverse scenario can be seen with the concept of coercion in marriage law but with strangely similar results. The former concept of legitimacy in this realm did reflect largely relational, contextual concerns. It was not for instance improper to submit to non-violent parental pressure\(^{327}\) or to submit in the face of a pregnancy for which one was responsible\(^{328}\). The irony is that at the very time that the legitimacy test has settled as a criterion of duress in contract law, it has been abandoned in the realm of Irish family law. In its place is a solely effect-centred test, arguably the triumph of liberal thinking in the area of family law. Whatever the ultimate purpose of the Irish judiciary in diluting the former rigour of the law,\(^{329}\) the result is a test that seems to view any species of external pressure (cultural, inter-personal or circumstantial) as a millstone rather than an asset.

Yet civil marriage is a quintessentially public act. It exists as a recognisable institution partly by virtue of the law. It is an institution that is socially perceived as embodying the pinnacle of intimate interaction, the most profound and lasting of intimate relationships. It is, furthermore, established in the collective conscience as a natural and normal, even expected, life event. In marriage, the intimate relationship is publicly recognised and validated as a union worthy of recognition in law and in society, so much so that the State bestows the family based on marriage with benefits and protections denied to its non-marital counterpart. It is by no means essential to a dignified and fruitful human existence but is nonetheless deemed so crucial that the Constitution implicitly guarantees the right and freedom to marry.\(^{330}\)

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\(^{326}\) Of the type required, for instance, by the Regulation of Information Act, 1995 where information on abortion given under the Act must not seek to promote this particular intervention, and must be accompanied by full information on the alternatives available.


\(^{328}\) The marriages in Griffith, op. cit., and Buckland, op. cit., were only rendered void by virtue of the fact that neither petitioner was responsible for the pregnancies that precipitated these marriages.

\(^{329}\) Was this development, perhaps, ultimately driven by a desire to circumvent the former absence of a divorce regime?

\(^{330}\) Per Kenny J. (obiter) in Ryan v. A.G. [1965] I.R. 294 at p. 313. See also Donovan v. Minister for Justice (1951) 85 I.L.T.R. 134. Kingsmill Moore J. noted that there was nothing unconstitutional in a provision requiring the approval of the Garda Commissioner where gardai wish to marry. Quaere the constitutional status of the now abolished requirement of parental consent when a party to a marriage
These perceptions about marriage are propagated in the social realm by a process of 'socially learning,' imbibed in socialisation and social interactive processes. Children are taught the 'script' from an early age. The immediate pressures and influences that often lead to a marriage are not merely buttressed but ultimately to a large part the product of widely-held social understandings. These are often, in the process of socialisation, internalised by the actor herself rendering it nigh impossible to distinguish external from internal influence. Behaviour that is at first socially learned is gradually internalised to the point of becoming 'quasi-instinctive'.

Thus we see how even an apparently free decision to marry is shaped by the most subtle yet pervading of factors. As Panken J. notes in *Lester v. Lester:*

“Marriage presumably is a relation into which two individuals enter...freely and voluntarily. Environmental influences...[i.e.]... education, conventions at a given time and in a given place and economic status of the parties sometimes control the character of the freedom and voluntary attributes of the parties entering into the marriage relationship. To that extent the freedom exercised in a marriage contract is limited”.

To some degree at least all marriages are contracted under colour of influence whether emanating from a particular individual or from the broader base of tenets and social understandings held in common by a particular socio-cultural group. In a similar vein, Professor Binchy asks whether the decision to marry can ever be regarded as fully free and whether questions of consent are truly "legal questions at all? Do they not raise a more fundamental philosophical issue? Are all our actions (including the decision to marry) causally explained by psychological, economic and

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is under the age of 21. See further the commentary in Kelly, Hogan and Whyte, *The Irish Constitution*, 3rd ed. (Dublin: Butterworth's, 1994) at p. 996 citing proceedings instigated by a male and female prisoner in separate prisons asserting their right to marry each other while incarcerated. The proceedings were discontinued when the State agreed to allow them to marry (*Irish Times, January 25, 1978*).


social influences?” In McF. v. G\textsuperscript{334} McWilliam J. had to consider the validity of an adoption order, in particular, whether the proper consent had been given therefor by the natural mother of the child. While acknowledging that the consent, where required, must be “full, free and informed”\textsuperscript{335} the learned judge added a note of circumspection. “If absolute rules as to fear, stress, anxiety or poverty were to be applied there could hardly be a case in which one or other of them would not be present”. There is, in other words, an element of coercion or compulsion in most every decision.

While the social factors propelling parties to marry are admittedly generally less blatant, they may be no less effective. People marry for any number of reasons and as Barrington J. points out in R.S.J. v. J.S.J.\textsuperscript{336} “…their motives have not always been of the highest. The motive for marriage may have been policy, convenience or self-interest …” The defendant in B. v. D., for instance, married, according to the evidence, in order to avail of the higher salary increments paid to married teachers.\textsuperscript{337}

Only the most ritualistic can be expected to marry for its own sake. Most people marry with certain wider purposes in mind, some more dubious than others. The motivating factors are many and complex. Some seek a greater sense of psychological security that, it is felt, comes with marriage. A craving for certainty in an uncertain world gives rise to the desire for commitment and permanence.\textsuperscript{338} The strong symbolic resonance of the institution of marriage (once legally a life-long commitment)\textsuperscript{339} conveys a sense of stability and entitlement.


\textsuperscript{336} [1982] I.L.R.M. 263 at p. 264.

\textsuperscript{337} See also Kelly v. Ireland [1996] 3 I.R. 537 where the allegation of an ulterior purpose (viz. to achieve favourable immigration status) was alleged but not made out.

\textsuperscript{338} See the comments of the Commission of the Family, Strengthening Families for Life, (Dublin: Stationery Office, 1998) at p. 183.

\textsuperscript{339} Indeed the fear that marriage would lose this resonance if not longer necessarily a life-long institution, was one of the factors cited by some in opposition to the referendum on the 15\textsuperscript{th}
For those anxious to identify with respectable society, the social status that attaches to marriage is a very important motivating characteristic. Becker for instance, argues that the self is constructed in social interaction with others. The typical individual assesses his conduct, prospective and past, in terms of the reaction it will elicit from those whose opinions he values, or at least fears. The extent to which one has a “stake in conformity” that is a vested interest in being seen to comply with conventional norms, will in turn depend on the number of contingencies riding on one’s conformity. These contingencies might include the maintenance of employment, the cultivation of friendships or the pleasing of parents. Marriage represents an identification with, and symbolic reaffirmation of, prevailing social understandings and moral norms. As Herma Hill Kay comments, (in the context of same-sex marriage,) “Even while we resist the regimentation that marriage entails we accept it as a sort of a ‘gold standard’ that signifies the desire for deep and permanent commitment. To be barred from marriage to one’s chosen partner is to see one’s individual relationship trivialised, one’s personal commitment deemed unworthy of public recognition”.

An added attraction might be the financial and tax advantages that arise from marriage. These advantages accrue both to the individual parties, who owe obligations (e.g. of maintenance,) to each other and to the new marital family itself as a unit; for instance in the existence of preferential tax treatment. The influence of these criteria should not be overstated. In fact it is surprising how resilient marriage has proved even in the face of distinct tax disadvantages, as was the case in Ireland.


See also Cohen, Deviance and Control, (Prentice-Hall) at pp. 86-88.


The parties to a marriage for instance can share or otherwise transfer unused income tax allowances and benefits to each other and are not liable for gift or inheritance tax on items received from each other.

Foote, Levy and Sander recount the epilogue to the decision of the Minnesota Supreme Court in Baker v. Nelson, 291 Minn. 301, 291 N.W.2d. 185 (1971), a saga that underlines how principle can sometimes prevail over mammon. (Foote Levy and Sander, Cases and Materials on Family Law, (Boston and Toronto: Little Brown and Co., 1985)). Messrs. Baker and McConnell, both men, had,
prior to 1982. The extent, at any rate, to which many fiscal advantages will be enjoyed largely depends on the degree to which a married couple already enjoy a healthy financial status. As Ruth Colker points out “...for poor people marriage may offer few economic advantages. It should not surprise us that marriage is a less popular institution in poor communities than in middle-class communities”.

The presence of improper or ulterior purposes can never, of course, be discounted. The best example is that of the so-called “green card” marriage, a marriage contracted in order to acquire access to a visa for entry to a particular State. Another good example is the “mutually beneficial arrangement” sometimes adopted by persons who are gay or lesbian, (sometimes called “lavender marriages,”) whereby a marriage is

with some clever machinations, obtained a licence to marry from the State. Having gone through a church ceremony of marriage, they then applied to the U.S. Internal Revenue Service to be assessed jointly as a married couple. The IRS refused to assess them jointly, returning to them a US$150 surplus of tax that would have been payable had it accepted their assertion. Despite this windfall, the couple continued to assert their marital status. The spectre of the IRS having to force persons to accept money back is surely not often encountered!

Prior to the judgment in Murphy v. A.G. [1982] I.R. 241 married couples suffered a distinct tax penalty related directly to their marital status. Probably on the assumption that only the husband received an income, tax allowances and benefits were allocated to each married couple as if the married couple were one single person. By contrast, two single persons living together would receive separate allowances and benefits. While this was struck down by the Supreme Court as an unconstitutional attack on the institution of marriage, the Court did note that there was little evidence that this ‘tax penalty’ had in fact dissuaded large sectors of the population from marrying.


And indeed judicial separation and divorce - a 1995 study showed how the facility of a ‘barring order’ (see Domestic Violence Act, 1996 and formerly the Family Law (Protection of Spouses and Children Act, 1981), is being used by many separated persons in lower-income groups as a substitute for a formal decree of separation. Fahey & Lyons, Marital Breakdown and Family Law in Ireland, (Oak Tree Press, 1995) at p. 122. Fahey and Lyons thus allude to a two-tier family law system where on marital breakdown the economically comfortable proceed for judicial separation or divorce, and the economically disadvantaged rely on the largely inappropriate facility of a barring order. See also the Law Reform Commission, Report on Family Courts, LRC-52-1996 at p. 5ff. and Coulter, “District Court orders outnumber separations”, Irish Times, October 10, 1995 who notes that “[m]ore than twice as many cases of marital conflict end in barring or maintenance orders in the District Courts as end in legal separation...District Court actions are the recourse of the poor, while the better-off are more likely to seek legal separation, the study found”.


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contracted perhaps to deflect suspicion on the part of parents and employers. Some may marry to escape a disagreeable situation, as in the line of cases involving escape from oppressive regimes cited above. In *R. (W.) v. W.* the petitioner cited a similar (though less dramatic) motivation to escape “what she considered to be an intolerable home and family situation”.

In short, even in the western world marriage is not as freely selected a union as the rhetoric of liberalism suggests. As Eshleman observes ‘total free choice’ in the selection of a mate is “so rare that to discuss it would simply be conjecture”. Considerations such as “money, power, social rank, occupation, education, age, incest, family ties” are indeed instrumental in a decision, although arguably unadulterated romance may sometimes beats the odds.

All of these various reasons may interface in a more or less complex fashion in a decision to marry. Each reason “weights” the options available to a greater or lesser degree. How then is it decided which reasons will found a petition for nullity on the ground of “lack of full, free and informed consent” and which not? If, as suggested, every marriage and contract is entered into subject to a variety of pressures and causal factors, how can one decide which factors can safely be ignored and which should be treated as factors vitiating a “full, free and informed consent?” The strategy adopted by the Supreme Court arguably leaves the law of marriage bereft of any logical and coherent distinguishing criterion in this regard.

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348 These arrangements need not necessarily be bereft of any intrinsic value to the parties thereto - See Nigel Nicolson in *Portrait of a Marriage*, (London: Phoenix, 1996) an account of the lives of his parents Vita Sackville-West and Harold Nicolson.


350 Unreported, High Court, Finlay P., February 1, 1980.


352 See the cases on misrepresentation. Factors such as wealth (*C. v. C.* [1942] N.Z.L.R. 356), family connections (*Allardycie v. Mitchell* (1869) 6 W.W. & a'B. 45) and age do in fact matter to some spouses. In *P.M. v. T.R.* (unreported, High Court, Lavan J., February 18, 1998) for instance a petitioner asserted that he would not have married the respondent had he not been deceived as to the
The Decline of Marriage and the Family - a Disempowering Phenomenon. The irony of this liberalising tendency is that it comes at a time when social pressure to marry is in gradual but steady decline.\textsuperscript{354} From the early 1970s onwards, the marriage rate in the Republic of Ireland has dropped steadily, from 7 per 1000 of the population marrying \textit{per annum} in 1970 to 4.5 in 1998.\textsuperscript{355} The European average marriage rate has fallen from 8 per 1000 in 1960 to just over 5 in 1999.\textsuperscript{355} By contrast the proportion of births outside marriage in Ireland as a percentage of total live births \textit{per annum} rose from 6.8\%\textsuperscript{356} in 1983 to 28.3\% in 1998, a 416\% increase over 15 years.\textsuperscript{357} The picture across Europe is largely similar (although there are significant internal variations).\textsuperscript{358} Eurostat reports that on average one in every four babies born in the EU in 1999 was born outside marriage, up from 5\% in 1960 and 10\% in 1980. In Iceland the figure was close to two-thirds of all births in 1998.\textsuperscript{359} Initially this decline simply represented the tailing off of the booming post-war marriage rate. It can, however, no longer be maintained that the figures are merely levelling out. While there are some signs of occasional revival,\textsuperscript{360} and as yet "no permanent widescale rejection of marriage",\textsuperscript{361} the conclusion that marriage is in decline is difficult to avoid. This in turn is a product of the transformation in the social latter's age. In Singh \textit{v.} Singh the petitioner was induced to marry by (apparently erroneous) representations as to the respondent's good looks and intelligence.\textsuperscript{355} Though the ceremony of marriage and the rituals that attend it are still the subject of periodic fads: see French, "Icing on the Cake?" \textit{The Guardian,} (The Week), March 21, 1998 at p.1: "Everybody's doing it - even if it ends in tears and alimony". Adherence to the ritual and pomp of marriage should not, however, be mistaken for serious commitment to the \textit{institution} of marriage.\textsuperscript{354} \textit{Statistical Bulletin,} (Dublin: Central Statistics Office, 1971-2000). Latest figure from \textit{Statistical Bulletin,} Vol. LXXV, No. 1, March 2000, Pn. 8306, at p. 269.\textsuperscript{355} See also the data and commentary in "The Death of Marriage", \textit{Newsweek,} January 20, 1997.\textsuperscript{355} Was this the true figure for births to Irish women? It is not unlikely that at least some women were choosing to avoid the stigma attached to non-marital pregnancy by moving to Britain in the final months of their pregnancies.\textsuperscript{357} \textit{Statistical Bulletin,} Vol. LXXV, No. 1, March 2000, Pn. 8306, (Dublin: Central Statistics Office, 2000) at p. 270. See also "Single parent numbers grow", \textit{Irish Times,} February 18, 1999. The average for the first three quarters of 1999 is even higher at 30.7\%.\textsuperscript{356} The figures tend to be lower in southern Europe, and higher in northern Europe. In Greece the figure was 3.3\% in 1999, in Cyprus only 1.4\%. By contrast over one in every two births in Denmark, Norway and Sweden is extra-marital.\textsuperscript{358} Eurostat News Release No. 60/98, "One in four EU babies born outside marriage", August 4, 1998, \textit{http://europa.eu.int/comm/eurostat/Public/datashop/} \textsuperscript{360} In Denmark for instance the marriage rate has risen from 5.2/1000 in 1980 to 6.5/1000 in 1997.
understanding of marriage reflecting, in particular, greater tolerance of non-marital relationships and non-marital pregnancy.\textsuperscript{362} Ironically at the very time that the structural pressures noted above are being recognised as possibly vitiatory of consent, these very pressures are being swept away.\textsuperscript{363} This, indeed, is reflected in the changing attitudes of the judges themselves. Whereas older authority such Griffith or Scott \textit{v. Sebright} seem genuinely infused with caution and gravity, modern Irish caselaw appears less solemn and formal. Protestations of a “public interest” in the stability and validity of marriages abound. Yet modern judges seem considerably less circumspect, less exacting, particularly in matters of proof. For example, the formerly strict requirement of thorough medical and psychiatric evidence of relative impotence seems to have been whittled away considerably. In \textit{S. v. S.}\textsuperscript{364} for instance, the Supreme Court accepted the unsupported testimony of the petitioner as proof of the respondent’s\textsuperscript{365} psychological impotence relative to her, in Duncan’s words “inferr[ing] the existence of a complex psychiatric condition from the uncorroborated testimony of a highly interested party”.\textsuperscript{366}

The factors contributing to this trend, it is suggested, are largely material in nature. Put simply, the family has to a large degree lost its significance as an economic unit. Dominian\textsuperscript{367} documents how the family in pre-industrial Europe, characterised by uniformity of function and lack of specialisation, held a virtual monopoly in the provision of goods and services needed by its members. Education and health, food


\textsuperscript{362} A linear historical analysis, suggesting a steady decline over hundreds of years is not well-founded. Freeman indicates that patterns of marriage and family cohabitation arrangements have simply returned to the model most preferred prior to 1753, the date of Lord Hardwicke’s Act. Freeman, “Marriage and Divorce in England”, (1996) 29 \textit{Fam. L.Q.} 549. At that time, marital status was less certain and more fluid. It was perfectly acceptable it seemed, not to mention quite common for persons to live outside wedlock.

\textsuperscript{363} Note the introduction in 1973 of an Unmarried Mother’s Allowance (now Lone Parent Allowance) and preferential local authority housing entitlements now in place.

\textsuperscript{364} [1976-77] I.L.R.M. 156.

\textsuperscript{365} Who was not present at the hearing of the petition.

\textsuperscript{366} Duncan, “Sex and the Fundamentals of Marriage”, [1980] \textit{D.U.L.J.} 29 at p. 31. See also the earlier case of \textit{E.M. v. S.M.} (1942) 77 I.L.T.R. 128, and \textit{A. O’H v. F.} [1986] I.L.R.M. 489. In both cases inability to consummate was recognised in the absence of a medical examination. In the latter case Barron J. suggested that where an otherwise affectionate husband failed to consummate the marriage, a presumption would arise that he was impotent, at least relative to his wife.
production and processing, clothing, care of infants, of the aged and infirm, were largely the responsibility of the family. With the dramatic technological and administrative innovations experienced during and after the industrial revolution, these functions were gradually ceded from the family to other institutions. The factory swiftly took the place of the family home as the main centre of production of goods, effectuating "a permanent separation of home and work" for many individual family members. This had the added consequence of decreasing the coherence and unity of the extended family. Factories needed to locate near to natural resources (such as water and coal,) and required a large mobile workforce to be at its disposal. Thus nuclear family units came to be displaced from their wider family base by migration to places of high employment. While there was a significant time lag between industrial reform and the growth of the modern administrative state, the latter gradually took over the former familial functions of education, social security and healthcare.

Glendon likewise suggests that the reasons for this decline are intimately bound up with changes over several centuries in economic conditions and in particular in standard patterns of wealth acquisition and maintenance. In this approach she mirrors the historical materialism espoused by Marxist thinkers. Glendon maps the demise in the legal and social underpinnings of the familial nexus to the corresponding growth in legal provisions safeguarding employment and social welfare. In former times, most wealth was wrapped up in realty, land the ownership of which was intimately bound up with the matter of familial relationships. Today, however, employment is arguably the prime determinant of an individual’s status and economic security. Employment, Glendon argues, is the ‘new property’, highly individualised and thus not easily transferable amongst family members. Unlike realty, the benefits

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368 See also the discussion of the work of MacIver in Fletcher, *The Family and Marriage in Britain*, at pp. 43-46. MacIver also charts the demise of the multi-functional family with the ceding of 6 key, (but described as ‘non-essential’) functions – recreational, health, economic, educational, religious, and governmental - to outside agencies, the remaining functions being primarily affective.
369 Dominian, *op. cit.*, at p.10.
and entitlements arising from employment attach mainly to the individual. Since the modern employee rarely has much investment besides these *expectation rights* and the equity in the family home, this nexus has assumed inordinate importance.

This trend parallels a corresponding dichotomy. In recognition of the growing economic significance of employment, the rules and understandings binding the employee to his job and the job to the employee have gradually been tightened, over the twentieth century in particular. Glendon notes a corresponding loosening of those linking the individual to the family and to marriage. The laws and social understandings concerning marriage and the family have been liberalised considerably over time. The legal and social bonds, thus, have been much attenuated allowing the emergence of what Glendon calls the ‘New Family’, a unit characterised by its fluidity and impermanence and by the interchangeability of its constituent members. Glendon asserts that this is possible because of the declining economic significance of the familial bond as marriage and the family have become a less important determinant of individual security.

Increased ‘freedom’ from family bonds has, in a somewhat circular manner, been prompted by and has facilitated and necessitated increased reliance upon employment and the State as forms of social security. The increased availability of State support, correspondingly, permits and indeed sometimes seems actively to encourage the weakening and sometimes the truncation of family units. The dangers of the isolation and alienation ensuing from (and eventually engendered by) this phenomenon are too obvious to be delineated in detail. From Aristotle to Rousseau to Marx, philosophers and sociologists have laid stress upon the social nature of the human person. The most profound and lasting of our attachments and interactions occur within the family and wider communities based on common understandings and experiences. If this is the case it may be said that the gradual disembodiment of the family (in the guise of securing individual freedom) is, in fact, a *disempowering phenomenon*.

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The case of Arranged Marriages

The requirement of 'free consent' posited in the Irish marital cases may have contributed to this trend. In particular it fails to accommodate certain minority cultural practices which, when put in context, could be said to be integral to the maintenance of certain valuable family living patterns. So far, the discussion has proceeded by reference to relatively isolated instances of coercion or compulsion to marry. The factors that give rise to the pressure are predominantly situational rather than structural e.g. pregnancy, mental illness, inter-personal threats of violence. This present segment, however, surveys the scenario where an external impetus to marry is not merely an isolated phenomenon but a socially mandated norm. Lord Penzance's assumption that marriage is a 'voluntary union' is after all largely culturally specific - in fact, his comments are expressly confined to "marriage in Christendom". It is by no means universally accepted that marriage need be the product of a free consent of the parties thereto. In Pakistan for instance it has only recently been accepted that a valid marriage may be contracted against the wishes of parents and even then with significant caveats.

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372 This segment deals partly with material from an unpublished paper entitled Choice in Context: The Case of Arranged Marriage presented and discussed by the present author at a postgraduate Seminar in Trinity College School of Law. The present author is grateful to the participants at that seminar for their helpful comments.


374 See Goodwin, "True love defeats a father's fiat", Guardian, March 11, 1997 and Boggan and Popham, "The arrangement" Independent, (Tuesday Review) July 21, 1998: "...the lengthy judgment of one of the affirming judges, Justice Khalil-ur-Rehman Ramday, was so hedged about with 'ifs and buts' that the message was seriously diluted". But not all Islamic states are the same. The Tunisian Law of Personal Status, 1956 stipulates that a marriage can only be arranged by the parties thereto themselves, a typically liberal attitude to marital mate-selection exhibited some 30 years before the Pakistani decision noted above. The reality of life in some Islamic countries is such, however, that notwithstanding liberal laws, those who disobey the will of their parents face serious difficulties. In fact, despite the judgment of the Pakistani Court cited above, Kanwar Ahsan, another husband in a similar situation, was shot and critically injured as a result of the 'free' marriage between himself and his wife, Riffat Afridi. See Galpin, "Fugitive lovers seek asylum" The Guardian, March 14, 1998.
Several of Britain’s most prominent cases on marital duress emanate from the Indian and Pakistani communities in Britain. This is no accident. A prominent feature of Sikh, Hindu and Muslim family life in the Indian sub-continent, even today, is the arranged marriage. For present purposes this may be defined as a marriage at least part of the initiative for which comes from a person other than one of the parties thereto. This will typically involve the parents of either or both prospective spouses. There is no necessarily inherent implication, however, that the parties thereto need enter into a matrimonial union unwillingly or unhappily. Indeed, some commentators make a careful distinction between ‘forced marriage’ and ‘arranged marriage’, noting that the latter should not entail marriage without free consent.

In Ireland, the cultural phenomenon of the arranged marriage is, with some notable exceptions, largely a thing of the past. Presently, the cultural norm is that

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376 The then British minister of state at the Home Office, Baroness Symons, argued in 1998 that while one has “a basic human right not to be forced into marriage...this mustn’t be confused with arranged marriages”. Boggan, Abram and Popham, “Huge rise in forced marriages”, The Independent, July 20, 1998, p. 1. In the same report, the deputy leader of Britain’s Muslim Parliament, Jahangir Mohammed acknowledged that “to force anyone into a marriage is un-Islamic”. Boggan and Popham’s subsequent feature, “The arrangement” in The Independent, (Tuesday Review) July 21, 1998 at p. 1 also underlines that “most arranged marriages are not unwanted, and are at least as successful as many marriages of choice”.

377 Though see C. v. C. an account of which can be found in the Irish Independent, October 19, 1991 at p.1. This was an unreported and apparently ex tempore judgment of Lynch J. There a marriage arranged by the father of the petitioner and her putative spouse, was declared null and void “because the wife did not give her full consent”. According to her solicitor, the petitioner married the defendant, a man ten years her elder, in 1976 pursuant to an agreement made between the latter and the petitioner’s father. Prior to the ceremony, the petitioner related her unwillingness to marry to the officiating priest, only to be told by him that it was “too late to call off the wedding”. Despite her expressed reluctance, she complied with her father’s wishes and went ahead with the marriage to avoid “crossing him”. In the face of repeated threats of violence from her putative spouse (on their separation the petitioner had to live with her brothers for safety from the respondent) she lodged a petition for a declaration of nullity. Despite a fifteen-year interval between the date of the marriage and the filing of the petition, the marriage was declared null and void.

378 For a depiction of the practice in Ireland in former times, see Peig Sayers, Peig, A Scéal Féin, Ni Mhainnin & Ó Murchú, (eds.) (An Daingean: An Sagart, 1998) at chapter 18, “Cleamhnais is Pósaadh”, pp. 130-135, and Séamus Ó Grianna, “Mánuis Ó Súileacháin”, in Ó Grianna, Cith is Dealán, 11ú eagraín, (Corcaigh: Cló Mercier, 1989) 35 at pp. 48-50. The latter story also exposes the economic interests affected by marriage, negotiations for the marriage of the central character almost being sundered by the issue of the number of sheep that would be given as dowry. Thus, in Ireland, “the idea
couples as a matter of course arrange their own marriages, with minimal involvement from third parties. To the extent that marriages were still arranged in the twentieth century, this tended to reflect a norm that applied only to particular situations, (a ‘situational norm’), most commonly where the female party to the marriage had become pregnant outside wedlock. The situation discussed herein, by contrast, largely centres on the arrangement of marriages as a structural or cultural norm that prevails in all cases and not simply where a particular situation has arisen. This category encompasses the situation, experienced by and large (though neither exclusively nor necessarily,) in pre-industrial societies where marriages are arranged as a matter of course by third parties. The normative values espoused by the particular socio-cultural group to which the protagonist belong promote such arrangements as being both proper and desirable and are often buttressed by religious tenets, furnishing an added layer of legitimacy.

The cultural practice of arranging marriages is, while widespread, by no means uniform. Cultural groups and subgroups vary widely in the extent to which they allow or tolerate personal input from the parties to the prospective marriage. Within cultural groups wide divergences can be traced back to class and social status.

of marriage based on romantic love is a relatively recent one”. See McGuinness, “The Days of the Matchmaker are long gone”, Sunday Tribune, August 27, 1995.

In the sense both that it generally tends to happen and that it is generally thought that this ought to happen - both statistically likely and morally expected. The word ‘norm’ has a double centre of gravity. It denotes what is commonplace or typical but is additionally used to describe what is generally regarded as morally prescribed as acceptable behaviour. In this sense it is both descriptive and prescriptive. See further the discussion in Macneil, *The New Social Contract*, (New Haven: Yale University Press, 1979), at pp. 37-38.


Eshleman, *The Family: An Introduction*, 4th ed. (Boston: Allyn and Bacon, 1985) at pp. 310-311 suggests that the two extremes of total free choice and no choice are sociological ideal types only, against which real normative values may be examined. “Between these two extremes are various combinations of arranged-free choice possibilities. Parents may arrange and give their son or daughter a veto power. The son or daughter may make his or her own selection and give the parents the veto power. One of the persons to be married, usually the son, may select the bride with his parents”.

Bidisha, *op cit.*
Varying degrees of consultation are afforded the parties to the marriage. In some cases the arrangement may be made between parents and a prospective spouse.\(^{383}\) In other cases the parties will be allowed to veto an intended partner (although excessive use of the veto may undoubtedly reduce the parental tolerance afforded.)\(^{384}\) In addition to this element of qualified choice, many prospective spouses are permitted a minimum level of contact with each other prior to nuptials taking place. As Catherine Ballard notes in a late 1970s study of the experiences of young second-generation South Asians living in Leeds: “...in Britain, as well as in the sub-continent, young Asians are now asking for, and often getting, the chance to meet one another properly or at least to talk at length over the telephone, before the engagement takes place. Most of them are now able to veto a proposed match”\(^{385}\)

**The Arranged Marriage: economic and social origins.** Any attempt to consider an individual social phenomenon outside the context in which it arises is bound to lead to a limited understanding thereof. The phenomenon of arranged marriages must hence be viewed against the complex of social, economic and political priorities of the societies that subscribe to it, or more accurately, of their most prominent interest groups. The practice cannot simply be viewed as a quaint religious practice. Religious tenets, as Weber\(^{386}\) notes, are arguably as concerned with the temporal as the transcendental.\(^{387}\)

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384 See also Bidisha, “Don’t pity us poor Asian women”, in The Thursday Review, *The Independent*, July 23, 1998. “Willing gentlemen are delivered to the girl’s door for her delectation or rejection. She might meet someone she likes, or she might change her whole mind about the thing”. Boggan and Popham also report that “[m]any Muslim men and women are given a choice over a number of partners, and many parents in Asian communities demand no more than that their children marry someone of the same religion”. Boggan and Popham, “The arrangement” in *The Independent*, (Tuesday Review) July 21, 1998 at p. 1.
385 Catherine Ballard, “Conflict, Continuity and Change: South Asians in Britain,” in Saifulah Khan, *Minority Families in Britain: Support and Stress*, (London: Macmillan, 1979) p. 109ff. (Papers from the International Conference on Transcultural Psychiatry, Bradford, 1976) at p. 135. Mathur too stresses this growing element of qualified choice: “Today couples, depending on how liberal their parents are, have a coffee or meal on their own... before deciding to commit. Middle-class women are allowed to reject suitors favored by their parents”. Mathur, “First comes marriage, then comes love”, www.geocities.com/Wellesley/3321/win4a.htm.
387 In other words, religious practice more frequently follows social concerns than leads. An interesting example in support of this thesis is that given by David Norris in his article in (1976) 1 *D.U.L.J.* 18
South Asians in Britain are by no means a homogenous group. Indeed, social and ethnic stratification is often as marked amongst individual subgroups of the ethnic minorities as a whole as it is between the ethnic minorities as a whole and the indigenous population. What most share, however, is a common model family structure and model of kingroup interaction which in turn is intimately related to the economic and social conditions prevalent in their homeland of origin. Most South Asians living but not born in Britain came to the latter country in the post-war decades. For most, the move was intended to be temporary, the plan being to make as much money as possible and to return to family and homeland within a short timeframe. Typically, however, prospects of a triumphant return receded as these latter-day ‘Dick Whittingtons’ discovered that the streets of London were not paved with gold. Wages certainly were better than at home; but so too was the cost of living. Gradually patterns of residence became more permanent as more and more the members of an immigrant’s kingroup or village came to join him or her, giving rise to living patterns often closely emulating those encountered in the homeland.

entitled “Homosexuality and Law”. Here, Norris traces the origins of Judaeo-Christian proscription of homosexual acts to “an understandable attempt by the Children of Israel after their captivity to establish a definite identity in opposition to the homosexually-orientated religious culture of the Pharaohs. Thus practices such as the inclusion of ritual homosexual activity which the early Hebrews had shared with the Egyptians, were dropped in favour of an exclusive and aggressive heterosexuality, which had the added advantage of being a useful though crude piece of social engineering, by ensuring the propagation of a warrior race and also later on of preventing the absorption of the Israelite into another powerful homophile culture - that of the Greeks”. Eshleman, The Family: An Introduction 4th ed. (Boston: Allyn and Bacon, 1985) in a similar manner yokes the practice of polygamy to materialist factors, noting how the practice is “linked closely to sex ratio [and] economic conditions...”. See also Sherif who observes the dynamic nature of ideology, noting how “it is forged, negotiated and reexpressed in connection with other social, economic and historical factors”. Sherif, “Islamic Family Ideals and Their Relevance to American Muslim Families” in Pipes McAdoo (ed.), Family Ethnicity: Strength in Diversity, 2nd ed. (Sage, 1999) at p. 207.

Class and social status are a key factor – see Bidisha, op. cit. Exposure to education is also an important factor. Bohpal, in “Driving Passions”, The Guardian (Higher Education Supplement) February 10, 1998, at p. ii.-iii., notes how education has been shown “to have a significant impact on women’s participation in traditional Asian practices” with better-educated women proving (at p. iii) “less likely to enter into an arranged marriage than those who dropped out of education at an earlier age”.

Of course not every family will correspond with the model, but many will and most will at the very least regard it as an ideal to be attained in preference to other models. An attitude perhaps allowed to prevail partly by the immigrants themselves who, anxious not to disappoint their families, often conveyed unduly glowing reports of their progress to those remaining in the subcontinent.

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Strong kin networks, usually manifested in the existence of the extended family, typify traditional Indian subcontinental family living patterns. Family patterns, though often quite resilient to social and economic change, are intimately linked to prevailing economic conditions. The extended family tends most typically to be encountered in pre-industrial agricultural economies of a relatively advanced nature, where life expectancy is moderately high but state social security minimal, if not non-existent. Agricultural production will be advanced enough to allow the creation of a surplus of supply over family needs and hence facilitate commerce with outsiders. The land, usually held in common by the kin-group, can thus support large numbers of people, but correspondingly requires a significant labour input, particularly where tillage, rather than pastoral agricultural practices, is the norm. By contrast, in particularly poor regions, where subsistence farming is most common, family units tend towards the nuclear, (as is also the case at the other end of the social spectrum in post-industrial societies, but for different reasons).

In the Indian subcontinent, a woman on marrying her husband usually comes to reside with him and his parents and may, in addition, often share a joint family life with a number of her spouse’s brothers and sisters-in-law and their respective families. Marriage then is not the creation of a new family but is instead “a means

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391 A study of the prevalence of polygamy (the taking of plural wives) and polyandry (the taking of plural husbands) bears this out. Polygamy is a preferred model of family life only in societies where the agricultural productivity of land and thus the need for agricultural labourers is high; even then it tends to be the case that those who can afford to take plural wives do so. Indeed the Koran advises against plural marriage unless the husband can afford it. Polyandry on the other hand is encountered only in the very poorest of societies and then only in rare cases, where the land cannot support more than a few family members. The taking of plural husbands affords an economic means of satisfying sexual needs while keeping the number of children to a minimum.


393 Within this framework, roles tend to be allocated on a relatively precise basis - there are set roles even for children who share in the workload of the household. Indeed, children are a central feature of family life and are rarely excluded from family celebrations and events. It is often the grandmother who involves herself most in the upbringing, care, education and discipline of the children of the
of providing for the continuity and stability of the existing family”.

In so closely cooperative an environment then it is clear that the act of marriage creates certain externalities, certain effects that impinge on the family life of a wider group than just the newly married husband and wife. As much acrimony may ensue, after all, from the incompatibility of mother-in-law and daughter-in-law, working on a day-to-day basis in close proximity to one another, as from that of the parties to the marriage. Thus marriage has certain practical familial implications not normally encountered with the form of family living patterns adopted in the west: it is in other words, a ‘family event’. There is some considerable merit, then, in suggesting that at the very least other members of the family have some say as to the introduction of a new member. As Ballard notes “as long as families remain tightly organised, so that a marriage is as much a contract between two families as between two individuals, it seems likely that family involvement in marriage will continue”.

For a complete picture however one must look also at the symbolic implications of marriage in South Asian societies. Western discourse treats of the family in terms of its benefits for the care, personal development and socialisation of the individual. Instead of asking what can the individual do for the family the question is what can the family do for the individual? For most South Asians, by contrast, family takes precedence over self. In particular, members of a family are socialised to view their activities as impinging not only upon their personal own welfare and reputation, but more especially upon the welfare and prestige of the family of which one is a member. The prestige and status of the South Asian family - in Islamic Pakistan it is

group. Daughters-in-law tend to the tasks of housework, the purchase of household supplies and cooking.

394 Eshleman, op. cit. at p. 311.
396 See the discussion in Glendon, op. cit., at pp. 41-46 and her citation of Bénabent, “La Liberté individuelle et le mariage”, Rev. Trim. Dr. Civ. 71, 440 (1973) at p. 495. Bénébent argues that whilst the family was (at that time at least) still quite strong, “it is being seen from another angle. Instead of the individual ‘belonging’ to the family, it is the family which is coming to be at the service of the individual”. In short, “[t]he happiness of man is sought systematically and above all protected by the group”, (ibid. at p. 494).
termed izzat - is dependent on the behaviour of its members. An individual who marries below his caste, or outside his religious sect, or without parental arrangement or at least approval; a woman who becomes pregnant before marriage or indeed, who fails to become pregnant soon after marriage, in each case the departure from conformity tarnishes the izzat of the family. The restoration of prestige usually involves the drastic step of ostracising the supposed ‘wrongdoer’: “Expulsion restores the honour of the remainder of the group but also leaves the expelled person without communal attachment, a highly unattractive fate in Asian terms”. In rare but notable cases, sanctions sometimes can take an extreme form, with some instances of injury and even murder being threatened or carried out where a party is perceived to have damaged the honour of the family. In particular, a refusal to submit to an arranged marriage can in some cases (and especially amongst those who hail from rural North Pakistan) have profound consequences. Preventive measures are not uncommon. Sometimes marriages are arranged early so as to avoid the embarrassment of a supposedly ‘unruly’ daughter damaging the family izzat.

397 This is a particularly prominent feature of Islamic discourses - see Sherif, “Islamic Family Ideals and Their Relevance to American Muslim Families”, in Pipes McAdoo (ed.), Family Ethnicity: Strength in Diversity, (Sage, 1999) at p. 211.
398 Even in Islamic Pakistan, where the Koranic requirement of ummat demands that persons be treated equally, without reference to caste, discrimination based on caste is still prevalent.
399 A high premium is placed on the procreation of children within marriage. Grave stigma attaches to a woman who fails to produce heirs, regardless of the cause. To a lesser, or more subtle extent, however, this is also a feature of western social discourses. Campbell notes and displays how a stigma can still attach to couples who choose to remain childless. See Campbell, The Childless Marriage - An Exploratory Study of couples who do not want children, (London: Tavistock, 1985).
400 In Regina v. Immigration Appeals Tribunal, ex parte Shah, and Islam v. Secretary of State for the Home Department (The Times, Law Report, March 26, 1999, (HL)) fear of violence consequence upon accusations of immoral behaviour prompted the House of Lords to acknowledge the refugee status of two Pakistani women.
401 Instances of murder have been noted, as in Burns, “Murder ends arranged marriage”, Sunday Times, June 25, 1995, where an Asian woman living in Yorkshire was allegedly murdered, allegedly in consequence of her stated desire to end an arranged marriage with a man from Pakistan. See also “Divorce Bid Wife Slain”, Irish Independent, (World Report), April 7, 1999, at p. 32, involving a woman from the North-West Frontier Province of Pakistan, allegedly killed because of her wish to divorce her husband.
Marriage, thus, is:

"not only...a matter of...being given a partner for life but it is also an event which forces each individual to come to a decision and make a clear public statement about where his or her loyalties lie".  

It is, at least partly, an act of great symbolic significance, an indication of loyalty and commitment to the religion, custom and mores of one’s people, and implicitly to family, caste and kinship. As Ballard, again, observes:

“Outside observers often do not perceive that an arranged marriage must be seen within the context of prior socialisation and established kinship networks. Acceptance of such a marriage can be seen as symbolising an individual’s loyalty and commitment to his family and community and to all the personal advantages and disadvantages that this implies”.

For exiles too marriage has a particularly symbolic resonance. Despite a certain degree of contact and assimilation with the indigenous population of their country of residence, “most young Asians feel...that their deepest loyalties are to their own group”. Ballard’s suggestion in 1978 that most young South Asians in Britain, “…perhaps the majority, have always been clear about the ultimate limitations of their choice” may certainly carry less force twenty years on. The cultural assimilation of young Asian Britons into the local community has certainly spawned considerable cross-generational conflict as evidenced by several British cases concerning pressure to marry. Nevertheless the arranged marriage remains a prominent feature of British life for many second and third generation South Asians.

The process of socialisation experienced at home and in the wider ethnic kin-group

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402 Such a marriage was part of the subject matter of Barton, *The Scarlet Thread: An Indian Woman Speaks*, (London: Virago, 1987).
403 Ballard, *op. cit.*, at p.123.
404 Ibid. at p.124.
405 Ibid.
406 This conflict increases in direct correspondence to the level of education experienced by the younger person - see Bohpal, “Driving Passions”, *The Guardian (Higher Education Supplement)* February 10, 1998, at p. ii.-iii..
407 E.g. *Mahmud v. Mahmud*, 1994 S.L.T. 599, where the petitioner was already living with a woman not his wife at the time of his arranged marriage. His mother and siblings claimed that what they saw as his unorthodox lifestyle led their father to an untimely death.
leads many to expect that a marriage will ultimately be arranged for them and not contracted on their own initiative. Ballard’s assertion that “All young Asians are well aware throughout their adolescence that it is their parents’ intention to arrange a marriage for them”, is probably, even today, still quite valid. According to Ballard many second-generation South Asians accept this; in fact quite a few register a sense of ‘relief’ that this is the case.

Indeed it is arguable that at least some of the more recent intergenerational tensions entail not outright rejection of the arranged marriage but rather a renegotiation of its content with the resulting liberalisation noted above. Some second generation South Asians in Britain even see the adoption of and conformity to the customs and mores of their people and in particular to the concept of arranged marriage as an opportunity to reassert a sense of identity in the face of prejudice and intolerance. This ‘reactive ethnicity’ propounds the arranged marriage as a potent symbol of belonging and commitment to kin and country.

The legal reaction to Arranged Marriages. The dynamic, not to mention diverse nature of the modern arranged marriage is a feature often ignored by western commentaries on the matter. The western stereotype of such unions perhaps sits more comfortably with cases like Singh v. Singh the facts of which have already been documented above. Here the petitioner first met her bridegroom only on the

408 Ballard, op. cit., at p. 123.
409 Ballard, op. cit., at p. 124 notes the comments of a young South Asian - “I’ve had loads of girlfriends, some English some Indian, but I’ve always known that in the end I’d do what the family expected and marry the girl that they choose. I’m quite happy about it; in fact it’s quite a relief”. See also Bidisha, “Don’t pity us poor Asian women”, The Independent, (The Thursday Review), July 23, 1998, who notes that “it is no different from, and a lot safer than, placing a lonely hearts ad in Time Out”.
410 Indeed, marriages are often arranged with persons from the subcontinental village of origin both as a practical impetus to maintaining contact therewith and as a symbolic renewal of the bond with the homeland. The enactment of the British Nationality Act 1986, however, has restricted the extent to which marriage could result in automatic citizenship rights for non-nationals this practice has been rendered more problematic. However proud of their origins many British residents, long settled or indeed born and reared in Britain, are not anxious to return to the subcontinent.
411 See Bidisha, op. cit. alleges that in writing about arranged marriage, western journalists are guilty of “making huge generalizations about what goes on in “Asian culture” and “the Asian community” and have an offensively limited notion of life in India or Pakistan”.

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morning of her wedding. Aged only seventeen and not long in Britain her parents had arranged for her to marry an unknown man, four years her elder. Though the petitioner went through with the civil ceremony, it was obvious that she was not pleased with her parents’ choice and subsequently told them that she wished to have nothing more to do with the defendant. She refused to go through with the planned religious ceremony.

The decision of the Court of Appeal has already been outlined and only certain features need to be recounted. The test used therein has now been superseded by less rigorous requirements both in Ireland and in the U.K. and thus as a legal precedent Singh is not surprisingly weak. It is nonetheless useful to revisit the language of propriety used therein. It leans strongly in favour of the parents’ actions, suggesting that the petitioner had quite simply “obeyed the wishes of her parents, having a proper respect for them and the traditions of her people”. Megaw L.J. though noting the reluctance of the petitioner, cited as her prime motivation for marriage not fear but rather “[a] sense of duty to her parents and a feeling of obligation to adhere to the custom of religion...”.

It is hard, from one perspective, to disagree with the Appeal Court’s decision. After all, if she was so fearful of her parents and reluctant to refuse their choice of spouse during the wedding ceremony why not thereafter? If she had the wherewithal to refuse to partake in the religious ceremony of marriage, what had stopped her from objecting to the civil ceremony? Arguably she exhibited considerably less fear of

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413 This is not altogether unusual it seems; See Clifton, “Making Matches” in “Tying the Knots”, Newsweek, June 9, 1997 at p. 61.
418 Ibid. at p. 968. As Barron J. said of the petitioner in A.C.L. v. R.L, unreported, High Court, Barron J October 8, 1982; “she had a free choice and she expressed it and exercised it to please her parents”.
419 Objection to which would arguably have been of less consequence to her religiously- minded parents than her refusal to undergo the religious ceremony, although admittedly by objecting to the civil ceremony she would have been implicitly refusing to go through with the Sikh ceremony.
her parents than she alleged; her stubborn refusal to undergo the religious ceremony is clear evidence of that if any is needed. It is arguable that she felt upset not at the fact that she was being propelled into marriage but at what she regarded as the poor choice and the alleged deceit\textsuperscript{420} of her parents. Otherwise the petitioner was content to regard submitting to her parents' choice as "the right thing to do".\textsuperscript{421} In principle, the petitioner was happy to have an arranged marriage.\textsuperscript{422} She agreed to the totality of the arrangement - could she subsequently complain when it did not work out to her liking?

Ultimately, as seen above, the Court of Appeal dismissed the allegation that the petitioner's consent have been affected by either duress of misrepresentation. In the wake of the decisions in the Irish cases of \textit{M.K. v. F.McC.}\textsuperscript{423} and \textit{N. v. K.}\textsuperscript{424}, however, the likelihood is that were \textit{Singh} to be decided in an Irish court today a different result would ensue. Indeed, in both \textit{N. v. K.}, and \textit{D.B. v. O'R.}, one encounters marriages that were effectively arranged by the parents of the parties, albeit in response to the specific situation of pregnancy. Despite the fact that in each case the petitioner at the time of the marriage seemed to be quite compliant, the Supreme Court struck down each marriage for want of free consent. In each case, the petitioners accepted without question the arrangements made for them.

\textsuperscript{420}She also alleged misrepresentation as to her suitor's characteristics, her parents having assured her that he was handsome and well-educated. At the time, however, the law was clear that only an error as to the identity of a person - as opposed to the characteristics thereof - would constitute misrepresentation sufficient to render a marriage void. \textit{Moss v. Moss} [1897] P. 263. But see also the decisions in \textit{Allarduce v. Mitchell} (1869) 6 W.W. & a'B. 45, \textit{Bilowit v. Dolitsky} 124 NJ Super. 101, 304 A 2d. 774 (1973) and \textit{Militate v. Ogunwomuju} [1994] Fam. Law 17 wherein the distinction between errors going to the root of identity and errors regarding certain characteristic features of the individual has arguably been blurred. In Ireland, this distinction seems to have been brushed aside in favour of a requirement that there be informed consent. In this regard it does not seem to be fatal to a claim that the misrepresentation related to characteristics of a person: see \textit{F. v. F.}, unreported, High Court, Barron J., June 22, 1988, \textit{B.J.M. v. C.M.} [1996] 2 I.R. 574, \textit{M.O'M v. B.O'C.} [1996] 1 I.R. 208.\textsuperscript{421} \textsuperscript{421} [1971] 2 W.L.R. 963 at p. 969.

\textsuperscript{422}There is some merit in the suggestion that by abdicating her freedom to select the partner of her choice to her parents she was bound to accept the consequences. It might even be argued (though not terribly convincingly,) that her parents acted as her agents in this regard and that she as principal is bound by their actions on her behalf.\textsuperscript{423} \textsuperscript{423} [1982] I.L.R.M. 277.


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In *Singh*, there was arguably greater opposition expressed (albeit after the civil ceremony). Nonetheless, as argued above, at no stage did the petitioner exhibit any objection in principle to the practice of arranged marriage. It might be suggested that the reformulated doctrine poses no threat to the party who willingly submits to an arranged marriage. However a close reading of *N. v. K.* and *D.B. v. O’R.* does not bear this latter suggestion out. *N. v. K.* and *D.B. v. O’R.* suggest that this passive acceptance of marriage is itself less than a full, free and informed consent. The substance of each decision cannot in logic be distinguished from the case of the arranged marriage. In both scenarios the parties act under instruction from others, albeit willingly and believing that it is proper to do so. By submitting to the will of another, the party to a marriage is avoiding giving the full, free consent that is required for the formation of an unimpeachable marriage. In both cases the petitioners effectively abdicated their faculty of choice to other parties. They would let the latter “make up their minds for them”. There was no suggestion that the pressure imposed was illegitimate and indeed no protest on the part of either petitioner, although it was clear at least in *D.B. v. O’R.* that had there been any it would have been heeded. Many marriages arranged in line with tradition share several of the characteristics of these cases. The parties are often quite happy to accept their parent’s will having been socialised to believe that their parents know best and that whatever decision is made by them they will accept.

Similarly in both Irish cases, (at least according to the Supreme Court’s delineation of the facts,) one finds young women each of whom is peculiarly dependent and obedient to the parties who arranged their respective marriages. How does this differ from the case of the young woman in *Singh* who, believing that her parents are entitled to arrange a match on her behalf and happy to accept this arrangement, acceded to what she regarded as custom? The grave danger in this jurisdiction (where lack of consent renders a marriage not merely voidable but void) is that however contented the parties to marriage may be, a third party could complain that they are not validly married.
Legitimacy and Cultural Diversity. Ostensibly Irish family law claims not to subscribe to the requirement of ‘illegitimate pressure’ posited by the British courts as a prerequisite to a finding of duress.\textsuperscript{425} Less current authorities, on the other hand, abound in the language of propriety.\textsuperscript{426} Far from eschewing the discourse of legitimacy, however, it is suggested that modern Irish caselaw subtly endorses it.

The Irish cases invoke, even in the face of the abandonment of concepts of legitimacy, a paradigm of normalcy that is culturally exclusive. The effective message is that anything other than an active free consent, given in circumstances where there is no external pressure or expectation, is impeachable. The abandonment of the concept of legitimacy in this jurisdiction merely masks the assertion of an unmistakably liberal individualist perspective in marriage law. The two prongs of the test for duress have effectively been merged into one; the very fact of external pressure or persuasion is itself constructed as necessarily illegitimate. This clearly runs counter to the collectivist perspective promoted by certain cultures also inhabiting these islands. As Bradney\textsuperscript{427} observes “[o]ne ‘we’ is being selected; another rejected”.

The Legal Standing of Arranged Marriages. Bradney notes how the adoption of the legitimate pressure test in Scotland led to similar assertions of cultural exclusivity in Britain:

“[i]n duress cases the courts sometimes advert to the behaviour which they characterise as ‘natural’ or ‘normal’. Such statements imply the existence of a consistent social norm that is not the case in a pluralistic

\textsuperscript{425} In \textit{N. v. K.}, \textit{op. cit.}, the Supreme Court made a radical departure from a law of nullity that looks to the \textit{nature} of the cause and its perceived legitimacy to the \textit{effect} thereof. In effect then the Supreme Court adopted a test of ‘impaired consent’. Indeed for McCarthy J., as noted \textit{supra}, “[t]here is no logic in excusing a fear because it is justly imposed. However \textit{bona fide} or well-meaning pressure is, how can it be said that a prospective partner is exercising free will? Analyses of duress, fraud, etc….lose sight of the essential question: was there voluntary consent?”

\textsuperscript{426} In \textit{Singh}, for instance, reference is made to the “proper respect” and “sense of duty” owed by the petitioner to her parents and the “obligation to adhere to the custom of religion”. In \textit{Griffith} and \textit{Buckland} it is made perfectly clear that so far as the law stood at that time pressure to marry founded on a justified allegation of paternity was pressure properly imposed.

society. There is no overarching agreement about what is normal or natural. In making statements which suggest there is, the courts conceal the reality of their decisions...[and]... are promoting a particular social standard as one which will be enshrined in law. The standard they are approving, a form of liberal individualism, is one which is anathema to some sections of the population”.428

In short, this approach “plainly challenges some family forms and cultural practices found in Great Britain” .429 Cretney too argues that the courts may, in a plural society have to “take account of family structures reflecting values which are markedly different from those of the majority”.430

Despite the apparent abandonment of the concept of legitimacy, the problem of cultural exclusivity is, if anything, potentially more serious on this side of the Irish Sea. In England and Wales a marriage will be voidable rather than void for duress.431 This means that only a party to the marriage will be able to sunder the union. Should neither party, being aware of the possibility of avoidance,432 take these steps, the validity of the marriage may arise by approbation.433 Where a person marries without full, free and informed consent, Irish law, by contrast renders such nuptials null and void ab initio.434 Thus it is open to the Court to recognise the voidness of such marriage in proceedings taken by a much wider variety of persons provided such persons satisfy the normal requirements of locus standi.435 The possibility of

428 Ibid.
429 Ibid.
431 Matrimonial Causes Act 1973, section 12(c).
433 G. v. M. (1885) 10 A.C. 171 at p. 186, Lord Selborne L.C. defined approbation as including “any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation existed”. M.O’D. v. C. O’D., unreported, High Court, O’Hanlon J. August 5, 1992, R. Mcg. v. N.K., unreported, High Court, Morris J., May 23, 1995; Tindall v. Tindall [1953] P. 63.; W. v. W. [1952] P. 152.
434 See above at pp. 123-124.
questions of invalidity being raised, however, in extra-judicial context cannot be
discounted. The prospect that an arranged marriage might be void may prompt State
agencies (such as the Revenue Commissioners) to question the right of certain
persons to be treated as married. Complications may arise from such uncertainty, for
instance, when certain decisions must be made in respect of a person by their next of
kin or where a person dies intestate.\(^{436}\) The possibility exists that conduct tending to
affirm the validity of the marriage may amount to ratification sufficient to render the
marriage valid, but the inherent uncertainty involved in establishing this is virtually
guaranteed. The fact that a couple may find it easy to show ratification does not
detract from the overall message that an arranged marriage is an inherently suspect
institution.

Smith,\(^{437}\) *inter alia*, posits that the enforcement of contracts is predicated on the
social value that the agreement is perceived to have. In assessing whether and to what
extent the law ought enforce contracts and agreements (such as the agreement to
marry,) the key factor is the extent to which enforcement may promote valuable or
non-valuable living patterns as the case may be. In refusing to enforce a marriage
arranged in line with the traditions and customs of a particular minority
community,\(^{438}\) the law implicitly suggests that those cultural practices and the
complex of relations that give rise to them - most particularly the extended family -
are if not objectionable, then not socially useful. What conclusion can be drawn from
the declaration of nullity in any particular case but that the law regarded a marriage
entered into in the relevant circumstances as not being a socially valuable or indeed
viable relationship? Of course the law does not restrict the relationship *per se*. But
neither does it receive the law's *imprimatur*.

\(^{436}\) Where a party dies without a will his or her spouse is automatically entitled to a portion of the
former's estate, depending on whether there are also children. Even where a person dies with a will,
his or her spouse is, notwithstanding the terms of the will, entitled to at least one-third of the former's
estate (Section 55) and may claim first refusal on the family home if included in the estate. (Section
56). To qualify, a person however, must legally be the spouse of the deceased.

Is an arranged marriage to be treated as giving rise to non-valuable living patterns? This is, quintessentially, an issue of cultural perspective. Some may view the arranged marriage as a recipe for disaster, a curtailment of personal freedom that is bound to be detrimental to personal wellbeing. Are the effects so detrimental? Certainly where there is inter-generational conflict about the norms that underpin the arranged marriage, the effects can brutal. The normative values that give rise to the arrangement are not universally subscribed to amongst second and third generation South Asians in Britain, with the resulting conflicts sometimes leading to violent and even fatal confrontations. Of course, the fact scenarios before the courts (and in the news media) may not provide a statistically accurate representation of the standard fallout where persons are married following on a arrangement. Are there couples who have made a success of a marriage arranged in such circumstances? Doubtless there are, but these couples tend not, almost by definition, to come to the attention of the law. Success stories tend not to end up in Court.

As shown above the extent to which the parties to arranged marriages (being the product of a cultural norm,) subscribe to the cultural values and social understandings of their community can be particularly strong, even amongst second-generation exiles. The pervading effects of socialisation within the family and ethnic group stress the importance of the integrity of the family and the necessity of each of its members subordinating what they see as their personal well-being to the welfare of the family as a whole. In coming into contact with the indigenous population of the exile’s place of residence, the latter may be prompted to reassess the accuracy of his perceptions and notably his sense of disentitlement in respect of the choice of spouse. But as often, partly owing to effective familial socialisation, partly because of reactive ethnicity, second generation South Asians accept the phenomenon of arranged marriages and even come to value it:

Having gone through with the marriage and made this commitment, often with considerable foreboding, most young Asians come to feel that their parents’ careful choice [and this is where the situational norm differs from the cultural norm] has not been such a bad one and that they have more freedom than they expected. They usually also find themselves ‘falling in love’ with their husband or wife in the traditional Asian way, that is after the marriage ceremony rather than in the period of courtship.439

And while the once low divorce rate in the Indian sub-continent is now rising, at least some participants see the arranged marriage as having prospects of success that at least equal those in the west. The key, according to one female college graduate interviewed by Clifton is that “[i]n an arranged marriage, you expect nothing and you are mentally poised to adjust to life with a stranger. In a love marriage you enter with the highest expectations and if they are not fulfilled the relationship shatters”.440 In fact even in the west, modified models of the match-making role seem to be reappearing in new guises: a recent survey showed that 20% of single people in Britain had consulted a dating agency with a view to finding a partner.441 In the words of one dating agent, “We do what families used to do 100 years ago... You used your contacts to find a good match for your daughter, like in a Jane Austen”.442

Some point out, justifiably, that societies in which arranged marriage is a phenomenon tend by and large to oppress women and sexual minorities. Amrit Wilson for instance443 identifies the arranged marriage as “an essential part of the gigantic and oppressive framework of the joint family which for so many generations kept women in subjugation”.444 While no doubt an accurate description of such societies, Wilson’s analysis presupposes an immutable link between the oppression of

439 Ballard, C., op cit., at p. 125.
442 Karen Mooney, of Sara Eden Introductions quoted in Luck and Milich, ibid.
444 See also Swaminathan, “Love Match and the Arranged Marriage”, www.cs.wustl.edu/~bs/essavs/marriage.html who observes that “[t]he arranged marriage tends to be patriarchal in power structure: the wife is vested with the responsibilities of children and home, for the husband is responsible for providing and protecting”.

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women and the maintenance of the extended family. The scope for the renegotiation of gender roles and the balancing of power dynamics within the family is ignored.445 A return to positive values doesn’t necessarily require a return to past practices.

Wilson’s analysis also perhaps implicitly insinuates that without the extended family networks women would be free from oppression. She ignores the fact that in the supposedly liberal west, women have been and are still subjected to oppressive practices, including violence. The dispersed, nucleated family is no more a guarantee of female emancipation than the extended one. Nor can the pervading effects of misogyny and sexism be so easily discounted in the west, though arguably they are more subtle in form than elsewhere.

Others point to the many abuses that attend the practice of arranging marriages. Threats of violence and mutilation, and actual instances of murder446 and serious bodily harm have become a much-reported feature in intergenerational conflicts regarding some arranged marriages. A report in the Independent in July 1998447 recounted a series of violent and some fatal incidents visited almost always on women who had objected to arranged marriages or otherwise acted in a manner that was perceived to disgrace their families.448 This discourse, however, again assumes that violence and abuse, particularly against women, is less a feature of western than of eastern lifestyles. In fact, as study after study shows, domestic violence and child

445 See Sheriff who identifies the potential, even in Islamic families, for the renegotiation of social rules and customs. “Islamic Family Ideals and Their Relevance to American Muslim Families”, in Pipes McAdoo (ed.), Family Ethnicity: Strength in Diversity, (Sage, 1999).
446 See Hall, “Life for ‘honour’ killing of pregnant teenager by mother and brother”, The Guardian, May 5, 1999 where a girl was murdered by her mother and brother. The girl in question had married a man by the arrangement of her family but had abandoned the marriage and was reported to have been seeking a divorce. When the girl became pregnant by a man not her husband, the mother and brother sought vengeance for the apparent ‘disgrace’ that the victim was perceived to have brought upon the family.
448 In some quarters there is also, it seems, a practice of abducting women for the purpose of sending them to India or Pakistan with a view to contracting an arranged marriage. One such woman managed to escape abduction to Pakistan by alerting the police to her plight. See Jenkins, “‘Abducted’ woman escapes from plane’, The Times, January 29, 1998. Her parents, being unhappy with the woman’s choice of boyfriend, attempted to send her to Pakistan for an arranged marriage.
abuse as Bidisha points out are not “race-specific”.\(^{449}\) It ignores also the possibility that the extended family can potentially safeguard against certain forms of abuse. The spousal privacy that in many cases facilitates inter-spousal abuse is less easily available in the extended family. And while the arranged marriage in India and Pakistan can rightly be said to perpetuate the caste system that, though outlawed,\(^{450}\) still prevails in socio-cultural practice, it cannot be denied that for westerners too social class and status are an equally strong feature of social life, and hence crucial factors in mate-selection.\(^{451}\)

It is not being suggested that the arranged marriage should be adopted as an appropriate means of ordering modern marital relations. Besides the presence of well-established cultural norms promoting the ‘love marriage’ as the ideal of modern relationships, it must also be acknowledged that the economic factors that underpin the arranged marriage are largely absent from post-industrial western society. Indeed, to the extent that the arranged marriage remains the norm in Asian communities in Britain it is a rather stubborn survival, largely out of kilter with socio-economic conditions in modern day Britain.

Nor is it being suggested that one must promote the integrity of the family unit at any cost. Just as the family is a traditional source of social and psychological empowerment so too do relations in tightly-knit insular family units often give rise to oppressive practices, (e.g. domestic violence, sexual abuse, emotional blackmail. In many cases lawyers have ignored these phenomena or wrongly ‘downgraded’ them to the status of ‘welfare’ issues. As Afshar\(^{452}\) observes, a certain proportion of South Asian families in West Yorkshire use their kinfolk (usually female kinfolk,) as a source of cheap labour, justifying low wages on the basis of a supposed cumulative accrual to family well-being.

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\(^{449}\) Bidisha, op. cit.

\(^{450}\) In India the caste system is prohibited by law. In Pakistan, Islamic teaching promotes the principle of equality, the *ummat*, although in practice there is still an unofficial caste system.

The paradigm of the arranged marriage, however, offers a sensitising counter-perspective to the dominance of liberal individualism in modern familial legal discourses. As shown above, the arranged marriage is underpinned by an understanding of the value of family that it is submitted is a potent counterpoint to trends that have gradually atomised the individual. For many Muslims for instance, the western emphasis on the individual is perhaps justifiably viewed as “lonely and self-centred”. For them, according to Sherif, “[f]amily provides a sense of place, a congenial setting, and a social network for financial and personal support”. It is a crucial source of interpersonal support, a site of “security and emotional support in times of individual stress”.

The emphasis on the individual in liberal discourses is simultaneously empowering and disempowering. For the able, the well-resourced, the well-educated it may be a source of comfort. For the elderly and the generally marginalised, and those concerned for their welfare, it should by contrast be a point of concern. The tendency towards individuation is hardly new. Marx complained of the “separation of man from man” that the worship of liberty entailed. In certain respects the tendency has been reversed but largely in the burgeoning of central government rather than in more intimate communities of interest. In the middle ground between citizen and state, the fate of intermediating institutions, most notably the family, has largely waned. This is underlined by a recent survey that estimates that by the year 2020 over one-third of Britons will live alone. In the face of such individuation the value of the extended family can more easily be demonstrated. Mathur notes one benefit, a potential solution to the very modern debate about child care: “living with the extended family….means a free staff of child minders”. In addition to this and the myriad of other economies of scale that ensue, there are social security implications: “shocks

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453 Sherif, “Islamic Family Ideals and Their Relevance to American Muslim Families”, in Pipes McAdoo (ed.), Family Ethnicity: Strength in Diversity; (Sage, 1999) at p. 212.
454 Ibid.
such as death, the loss of a job” can more easily be absorbed, and “the system cares for elderly parents and grandparents who are generally isolated in western society”. But the primary advantage is arguably emotional. “Above all”, Mather concludes, “it is a buffer against one of the biggest modern ills – the despair of feeling isolated in a cold world”. Freedom, for its part, “comes with a price”.

Chapter 6
Conclusion

The person as a social being: Segregation, Isolation and Atomisation

The ‘South-east Asian’ experience, for want of a better term, outlined in the preceding chapter, brings this discourse firmly back to the issues addressed in the introduction to the first chapter. The fetishisation of personal freedom and individual empowerment masks the complexity of inter-personal dynamics. Social sentiment is suppressed, ignored or constructed as an outward expression of self-regard. Freedom cannot, however, be so slavishly adulated in this manner. Modern literature, for instance, brims with images of the isolated, atomised individual functioning in a largely impersonal society, replete with uncertainty and crises of identity and purpose. From Gogol’s ‘Overcoat’ to Eliot’s ‘The Wasteland’ one finds a common yearning for a community of purpose, for a sense of place in the face of human isolation and loneliness. A stark and poignant example of this trend can be found in the Gaelic poetry of Máirtín Ó Direáin. Born on Inis Mór in 1910, the theme of social and cultural disintegration is a constant concern throughout his work. He paints¹ a grim picture of the modern day Irish, divested of the warmth and security of what he saw as a strong, supportive, community life. The human individual is ‘stoitie’ – uprooted:

“I am now alone, without a name in the midst of a crowd,
Without a ‘who might you be?’ on their lips,
Having neither knowledge nor interest in my origins…”²

¹ Others, by contrast, saw it as stultifying and stagnant – see Ó Faoláin, “An urgent, ignorant and mute sex life in the hidden Ireland”, Irish Times, September 4, 1995 at p. 14. Ó Faoláin argues that the view of Ireland prior to the 1960s as an idyllic place for youth was a predominantly middle class view. The reality for those of less privileged status was, she suggests, bleaker, with sexual, emotional and physical oppression being widespread.
² Present writer’s own translation. “Deireadh Ré” from Ó Direáin, Ó Mòrna agus Dánta Eile, (Cló Móraín). Reproduced in Ó Goilidhe, Diolaim Filiochta, 2a foilsiú, (Tamlacht: Folens, 1986). The present author has chosen to translate these passages as literally as possible, but the very great
Likening himself to the ancient hero Oisin, who returns from Tir na nÓg to find his family and people long deceased, he says:

"I am Oisin on the rocks, And now on the expanse of the beach, I lament those who have passed away".3

In a phrase reminiscent of Claude Lévi-Strauss's writings on the family,4 Ó Direáin decries the impersonal nature of the relationship between State and Citizen, implying that it can never replace the bonds of community and family:

"....We will thus be remembered henceforth: There will remain a heap of files, under a mound of dust, Left behind in a Government Office".5

Claude Lévi-Strauss,6 in a similar vein, suggests that the bond between citizen and State is imperfect and impersonal compared with the bond between individual and families and other relatively smaller communities of interest. Charting the rise of the nation-state in the late 1700s, he notes the suspicion that the rulers of this new order had of intermediating institutions, bodies that threatened to detract from the loyalty owed to the central authority. The churches were obvious targets of this suspicion,7 but trade unions and guilds were equally troubling in the eyes of the State. The concern of the newly emerging nation-states was to liberate individuals from these 'intermediate' organisations so that their loyalty to the State would be complete.

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3 “Soine’, for instance, normally meaning ‘surname’, is translated as ‘origins’.
4 “Stoite” from Ó Direáin, Rogha Dánta, (Sairséal & Dill). Reproduced in Ó Golúidhe, Diolaim Filiochta, 2a folsiú, (Tamlacht: Folens, 1986). The reference to ‘Oisín’ is an invocation of a tale from the Irish Fenian mythological cycle. Oisín, the son of the great Fionn MacCumhaill, is taken by Niamh Chinn Óir to Tir na nÓg, the land of perpetual youth. Having spent what to him seems like three days in this place, he returns to his homeland, only to find that three hundred years have past. His family and comrades now dead, he laments times past.
5 See above at footnote 4.
7 ‘Stoite’ - present writer’s own translation.
Viewed as an atomised unit competing within society, with his own perceived best interests to the forefront, it is natural to argue that the human individual benefits most from an ideological framework that is liberal-individualistic in its stance. The life of the individual, however, is more complex. Durkheim, in particular in his *Elementary Forms of Religious Life*, draws attention instead to the dichotomous motivations of the human individual. The human individual is, he says, *homo duplex*, a creature governed by the twin forces of 'body' and 'soul':

“Far from being simple, our inner life has something of a double centre of gravity. On the one hand is our individuality – and, more particularly, our body in which it is based; on the other is everything in us that expresses something other than ourselves”.

In other words, there is instinct, which propels the person inwards towards the satisfaction of self, but this competes with ‘soul’, or social sentiment, which propels one outwards towards social interaction and integration. The simple pattern of the individual pitted against society depicted by liberal individualism jars with this more complex illustration of the natural duality of human nature. Self-regard neither is, nor should be, the sole motivation behind human behaviour.

Thus, for Durkheim, the meaningful existence of the human individual is enhanced, rather paradoxically, by “...a constant submission to the constraints of collective conscience, (the general social morality of the time)...”. Durkheim, however, did not discount the value, or what he termed the ‘functionality’ of individual endeavour, even where the conduct of the individual was technically viewed as ‘deviant’. He recognised the need for personal innovation as a spur to social progress and change. The conflict here is obvious, but the possibility of reconciliation of these twin factors is present. As a way of marrying the individual and social elements of this dichotomy, he posits a biological meritocracy as the solution to the state of *anomie* in which he

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8 Wolff, (ed.), *Émile Durkheim et al.: Writings on Sociology and Philosophy*, (New York: 1960) at p. 328
10 A Greek derived term indicating a state of ‘normlessness’.
perceived France to be at the time of his writing. His argument was that ‘body’ and ‘soul’ would be reconciled when the individual was allocated a social task corresponding with his individual biological aptitude and ability.

In these times too, the growing diversity of western society offers the prospect of a similar synthesis between the individualism favoured by the indigenous population and the more collectivist, group-oriented perspective of, for instance, South-East Asian immigrants. Just as the latter have been prompted to modify the practices of arranged marriage, possibly in response to western influences, indigenous westerners might too be prompted to reconsider what is, it is suggested, a discourse based too heavily on liberal-individualistic preconceptions.

The Politics of Freedom exposed

This thesis of course concerns coercion and legal responses thereto. Coercive and compulsive forces are universally present, despite the individual’s will to conquer nature. Even the hermit, eschewing all social bonds, must respond to a myriad of physical compulsions and needs. Coercive and compulsive forces, at the risk of repetition, abound in social and cultural settings of any type. The law’s response to these forces is decidedly selective. The types of coercion and compulsion that will vitiate a contract, for instance, are but a select subset of the total sum of factors that propel the individual to action (or inaction as the case may be). Deciding whether a person acted ‘freely’ for legal purposes cannot but implicate questions of policy and subjectively determined value.

The preceding chapter exposed again the myth of legal neutrality first vaunted in the

11 Even in India’s quite indigenous cinema industry, the love-marriage (as opposed to the arranged match) is regularly vaunted as idyllic and thus desirable.
12 See Paglia, Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson, (London: Penguin, 1990) in the “Introduction” where Paglia argues that the masculine elements of humanity aspire to conquer and tame nature. This will to conquer nature is, she argues, ultimately doomed to failure. Man must accept, she concludes, that however much he endeavours he can never defeat the ultimate might of Nature.
opening chapters of this thesis. There is no one objective universal formula to determine whether a person has exercised free consent. The legal concept of freedom is, far from being a scientific fact, a distinctly political and hence variable entity, determined by the cultural and social norms and the political priorities prevailing in a particular place at a particular time. Those now prevalent in Irish marital discourses in particular are, as demonstrated in the previous chapter, predominantly liberal individualistic. In a similar vein the doctrines of contract law, despite the attempt to psychologise duress by means of the overborne will theory, are ultimately yoked to concepts of legitimacy that in turn largely reflect a discrete (and thus liberal-individualistic) conception of social relations. Only equity has attempted to grapple with the relational aspects of contracting and even there the results are confusing and troubling, suggesting again a subtle but entrenched suspicion of parties who act motivated by something other than self-interest.

The practical ramifications are complex. Only a very small percentage of contested cases of coercion ever reach court. Such cases tend to be exceptional rather than typical of cases in which coercion is alleged to arise. They represent but a small fragment of the true incidence thereof. The relative costs and inherent uncertainties involved in court proceedings dissuade many disputants from suing (and persuade many that do to settle out of court.) The relational perspective itself provides two compelling alternative explanations: first, that many long-term contracts provide for alternative means of dispute resolution, either through arbitration or some internal trouble shooting mechanism, and second, that the parties to an ongoing relation may often forego pressing a point of contention in favour of preserving the long-term stability of that relation. In most situations the impact of law is more indirect. The hortatory effects of law are of special note. The punitive element of a criminal law, for instance, though important is perhaps properly regarded as ancillary to the behaviour-inducing (or -restraining) effect that it is intended to have. The law against murder for instance is arguably as much concerned to prevent the taking of a life as to punish the perpetrator of such an act *ex post facto*.

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13 Criminal Justice Act, 1951
The requirement of publicity of trials\textsuperscript{14} underlines this theory. It is arguably not only present to safeguard the rights of the individual (which might more easily be denied when trial proceeds in private) but is also designed to help propagate the 'messages' of law. The trial and conviction of a person accused of a crime is a public event, an event during which the collective as a whole reiterates its moral opposition to the activity or behaviour that led to the trial in question. Even where judicial pronouncements are intended to be confined only to the case before the judge in question, the pronouncement in many cases carries a message intended for a much wider audience.\textsuperscript{15} The law (and legal processes) then radiates certain messages about what is considered to be ideal (or at least non-detrimental behaviour). Its success in radiating these messages is not always guaranteed. Many contingencies lie between the creation of a law and its success in inducing behaviour. Of particular importance are the actual and perceived likelihood of enforcement.

\textbf{Freedom and legal circumspection: leaning back to fairness}

In light of the theoretical and practical ramifications of the application of the doctrines discussed herein, certain strategies might tentatively be suggested. It is not the intent of present writer to demonstrate, or indeed argue, that the doctrines should be abolished outright, or even radically curtailed. As noted at the beginning of this thesis, it was never the intention to suggest that freedom of conduct, (if it can ever be attained, which is another matter), is self-evidently deleterious. This thesis seeks to posit a sensitising perspective, one that, while not necessarily requiring practical changes, does call for a relatively radical re-conception of the manner in which the so-called methods of 'private ordering' are conducted in fact and constructed in law. This perspective suggests, at the very least, a more circumspect attitude to instances

\textsuperscript{14} Article 34.1 of the Constitution requires that, save in exceptional circumstances, justice is to be administered in public.

\textsuperscript{15} The House of Lords in \textit{Fitzpatrick v. Sterling Housing Association} [1999] 3 W.L.R. 1113 is a good recent example. The Court having ruled that the term 'family' in the Housing Acts included a same-sex couple who had lived together for some 18 years, the majority in the case was at pains to assert that the decision was to be confined to the facts of the specific case. Arguably this downplays the overwhelming symbolic resonance of the decision. Surely their lordships could not have imagined that
and claims of coercion. It implies that the law needs partially to withdraw from asserting the value of freedom in contracting (for this purpose including marriage) with a view to protecting certain relational aspects and wider interests of certainty and personal security.

There are two prongs to the relational perspective outlined above. The first concerns the prevalence and value of relations. The second is a contrapuntal note of realism, one that draws attention to the coercive potential of relations. This cannot be ignored. The nature of relations, as shown above, can create a dynamic of power all of its own, constantly reconstituted by the changing dynamics of the relation itself. The partial withdrawal suggested above, it might be said, would result in the unchecked proliferation of oppression within relations. This argument proceeds, however, on the demonstrably false assumption that the present doctrines can tackle coercive practices effectively. In fact, as demonstrated above, the very dynamic of the relation often precludes legal interventions of the type contemplated by the doctrines studied herein. The initiation of legal proceedings usually marks (or otherwise precipitates) the end of the relation, a step that many who view the relation as valuable will be unwilling to take.

**Procedural v. Substantive solutions to oppressive behaviour.** In contract, the preferable approach, it is suggested, is to focus upon a trend that has made its mark most notably in recent decades, but that harkens back to legal trends prevailing prior to the rise of *laissez-faire* doctrines. Classical contract theory, that came to the fore in the nineteenth century, stressed the importance of the private ordering of interpersonal affairs. The doctrine of autonomy in marriage is predicated on a largely similar agenda. Each eschews the proposition that the law should be concerned with the result of the bargaining process. It looks instead to the process adopted to achieve

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their unprecedented recognition of a same-sex relationship could fairly be seen as an event of isolated and limited significance?

the result. The ostensible concern is to maintain the appearance of neutrality in such cases. As displayed above, at least in relation to inquiries into the ‘freedom’ of the process leading to a contract or marriage, these inquiries are just as policy-driven as those that take a results-oriented approach. In every case, the matter of freedom involves the making (or invocation) of value judgments, no less so than when a judge explicitly inquires into the fairness of the result of a transaction.

Modern contract law has become more willing to look to the end-results of the contractual process, the content of the relation. This results-oriented approach is especially common in what Gilmore identified as the specialised offshoots of contract law. Employment law for instance, in addition to certain procedural safeguards, stipulates certain required terms of any employment contract, the minimum wage, the maximum number of hours, the minimum number of holidays, the right to paid sick leave and parental leave to name but a few. Landlord and tenant law likewise, looks as often to content as it does to process. Laws exist requiring a certain level of habitability, stipulating for instance, some rather specific terms regarding the state and quality of housing provided. Marriage law has always exhibited a stronger degree of control over the content of the relation, as evidenced by rules relating to support obligations.

Even in Contract law proper, though, it is often permissible to look to the result - in many ways already does. The requirement of manifest disadvantage in presumed undue influence is one example already noted, and this in a discourse that is apparently concerned to deal with ‘impaired consent’. In Zamet v. Hyman the very fact of improvidence in the result of the contract agreed, led the majority in the Court of Appeal to conclude that the presumption did indeed arise in that case.

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18 This is not to say that it ignores matters of procedure and pre-contractual behaviour.
19 Gilmore, The Death of Contract, (Ohio State University Press, 1974)
20 [1961] I W.L.R. 1442 (C.A.)
21 See also O’Dell’s analysis of Crédit Lyonnais v. Birch [1997] 1 All E.R. 144 where, it is suggested, the extreme improvidence of the bargain was, in fact, a most persuasive factor in its ultimate invalidity.
It is submitted that these results-oriented provisions should step into the space vacated by the partial retreat of doctrines based on conceptions of freedom proposed above. This is not to say that the law should ignore all instances of coercion, far from it. Contracts and marriages that result from violent oppression and the threat to do what is patently contrary to most systems of values can never be tolerated. Even where the result of a bargain is found to be substantively fair, circumstances may be such as to warrant a second, procedural, review. A widow who is cajoled into selling her wedding ring for what is a more than its market value would require the protection of provisions regarding procedural rather than substantive fairness. There is still, then, some role for the doctrines discussed above, but perhaps on a more modest footing.

The focus should, then, be on fairness and rigorously so. Law can in appropriate circumstances engender social change by providing 'bright-lines' regarding the appropriate conduct of citizens. The emphasis in this scheme would not be on sundering the relationship of dependence but rather on improving its content.

The fear that this approach might lead to inflexibility and uniformity in contractual terms is misplaced. The law rarely posits substantive terms that must or must not be included in a contract. The fairness or otherwise of a term will typically depend on the entirety of the context in which the parties act. The Unfair Contract Terms Regulations make reference to a variety of matters, including procedural matters, that must be taken into account. A contractual term that excludes liability for defects may in one case be deemed fair and in another unfair, because of the presence of certain idiosyncracies that so demand. In one case a defect may have been pointed out to a customer and the price correspondingly reduced; in the other the defect may have been concealed. The Courts that determine the substantive amount that a party to a marriage, dissolved or subsisting, should dispose of property or wealth in favour of a


spouse are equally endowed with discretion. There are no less than twenty separate matters that may be taken into account in determining what is a fair settlement between parties that have divorced or separated. ‘Just and proper’ provision for a 50-year old woman who has foregone a promising career to rear the children of her family will differ radically in substance from what might be deemed just and proper in the case of a man and woman in their thirties, having no children and equally successful careers.

It is true to say that the result-oriented approach is of its nature overtly policy driven. The mystique of impartiality cannot be maintained in such cases, a point that might lead some to fear that the legitimacy of law might itself be more easily subjected to challenges. Concepts of fairness, admittedly, are equally as subjective as the value-judgments that inform the construction of freedom in law. It is submitted that it is this very overtness, however, that makes the results-oriented approach preferable. The latter approach, in other words, is at least honest about its necessarily subjective underpinnings. Those who oppose the concepts of fairness adopted by a particular society at a particular time may thus more easily make a case for their alteration. Faced with the pretence of objectivity posed by procedural discourses, the prospects for an honest open debate about the standards that apply in procedurally oriented discourses are considerably lower.

The desirability of fairness-analyses will of course, differ depending on context. An observer would naturally be less concerned to police a bargain between businesses of equal standing trading at arm’s length than, say, a father and his child. It can already be seen that strategies based on fairness do recognise the need to discriminate between different scenarios where the prospect of unfair results may differ. The Unfair Contracts Terms Regulations, for instance, are confined to consumer contracts of a particular kind, namely those that are presented to the consumer in a standard

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This mirrors the concern of the Courts of Equity to police the fairness of bargains contracted by persons who are at a particular disadvantage vis-à-vis the person with whom they are contracting.

**Freedom or Fault? Debunking the criterion of ‘Impaired Consent’**

The key issue in this thesis, however, concerns the basis on which the law – in all its many guises – intervenes in cases involving coercion. Coercion and compulsion are inevitable facts. However desirable true freedom may appear, the limited nature of human existence is such that constraining and compelling factors are a constant. Various factors beyond the control of any one person conspire to shape and structure the actions (and inaction) of individuals. The dominant conceit of contractualism – that the individual be left to order his own destiny – may thus be largely an unrealisable goal (or at least one that can only be achieved in part).

That which is treated as coercion in law, then, is necessarily but a small portion of true coercion. The several doctrines that purport to treat of coercive incidents in contract law share a common element. Each is qualified by a requirement that the coercive behaviour complained of meets certain criteria of wrong, in other words that the pressure or influence be ‘illegitimate’ or ‘undue’ respectively. These are not empty formulae. These elements of impropriety serve to constrain and confine the relief given by the courts. Not every species of coercion or compulsion attracts relief. There must, it is said, be some added element of impropriety on the part of the party who is responsible for the coercion, or exploiting an incident of compulsion or need.

The impetus for the alternative perspective, which looks solely to the fact of ‘impaired consent’ is nonetheless strong. In the case of undue influence it has

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26 There is here a strong procedural element, the application of the regulations being directed only to situations where there is an absence of negotiation. This latter point illustrates that the two approaches need not be exclusive and can, in appropriate circumstances, work together to eliminate unfairness.

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served to sustain the debate on the precise grounds for equitable intervention in that field. It is however, in the field of Irish marriage law that the argument for a solely ‘consent-centred’ test has met with most favour. Irish marriage law has been transformed such that the fact of coercion or compulsion alone, without any element of fault or impropriety, is deemed sufficient to vitiate an otherwise valid marriage. It is the institution that seemed most impervious to liberal-individualist currents that has ultimately become the triumph of the ‘impaired consent’ thesis. In a field where one would expect the relational to be accorded overriding significance, a discourse has been adopted that serves ultimately to negate the value of the relational. However neutral it may appear to be, Irish marriage law has subscribed to a theory of coercion that is quintessentially one based upon the idea of the atomised individual, abstracted from context, divorced from the relations that shape and give meaning to an otherwise bleak human existence.

That this ultimate fetishisation of freedom should occur in the context of an institution that is founded on the concept of enduring duty and long-term co-operative endeavour is perhaps the supreme irony of this thesis. In adopting the ‘consent-centred’ test of *N. (orce K.) v. K.*\(^{28}\), the Irish Supreme Court fell victim to the lure of the rhetoric of freedom first mentioned at the start of this thesis. In doing so, it has symbolically negated the value and worth of the non-consensual. Freely assumed obligations and duties are but a small portion of the sum total of contingencies that the individual encounters in life. Expectations and obligations – legal or otherwise – arise from the complexity of relationships to which the individual, with varying degrees of choice, is bound. From these relations spring attributes of value and worth of which liberal-individualism is largely dismissive, even ignorant.

The ‘coercion simpliciter’ argument, then, falters on the basis that its assumption of the unqualified benefits of personal freedom is misguided. A coherent, context-sensitive law of coercion – be it in family or contract law – must of necessity look to and seek to enhance the enduring relations that are a constant feature of both the

\(^{28}\) [1986] I.L.R.M. 75.
affective and productive aspects of daily life. The alternative concept of the atomised, discrete, abstracted individual is one that can only diminish the quality of human existence. In its distilled form, it asserts an undue emphasis upon the individualisation of society that is ultimately to the benefit of neither the individual nor that of society as a whole. While the hard won freedoms of constitutional discourses should not easily be ceded, all individuals must contemplate the worth of a freedom without social relations, without networks of mutual support and obligation. Freedom, Mathur observes,\textsuperscript{29} “comes with a price”. That price is best avoided.

\textsuperscript{29} Mathur, “First comes marriage, then comes love” www.geocities.com/Wellesley/3321/win4a.htm.
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