Introduction—The General Principle

Undue influence occurs when a person, who is in a position of trust, authority and/or confidence vis a vis another, exploits the influence or power derived as a result of this position to persuade the other to enter into a transaction. In such a situation, the will of the weaker party is overborne by the stronger – i.e. the weaker party has no free will.

- Such a transaction will be struck down unless the dominant party can show the transaction was a product of the free and independent will of the other.

Doctrine rests on two bases:
1. Equity seeks to prevent relationships which give rise to influence from being abused.
2. No person should be allowed to retain a profit arising from their own fraud.

In Stivactus v Michaletos (No 2) (1993) → three things usually need to be established:
1. The defendant had influence over the plaintiff.
2. The defendant exercised that influence so that what was done was the result of that influence rather than the will of the plaintiff.
3. His position or otherwise the circumstances were such that the influence and the exercise of it were undue to the extent that equity should intervene.

The distinction between Undue influence and Unconscionable Conduct


Undue influence looks to the quality of the consent or assent of the weaker party, whereas unconscionable dealing 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 should do so.

- Further in this case Mason J:
  - Undue influence the will of the innocent party is not independent and voluntary because it is overborne. In unconscionable conduct the will of the innocent party (even if voluntary & independent), is the result of the disadvantageous position.

Undue can also be invoked in cases which the party exercising the influence is not the recipient of the benefit of the transaction but instead that benefit goes to another party: Khan v Khan (2004)

- It is not necessary to show that the party exercising influence acted in collusion or in concert with the party receiving the benefit of the transaction.
- What must be shown is that the party who takes the benefit knows that the weaker party is acting under the influence of the influential party.

Relationships in which Influence is Presumed

Onus is cast on the dominant party to justify the dealing in question.

Establishing the presumption

There are a number of classes of relationship that attract the presumption. These include:

- Parent/child
- Solicitor/client
- Trustee/beneficiary
- Doctor/patient
- Spiritual leader/ follower
- Fiancé and fiancée

**Parent and child**

Parental influence is *presumed to continual until the emancipation* of the child, which is not presumed from the attainment of any age, nor from evidence of independence and capability on the part of the child if the child remains obedient to the parent’s wishes: West v Public Trustee (1942)
- Onus of establishing emancipation rests on the parent: Lamotte v Lamotte (1942)
- Applies to anyone in a position of parental authority over another, and thus includes guardians.

**Bullocks v Lloyds Bank (1955):**

**Facts:** Plaintiff (21 yr old female) inherited money, which she transferred to her father & brother. She received advice from no one besides her father and his solicitor.

**Held:** The deed should be set aside.
- **Undue influence was said to arise** not only where a *person exerted influence to secure a benefit*, but also where a *person of imperfect judgement* was placed under the discretion of *someone possessing greater experience*.

**Solicitor and client**

A solicitor who enters into a transaction with a client carries a heavy burden: Haywood v Roadknight (1927)
- He must put himself at arm’s length to his client
- He must furnish his employer with all the knowledge he possesses and must give ample and correct advice and information to his client as he would have done if his client had been dealing with a third person
- He must show to demonstration for that must not be left in doubt, that no industry he was bound to exert would have got a better bargain.
- Must be entire good faith between the two

**Trustee and beneficiary**

The onus is on the trustee to justify the propriety of dealings with its beneficiaries, and the weight of authority supports the application of the presumption once the relationship of trustee and beneficiary is shown.
- However dealings between trustees and beneficiaries cannot be allowed to stand where they can be shown to have resulted from the exercise of a free and independent will on the part of the beneficiary: Whereat v Duff (1972)

**Doctor and patient**

Means the influence of attendants of the sick over those in their care. In Haskew v Equity Trustees (1918) it was applied to upset documents executed by a father in favour of a daughter who was looking after him. The father had been so weak that he was completely in the daughter’s control.

**Priest and penitent, or spiritual adviser and flock**
This is not restricted to ordained ministers of established religions, and seems just as likely to apply to fringe sects as to mainstream religions.

- In Allcard v Skinner (1887): religious influence is the most dangerous and the most powerful and to counteract it Courts of Equity have gone very far.
- In McCulloch v Ferm (2001) Palmer J set aside a payment of $93,325 made by the plaintiff's wife to a husband and wife who were the leaders of a religious movement on the basis of undue influence.
  - Mrs McCulloch was frail and in poor health and isolated from her husband.
  - Payment was for the benefit of Mr and Mrs Fern.

**Fiancé and fiancée**

The presumption does not arise in transactions between husband and wife as relationship is one in which gifts to one another are not uncommon: European Asian Bank of Australia v Kurland (1985).

- Though such a relationship could exist if the circumstances involved control and dominance by a husband over his wife: Farmers Co-operative Executors & Trustees ltd v Perks (1989)

The presumption has been held to apply to transactions between couples engaged to be married, at least in respect of gifts from the woman to the man: Lovesy v Smith (1879)

**The Influence of Husbands over Wives: The Principle in Yerky v Jones**

Yerkey v Jones (1939) laid down a limited principle allowing a wife to claim relief against influence supposedly exerted by her husband, at least with respect to dealings with third parties:

- If a husband causes his wife to become a guarantor for his debt in circumstances in which, assuming the husband and the wife were the only parties to the transanction, other than the lender, the wife would be able to set aside the transaction as against the husband and the guarantee will be voidable as against the creditor if it can be shown that the creditor relied on the husband to obtain the guarantee from his wife and had no independent grounds for reasonably believing that she fully comprehended the transaction and freely entered into it.

  - a wife need not prove actual or constructive notice (by the third party) of the undue influence. In other words, the conduct of husband binds the bank, independently of agency or notice

The more recent case of Garcia v National Australia Bank Ltd (1998), built on and expanded the principles in Yerkey v Jones.

**Facts:**

Mrs Garcia had been asked to be a guarantor and co-mortgagor with Mr Garcia in respect of loans made to Mr Garcia for use in his business. After separating from her husband and having obtained dissolution of their marriage, Mrs Garcia sought a declaration to have the mortgage and guarantees declared void.

**Held:**

The High Court held that the principle articulated by Dixon J in Yerkey v Jones could apply in the context of guarantees given by a party who was emotionally dependent on a spouse,
and therefore placed trust and confidence in the spouse. As a result of such trust and confidence, the emotionally dependent party may have entered the guarantee, without having received a full explanation of the nature and consequences of entry into the transaction. If the bank did not take steps to fully explain the terms of the transaction to the emotionally dependent spouse, then the guarantee could be set aside. In order for the guarantee to be set aside, Gaudron, McHugh, Gummow and Hayne JJ (Kirby & Callinan JJ reached the same conclusion but for different reasons) indicated that 4 elements had to be made out (at [31]):
(a) in fact the Guarantor did not understand the purport and effect of the transaction;
(b) the transaction was voluntary (in the sense that the guarantor obtained no gain from the contract the performance of which was guaranteed);
(c) the lender is to be taken to have understood that, as a wife, the guarantor may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet
(d) the lender did not itself take steps to explain the transaction to the wife or find out that an independent third party had explained it to her.
If these elements are satisfied, then it will be unconscionable for the bank to enforce the guarantee. Note that the person giving the guarantee must not have obtained any benefit from the transaction.

Caveat: the concept of a wife’s “special equity” was developed at a time when wives generally occupied an un-equal position in a marriage. Today, the situation is, on the whole, very different, and husband and wife are considered to be equal partners. In order to assess a claim of a wife’s “special equity,” therefore, the court will examine all of the circumstances surrounding the marriage, including any relevant educational and cultural factors.

Other Presumptive Relationships
Can arise in areas such as financial planning to family and social matter.
Undue influence is not restricted to the established categories \( \Rightarrow \) question in every case is
- whether the parties had contracted at arm’s length and on terms of equality, or
- whether there was a relationship of superiority on one side and inferiority on the other,
- a relationship containing the opportunity and the temptation for the unconscientious abuse of the power and
- influence possessed by the superior party sufficient to justify the legal presumption that the transaction was procured in that way.

Non-presumptive Relationships
In these cases the burden of proof rests on the complaining party to show the existence of the influence said to have procured the transaction.

Johnson v Buttress (1936):
Facts:
A 67 yr old man who was illiterate, of low intelligence, lacking in business experience and habitually reliant on others for advice and assistance, transferred land to a relative of his
late wife. He did not have any independent advice but was known to be appreciative of the kindness shown to him from the donee.

Held:
Set the transfer aside as having been made under the undue influence of the donee. The power to practice unconscientious domination over another may arise from:

1. an antecedent relationship
2. from a particular situation
3. in the deliberate contrivance of the party

- If it arises from circumstances (2 or 3), then facts must be proved which show the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered a free fact.
- Where the parties stand in some antecedent relationship, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee.
- The doctrine is confined to no fixed category. It rests upon a principle. It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part.

There was an antecedent relationship between them (because Buttress placed trust and confidence in Johnson and relied upon her for advice), which cast upon her the burden of proving that she had not taken advantage of her position. This she had been unable to do.

Louth v Disprose (1992)

Facts:
Diprose was infatuated with Louth. He showered her with gifts and at one time proposed to her; she refused. Subsequently Louth advised Diprose she was depressed and was going to be evicted and, if this happened, she would commit suicide (this was largely untrue). In response Diprose agreed to buy her a house and, at her insistence, put it in her name. Years later, when their relationship deteriorated, Diprose asked Louth to transfer the house into his name. She refused and he brought proceedings seeking to recover the house.

Held: The transaction was set aside

- Diprose was found to be under a special disability in dealing with Ms Louth
- That special disability arose from his infatuation with her and also due to his extraordinary vulnerability in the false atmosphere of crisis which she manufactured
- She was aware of his special disability and manipulated it to her advantage to influence him to make a gift of the money to purchase the house
- The transaction was plainly improvident

Rebutting the Presumption—Defences to Claims based on Undue Influence

Adequacy of consideration
The fact that the transaction was fair and reasonable or was a sale at full value, generally no further proof will be required of the propriety of the transfer.

- However, the transaction could be set aside or not suffice if the exercise of undue influence is shown: Commercial Bank of Australia v Amadio (1983), or if the transaction is improvident: Brusewitz v Brown (1923)
- Independent advice is not always necessary for a transaction to be fair: Wright v Carter (1903)

Independent Advice

If a person has been properly advised by someone who is independent and adequately qualified to give the necessary advice, then the dealing will be difficult to impeach.

- The mere fact that independent advice has been given will not decide the issue. The nature and quality of the advice is crucial:

Bester v. Perpetual Trustee Co Ltd [1970]

Facts: Ms B lost her mother at the age of 12 and her father when she was 18. She was to receive a substantial inheritance from her father, and two of her uncles persuaded her that it would be in her best interests if she settled her estate on them and received a small income in return. The deed of settlement was drafted by one of the uncles. Although she was asked if she had any questions by an independent solicitor, she was not given any advice. Twenty years later she applied to the court to have the settlement set aside.

Held (Street J): That the plaintiff had established the existence of a special relationship of influence in this case. The circumstances surrounding the Deed established a special relationship of influence (“paternal element”), thereby establishing the presumption of undue influence

The presumption of undue influence was not rebutted, although there was neither fraud nor personal advantage on the part of the defendant. There was not sufficient independent advice and such advice as Ms B received did not allow for a comprehensively informed choice.

Further, the transaction was categorized as “improvident” (careless, thoughtless, failing to provide for future needs).

Actual Undue Influence

In addition to the settled categories of influence, a party may seek to set aside a transaction by proving that the other party had come to occupy or assume a position of ascendancy, power of domination over him. In such an instance, the subordinate party had taken a position of dependence or subjection: Goldsworthy v. Brickell [1987] Ch 378, 401

In Bank of Credit and Commerce International SA v. Aboody (1989) 1 QB 923 it was held that the requirements for proving actual undue influence are:

- dominant party has capacity to influence the other;
- the influence is actually exercised;
- the exercise of influence is undue; and
- the relevant transaction was the result of the exercise of influence.
The defences against actual undue influence are the same as for the rebuttal of presumed undue influence set out in (1) (b) above.

**Undue Influence in the Execution of a Will**
No presumption applies to gifts made by will: Winter v Crichton; Estate of Galieh (1991).
- Anyone asserting undue influence in the execution of a will carries the onus of proving that a will, apparently regularly executed, was procured by the actual exercise of undue influence: Boyse v Rossborough (1857)
- It is necessary to show coercion amounting to pressure on the testator to do something which he or she does not wish or desire to do: Wingrove v Wingrove (1885)