

Torts and Contracts II
LAWS1017/5006
The University of Sydney
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Final Exam Scaffolds

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Undue Influence

(A) Presume Undue Influence by Relationship Type

1. **Rule:** Undue influence can be presumed where it either (a) falls into an established category or (b) can be demonstrated on the facts. It is for D to rebut the presumption by showing that P's entry into the transaction was 'voluntarily and informed' ([Johnson v Buttress](#)).
 - a. **Established Categories:**
 - i. Parent and child
 - ii. Including loco parentus ([Bank of NSW v Rogers](#)) [note: unlikely this case would be decided the same way not]
 - iii. Guardian and ward
 - iv. Religious advisor and disciple
 - v. Solicitor and client
 - vi. Doctor and patient
 - b. **Demonstrated on the Facts:**
 - i. Requires sufficient trust and confidence to give rise to a presumption of influence ([Johnson v Buttress](#))
2. **Can D rebut the presumption?**
 - a. Was P's decision (1) voluntary and (2) informed?
3. **Consequences:**
 - a. If undue influence is established, the contract is voidable and can be rescinded (move to 'rescission' scaffold).

(B) Actual Undue Influence

1. **Rule:** P must prove that D's undue influenced caused them to enter into the contract ([Allcard v Skinner](#))
2. **Considerations:**
 - a. [Johnson v Buttress](#) Case:
 - i. Relationship of influence exists
 - ii. Influence was exercised (question of fact)
 - iii. Exercise was undue
 - iv. Undue influence induced the transaction (causation)
 - b. Poor Mental Capacity: D took advantage of P's poor mental capacity ([Johnson v Buttress](#))
 - c. P was a Guarantor for D's loan: from a third-party creditor/bank ([Bank of NSW v Rogers](#))
 - i. But creditor must have 'actual or constructive knowledge' of the undue influence ([Bank of NSW v Rogers](#))
 - d. Married woman provided security for her husband's loan ([Yerkey v Jones](#); [Garcia v NAB](#)) [Note: HCA has left open the possibility that this principle may extend to long-term and other publicly declared relationships falling short of marriage between same and opposite sexes]
 - i. Four Requirements:
 1. Consent to provide security for husband's loan was procured by husband
 2. Wife didn't understand the effect of the transaction (burden is on the wife to prove this)
 3. Wife doesn't obtain any benefit from the loan
 4. Lender/bank didn't take steps to ascertain if the wife understood
 - a. Prima facie right to have contract set aside if this is the case ([Yerkey v Jones](#)); but this presumption can be rebutted (best way to rebut is to establish that P received independent legal advice) ([Johnson v Buttress](#))
3. **Consequences:**
 - a. If undue influence is established, the contract is voidable and can be rescinded (move to 'rescission' scaffold).

Unconscionable Conduct

(A) Under Statute – ‘In Trade and Commerce’

1. **Rule:** A person engaged in (a) trade or commerce must not engage in unconscionable (b) conduct (c) within the meaning of the unwritten law ([Australian Consumer Law, s 20](#)).
2. **Trade or commerce:**
 - a. Includes any business or professional activity (for profit or otherwise) within Australia or between Australia and places outside Australia ([ACL, s 2](#)).
3. **Conduct:**
 - a. Doing or refusing to do any act (act or omission) ([ACL, s 2\(2\)](#)).
2. **Unconscionable within the meaning of the unwritten law:**
 - a. **Now apply Amadio – i.e., use the general law scaffold below.**

(B) Under General Law (Equity)

1. **Rule:** The elements of unconscionable conduct under general law are outlined in Amadio: the onus is on the stronger party to prove that the transaction was fair, just and reasonable ([Amadio](#)).
2. **Elements:** All elements must be satisfied.
 - a. **Special Disability/Disadvantage:** P has a special disability or disadvantage which put them at a serious disadvantage or seriously affected their capacity to act in their own interests.
 - i. Recognised Disabilities (threshold is high!)
 1. Mental or physical Illness ([discussed in Blomley](#))
 2. Age ([Amadio; Thorne v Kennedy](#))
 3. Illiteracy/lack of education ([Amadio; Thorne v Kennedy](#))
 4. Language barrier ([Amadio; Thorne v Kennedy](#))
 5. Inexperience or lack of assistance/explanation ([Amadio](#))
 - a. Can still act unconscionably even where they do obtain advice ([Thorne v Kennedy](#))
 6. Intoxication ([discussed in Blomley](#))
 - a. Drunk might not be sufficient; drinking problem + drunk is stronger.
 7. Poverty ([discussed in Blomley](#))
 8. Need of any kind ([discussed in Blomley](#))
 9. Sex ([discussed in Blomley](#))
 10. Lovestruck ([Louth v Diprose](#))
 - i. Not a recognised disability
 1. Gambling addiction (other addictions?) ([Kakavas v Crown Melbourne](#))
 2. Inequality of bargaining power/driving a hard bargain ([ACCC v CG Berbartis](#))
 - b. **Sufficient Knowledge** D had sufficient knowledge of P’s special disability.
 - i. Requires actual knowledge including wilful ignorance (constructive knowledge is not sufficient). [Kakavas v Crown Melbourne](#)
 - c. **Exploitation:** Stronger party exploited P’s special disability unconscientiously in order to obtain P’s consent to the transaction.
 - i. Can include creating a sense of urgency regarding the transaction. [Thorne v Kennedy](#)
2. **Rebuttal:** Can D prove that the contract was fair, just and reasonable?
 - a. On the facts.
3. **Consequences:** If unconscionable conduct is established, the contract is voidable and can be rescinded ([move to ‘recession’ scaffold: pp 4](#)).

Rescission

1. **First Determine:** If the innocent party wants (a) rescission or (b) termination of contract + damages.
 - a. **If rescission, proceed.**
2. **Are there any bars to rescission?**
 - a. **Affirmation** ([Coastal Estates v Melevende](#))
 - i. The right to rescission is lost if the innocent party had knowledge of:
 1. The misrepresentation; and
 2. His/her legal right to rescind; and
 3. Instead affirmed the contract.
 - b. **Lapse of time**
 - i. A lapse of time can be evidence of affirmation.
 - ii. You don't have to rescind immediately but it has to be within a reasonable time (five years is unreasonable; [Leaf v International Galleries](#))
 - c. **Third party has acquired rights before the innocent party rescinded the contract** ([Car and Universal Finance Co v Caldwell](#))
 - i. An unequivocal act of election demonstrating an intention to no longer be bound is valid rescission [e.g., calling police; reporting car stolen].
 - d. **Rule in Seddon's Case**
 - i. Where a contract for the sale of land has been executed, the right to rescind for innocent misrepresentation is lost ([Seddon v North Eastern Salt Co](#))
3. **Consequences**
 - a. Parties will be restored substantially (but not necessarily precisely) to their pre-contractual positions ([Alati v Kruger](#)).