

DURESS

DURESS TO PERSON / PROPERTY

Intro

If a party provides a benefit under coercion or duress, their autonomy is vitiating, justifying restitutionary recovery.

Contract? Duress will render a contract void; hence, if X was acting under duress, the contract between X and Y is void and X is able to seek recovery.

'Illegitimate' threat

X must have been under an 'illegitimate' threat, that is, the pressure X is under '*must be one of a kind which the law does not regard as legitimate.*' (Barton).

- Unlawful: Threat of murder, injure, or deprive someone of their liberty (Barton). in *Barton v Armstrong* - threat of murder; clear threat; unlawful threat to person
- Threat to possession; refusal to return property; threat to seize or retain property - in *Hawker Pacific*, no explicit threat was made; the def's conduct indicated a threat that the helicopter would not be returned unless the plaintiff. Priestley J: *[I]t does not seem to me to be sufficient for the appellant's purposes to show that no express threat was made. If circumstances for which the appellant was responsible conveyed the threat to the respondent, then the threat of duress would operate as forcefully as if it were put into words.*
 - Factual threat: HC (plaintiff) urgently needed the helicopter for charter work on 5 March 1987. One of HC's representatives signed an agreement in which HC agreed to pay Hawker \$4,300 for the paint job on delivery of the helicopter and release Hawker from any liability in relation to it. Although Hawker's representatives did not make the threat in so many words, HC's representatives believed that Hawker would prevent them taking the helicopter unless they signed the agreement.
- Lawful threat: If a threat supports a lawful demand (owed money), can the def be unjustly enriched because the money is in fact due? Pressure is not illegitimate

Warning? It could be argued that Y only warned X of _____, not that they coerced X.

- Consider Y's motivations: did he make a statement warning about what will inevitably happen if an outcome occurs, or a threat? Did Y have **strategic motivations** to make the statement, knowing it would coerce Y to act a certain way? Or was Y just warning X of an inevitable outcome?
- Consider control: **how much control did Y have over following through on the threat?** Was it - (a) proposals to adversely change a plaintiff's future (threats); or (b) neutral predictions of the consequences that will follow if a proposal is ignored (warnings). On this approach, **a person must generally control a predicted adverse consequence to be threatening it**

Reasonable belief of threat? ...

- Hawker
- Mason v NSW
- Subjective belief + reasonable belief
- Subjective belief is relevant, not what a reasonable person ought to have believed

Not a worded threat? Even though Y did not explicitly threaten X with words, their behaviour of _____ OR circumstances of _____ conveyed the threat. Per Priestley J in *Hawker*, as Y's behaviour of _____ 'conveyed the threat' as _____, then their threat 'operates as forcefully as if it were put into words'.

- *Hawker* - Priestley J: *[I]t does not seem to me to be sufficient for the appellant's purposes to show that no express threat was made. If circumstances for which the appellant was responsible conveyed the threat to the respondent, then the threat of duress would operate as forcefully as if it were put into words.*
 - Factual threat: HC (plaintiff) **urgently needed** the helicopter for charter work on 5 March 1987. One of HC's representatives signed an agreement in which HC agreed to pay Hawker \$4,300 for the paint job on delivery of the helicopter and release Hawker from any liability in relation to it. **Although Hawker's representatives did not make the threat in so many words, HC's representatives believed that Hawker would prevent them taking the helicopter unless they signed the agreement.**

Causation

The illegitimate threat made by Y to _____ must have induced X's action of ___ (making payment, signing an agreement)___.

Per Lord Cross in *Barton v Armstrong*, 'no such onus' lies on X to establish that they would not have made the decision to _____ but for the threat. The onus lies on the defendant, Y, to prove that their threat 'in fact contributed nothing' to X's decision to _____.

Analogous to Barton, X was in 'genuine fear' of ___ (threat)___, and they 'believed their fears would be at end' once they ___ (succumbed to threat)____. Hence, the threat of _____ was a contributing factor in X's decision, even if it were not the only or predominant one, establishing causation (*Barton*).

Conscious? Lord Wilberforce and Scott suggested, in their dissent *Barton*, that X must be able to give evidence that the threat was a 'conscious reason' for their act of ____, which, if 'honest and accepted', will 'normally conclude the issue'. However, this is the dissenting judgment and probably won't be followed by the courts.

Ordinary motives? Per *Thorne v Kennedy*, as X's behaviour cannot be accounted for by 'ordinary motives', as they __ (sold something for less, signed something valuable away etc.)____, causation is inferred.

Urgency? Per *Hawker*, as X ___ (urgency)____, their conduct of _____ can be seen to have been caused by the threat as ___ (they had no other course of action / no other legal course of action)___.

Absence of reasonable alternatives?

Not its own requirement in Aus law; but can help point to causation

- Two views exist regarding the role of 'reasonable' alternatives in the law of duress.

- The first is that the availability of a reasonable alternative to payment is merely evidentially relevant in determining whether the payment was coerced (whether it was **actually induced** by the threat).
- The second is that it constitutes a **distinct substantive requirement** of the doctrine which has to be independently established.

But the critical question is not whether there was an alternative. It is whether the choice made between alternatives was made freely or under pressure.

- Kitto J; *Mason v New South Wales*

ECONOMIC DURESS

Illegitimate pressure

To establish duress, Y's threat must go beyond 'commercial pressure' (*Pao On*), another factor must be present so as to 'vitiate' X's consent.

Threat to breach of contract: per *Pao On*:

- This was mere commercial pressure -> the will must be vitiated; there must be another factor
- The plaintiff's motives when agreeing to indemnity agreement were commercial, not due to duress: The defendants, **fearing the delays of litigation and that public confidence in the company might decline if the main sale did not go ahead**, agreed.
- Did X protest?
- Was there a different adequate legal remedy open to X as an alternative course of action?
- Was X independently advised?
- Did X take steps after entering into the contract to avoid it?
- Lord Scarman: *It must be shown that the payment made or the contract entered into was not a voluntary act.*

Unlawful acts that constitute illegitimate pressure:

- Tortious wrong; coercion of money payable to the welfare fund (*Universe Tankships*)
- Unlawful threat to not release funds (that someone is entitled to) unless they sign documents (*Crescendo Management*)

Lawful acts? Australian authority is currently ambiguous regarding whether lawful threats of lawful acts can constitute illegitimate pressure.

Adopting the view in *Crescendo*, duress can be established if Y's threat amounts to 'unconscionable conduct'. Questions arise regarding whether McHugh JA was describing unconscionability generally, or the equitable doctrine of unconscionable conduct. Here, as Y _____, which could amount to unconscionability generally as _____, X could establish that Y imposed illegitimate pressure onto them, even though it may not be an unlawful threat.

- Consider bargaining power; consider whether the def has created the hard position the ptff is in; consider exploitation of financial hardship -> points to unconscionability
- Consider financial destitution if disagreeing to sign (eg like the preup in *Thorne v Kennedy*)

However, per Per Kiefel J in *Westpac v Cockerill*, McHugh JA in *Crescendo* was not referring to the equitable doctrine of unconscionable dealing, and that to apply such analytical framework to cases of duress would be incorrect: that the essence of the action under duress is the 'pressure brought to bear and its wrongfulness'. Analogous to *Westpac v Cockerill*, _____.

- *[I]n my respectful opinion, neither the threats of appointment and sale nor the demand for release were themselves wrongful nor could they have operated as coercive.*
- Lawful conduct can still be illegitimate pressure, just not using analysis of equitable unconscionable conduct; the above acts were not illegitimate pressure by Westpac

However, despite Kiefel J's judgment, the more recent case of *ANZ v Karam* suggests that 'economic duress' and 'illegitimate pressure' are too vague, and that to rectify this, the concept of duress should be limited to 'threatened or actual unlawful conduct'. This