WRONGFULNESS, RIGHTS AND ECONOMIC DURESS

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> [If] there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily should be held sacred.[1]
>
> Lord Jessel M.R.

> We take the view that there is no sanctity in a contract which is unjust. This is a principle which is deeply imbedded in the thought and the law of our country and from it spring those equitable doctrines which provided relief against unconscionable bargains, originally in the case of expectant heirs for whom the authorities of those days were particularly tender, and later in other cases in which the parties had not met upon equal terms.[2]
>
> Sir Lynn Ungoed-Thomas

I. INTRODUCTION

Implicit in these statements is a moral dilemma which has long existed in the law of contract: should the courts permit the enforcement of contracts which have been freely negotiated, regardless of their moral foundation or purpose, or should they first ensure an essential fairness in the making and performing of the contract? Should the courts uphold an almost Pelagian view of the primacy of the individual will in seeking temporal economic salvation or should they impose with Augustinian firmness a predetermined but not universally held morality? In other words, should the courts protect those who cannot protect themselves? The response of the Supreme Court of Canada was clearly stated by Mr. Justice Estey in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*:

> Where parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts.[3]

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[1] Printing and Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462, at 465, 44 L.J. Ch. 705, at 705 (1875).

[2] LEASEHOLD COMMITTEE, FINAL REPORT 139 (1950), cited in P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 748 (1979). This statement was pronounced while Sir Lynn was Solicitor-General in a Labour government, prior to his appointment to the Bench.

[3] [1982] 1 S.C.R. 726, at 745, 135 D.L.R. (3d) 1, at 15.

However, the issue involves more than the ethical problem posed by the role of volition in interpersonal economic relationships. The enforcement of unfair contracts raises important political-social questions, such as the use of economic power in individual relationships, the conceptual framework of modern contract law and its function as a social institution and a regulatory device in the marketplace. To assert as does Estey J. that experienced commercial men should not expect judicial sympathy ignores the realities of the modern commercial world. Indeed, His Lordship's statement, and that of Lord Jessel M.R., embraces the so-called will theory of contract, which is associated with classical individualism and nineteenth century liberalism. Sir Lynn Ungoed-Thomas' statement, on the other hand, implies a philosophy by which contract is viewed as an engine of distributive justice, an integral component of a unified law of obligations, or simply as an institutionalized technique for the exercise of a personal moral theology.

Logical structures have not been devised in the law of contract to assimilate these contradictory approaches. This is not merely a result of judicial or academic inadequacy, rather these conflicting aims simply reflect an unresolved issue in the realm of political philosophy, namely the relationship between the individual and the collective, the need for self-determination as an expression of an individual's identity and the collective's need for individual self-restraint in a complex, interrelated and over-populated world.

II. The Historical Background

The dilemma is seemingly more critical today than it was in the eighteenth and nineteenth centuries. A brief review of the historical dialectic between these views[4] is therefore useful.

Professor Atiyah[5] has suggested that the evolution of the modern law of contract can be traced to the end of the eighteenth century when a simple model of contract as the creation of legal liability *ex nihilo* through the exchange of promises was first formulated. A theory that contract was a means of creating wholly new legal obligations emerged, albeit almost imperceptibly, from the older common law notion that contractual liability arose more from consideration, conceived of as a pre-existing moral obligation, than from mere promising. The latter was

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[4] These have been called "individualism" and "altruism": *see* Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

[5] *Supra* note 2. What follows is essentially based on Atiyah's historical analysis which is itself indebted to M. Horwitz, The Transformation of American Law 1780-1860 (1977) and *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917 (1974). *See also* Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. of Chi. L. Rev. 533 (1979) and *Contract: The Twitching Corpse*, 1 Oxford J. Legal Stud. 265 (1981).

simply evidence of a primary liability the source of which was the consideration, and a legal duty to perform existed even in the absence of a promise to perform. This model was inherently moral, unlike the one which replaced it in the course of the next century, because the obligation was defined by the pre-existing duty, likely arising within the context of a fair exchange, and was itself a duty. This explains why certain contractual principles, regularly applied in the eighteenth century, came to be viewed through nineteenth century spectacles as anomalous, if not wrong-headed, for example, Chancery's willingness to invoke a notion of unconscionability in a variety of circumstances[6] to ensure a fair exchange and the common law's inability to distinguish contract and *quasi*-contract with the result that payment for the restitution of a benefit received was enforced in an action in *assumpsit* in the absence of promises acknowledging the existence of a duty.

If the receipt of a benefit was regarded as the primary basis of legal liability in the eighteenth century, in the nineteenth century contractual principles evolved in a manner which both reflected, and was influenced by, the development of the free market, the theories of the classical economists, such as Smith and Ricardo, and political theorists advocating individualism and utilitarianism. The unsophisticated moral notions of fair exchange and payment for benefits received were no longer acceptable in the now harsher political-economic world. Nor could they found the more complex legal techniques required by an industrial capitalism which demanded total freedom in the pursuit of its aims. The rage was for the "scientific method",[7] thus English lawyers predictably turned to the scientific expositions of general principles found in contemporary continental jurisprudence. In regard to the law of contract, the deepest well of new learning was Pothier's *Law of Obligations*[8] in which Pothier argued that a contract was an agreement based on the intentions of the parties and was created voluntarily. Contractual liability arose therefore only when voluntarily willed by a party.

This will theory of contractual obligation was perfectly tuned to the needs of the age and to the economy of the free market. It reflected the social ideals of individualism, self reliance and an increasingly atomistic view of society in which relationships were a matter of free choice.[9] Free will and self-help were the requirements for success, whether in the economy of salvation or the economy of the market place. Each

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[6] S. WADDAMS, THE LAW OF CONTRACTS ch. 14 (1977).

[7] T. HEYCK, THE TRANSFORMATION OF INTELLECTUAL LIFE IN VICTORIAN ENGLAND (1982).

[8] (1806). This was originally written in French and was intended to replace the conflicting and confused customary law with a uniform body of obligations law. It was re-written in English for the perceived English market.

[9] It is hardly surprising that in an era where the professional and commercial classes largely espoused evangelical Protestantism, whether Methodist or Low Church, the private law should uphold only two legitimate sources of legal liability, intentional fault and contract, both founded in the deliberate actions of the human will.

individual was responsible for himself, owing no duty toward his neighbours other than to refrain from violence. Legal contractual duties arose from voluntary agreements and the adequacy of consideration was irrelevant. A court's sole function was to ensure procedural propriety, not to police unfair bargaining and certainly not to impose additional legal duties on the parties. It was merely to resolve disputes by working within the framework to which the parties had allegedly agreed.

The ascendency of freedom of contract was accompanied by a growth of formalism in curial contractual analysis. As a result, whimsical eighteenth century doctrines such as fair exchange and the protection of the reliance interest, appeared as antiquarian relics in the callous world of nineteenth century contract making. If the basis for legal liability was now thought to reside in the will, anomalous eighteenth century doctrines such as duress and mistake had to be reinterpreted. Duress came to be explained as a defective consent or an unfree will. If a manifestly unfair contract was upset on this ground, it was as if the contract had been vitiated from the start by the absence of voluntary consent. In short, the rationale for permitting such a defence was no longer simple unfairness.[10] The defence, however, succeeded infrequently and the courts refused to expand its content or the scope of its application. Thus, duress of goods from which a doctrine of economic duress could have developed as it did in the United States was severely restricted; deprivation of one's goods did not amount to deprivation of one's free will as did duress of the person.

The ascendency of the will theory of contractual obligation was brief. Indeed, contract law under its hegemony was riddled with parodoxes which undermined the sterner utterances of judges such as Lord Jessel M.R. For example, with respect to breach of contract, an innocent party ought logically to have been compensated for his expectation losses. However, the courts, using the test of "reasonable foreseeability", inevitably awarded sums substantially in excess of those based on reliance or restitution. By implication then, the legal duty to compensate was judicially imposed on the parties without their consent. Another irony in the consensus approach was the attempted enforcement of the parties' *objective*, rather than *actual* intentions; in other words, the determination of factual issues was deliberately kept to a minimum. As a result, the court implicitly foisted upon the parties what it regarded as the intentions of the reasonable man, thereby making contracts for litigants whose disputes it professed to be merely arbitrating. However, the most blatant paradox during this time was the patent judicial willingness, purportedly to give commercial efficacy to the contract, to imply terms

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[10] It should be remembered that doctrines of unfairness and unconscionability and the notions of restitution and reliance-based obligations did not entirely disappear during the heyday of the will theory of contract. Rather they played an infrequent and interstitial role in unusual situations for which the consensual and voluntary explanation of private obligations provided no just solution.

which the parties would have themselves made had they adverted to the issue.

The final significant indictment of the will theory emanated from Parliament. Throughout the latter half of the nineteenth century, legislation was enacted regulating a wide variety of contractual relationships, especially those which affected the new contractual status of the nineteenth century, the consumer. In short, the climate had changed by this time. The ideal of individualism was replaced increasingly by one of collectivism. As law and legal practice became more professional, technical and time-consuming, jurisprudence gradually lost touch with the new economic, philosophical and political theories which addressed modern problems, so that a contract law based on the will appeared increasingly antiquated. Indeed, contract jurisprudence became more and more formalistic, technical and arid, and did not undergo the realist revolution that it did in the United States. In the confusing moral pluralism of the twentieth century, contract law preached from a philosophical perspective one hundred years out of date and increasingly scholastic in nature.

Since the early 1960's it would appear, however, that contract jurisprudence has tended to become more pragmatic in nature. Judicial discretion is now exercised frequently. The classical individualism traditionally characteristic of contract law is now perceived by all but the most obtuse judges as inadequate to cope with the realities of modern economic relationships, an opinion shared even by many who sympathize with classical nineteenth century liberalism as a philosophical and personal ideal. Apart from containing within itself the seeds of its own destruction, the law of contract, regardless of its jurisprudential pretensions, appears to be increasingly irrelevant in the modern world. Private contracting is no longer the predominant means of controlling economic power; rather governments play a large role in the allocation of economic resources either directly or indirectly through regulatory mechanisms. Thus, the decline of contract law as a regulator of economic relationships is matched by the rise of administrative law as the means of regulating public duties owed by governments to individual citizens. Even within the private sector, the rise of large corporate aggregates tends to mean that subsidiaries and related companies "contract" with one another on terms upon which no court is ever asked to adjudicate since disagreements are resolved internally.

In addition to these institutional reasons, the diminished role of contract follows from the decline in individual free choice, whether this has occurred as a result of government regulation or the widespread use of standard form contracts in monopolistic or near-monopolistic market situations. The absolute power of contracting parties, especially consumers, to determine their own bargains is virtually non-existent. Moreover, there is a declining value attached to individual free choice. That individuals do not have a divine right to self-determination in the marketplace is now widely accepted.

It is not surprising, then, that contemporary contract law is witnessing the decline of the will theory in fact, although judges still recite the traditional cant. Indeed, it would appear that the eighteenth century ideals of liability based on reliance and restitutionary principles and of judicial scrutiny of contractual obligations for fairness are once more on the rise; and that the law of contract is again merging with tort into a general law of obligations.

Given this background, the adoption of a will theory for economic duress seems incongruous. It is not entirely impertinent to suggest that the defective will basis which is required currently for a finding of economic duress requires closer examination. Several recent cases in the area may indicate that the courts are on the verge of moving away from a will-based theory to a moral theory, founded on "wrongfulness" or "illegitimacy". It is the purpose of this article to focus on these cases and to analyze this base.

III. Coerced Wills and Wrongful Actions

Ironically, the themes and variations characteristic of the historical evolution of modern contract law have been re-introduced into the law through the concept of economic duress emerging in Anglo-Canadian jurisprudence. Thus when Mr. Justice Kerr was called upon to address the issue in *The Siboen and the Sibotre*,[11] he noted that "the true question is ultimately whether or not the agreement in question is to be regarded as having been concluded voluntarily",[12] and that "the Court must in every case at least be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of any animus contrahendi".[13] On the facts of the case His Lordship concluded: "[The plaintiff] was acting under great pressure, but only commercial pressure, and not anything which could in law be regarded as a coercion of his will so as to vitiate his consent."[14]

Subsequent English courts have repeated the refrain[15] and the coerced will theory has seemingly become embedded in contemporary contract jurisprudence as the "test" for economic duress. It is, of course,

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[11] [1976] 1 Lloyd's Rep. 293 (Q.B.).

[12] *Id.* at 335.

[13] *Id.* at 336.

[14] *Id.*

[15] *See, e.g.*, North Ocean Shipping Co. v. Hyundai Constr. Co., The Atlantic Baron, [1978] 3 All E.R. 1170, at 1182-83, [1979] 3 W.L.R. 419, at 432-33 (Q.B.) (Mocatta J.); Pao On v. Lau Yiu, [1979] 3 All E.R. 65, at 79, [1979] 3 W.L.R. 435, at 451 (P.C.) (Lord Scarman):

> In their Lordships view, there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion which vitiates consent.

The same test is also cited in the most recent trilogy of economic duress cases, namely Syros Shipping Co. v. Elaghill Trading Co., The Proodos C, [1981] 3 All E.R. 189, at

nothing more than the old test for duress of the person transferred into the commercial realm and is predicated on the will theory of contract law since its essence is coercion of the will so as to vitiate real contractual consent. A trilogy of cases,[16] arising in the early 1980's, indicated the development of a more sophisticated set of criteria for economic duress. If conceptually developed, these criteria would bring the doctrine of economic duress into line with current trends in obligations-based liability generally,[17] in contrast to the initial curial attempts to develop a doctrine founded on the somewhat outdated will theory of liability. Of particular interest in these recent cases is the stated importance of the nature of the coercive action itself; an action must be "wrongful" or "illegitimate" as well as overbearing the plaintiff's will.

The first significant modern case to strain against a purely will-based liability in duress was *Barton v. Armstrong*[18] in which the majority in the Privy Council found that threats to the life of the plaintiff vitiated his consent to the transaction. The decision rested on coercion of the plaintiff's will. However, essential to this finding was the defendant's use of an illegitimate means of persuasion. Both the majority and the dissenting law lords (Lords Wilberforce and Simon of Glaisdale) agreed on that expression of the notion of duress of the person although it was elaborated only in the minority judgment.[19] The determinant of real duress is not mere pressure, which is part of commercial life in any case, but the presence of illegitimate pressure.[20] To prove duress the plaintiff must show the following: (1) that some illegitimate means of persuasion was used; (2) that a causal relationship existed between the illegitimate conduct and the plaintiff's response; and (3) that the plaintiff's response

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192, [1980] 2 Lloyd's Rep. 390, at 393 (Q.B.) (Lloyd J.); Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd., [1983] 1 All E.R. 944, [1983] 1 W.L.R. 87 (Ch.) (Millet Q.C.); Universe Tankships Inc. of Monrovia v. Int'l Transport Workers' Fed'n, [1982] 2 All E.R. 67, [1982] 2 W.L.R. 803 (H.L.), *aff'g* [1981] I.C.R. 129 (Q.B.) (Parker J.) and [1981] I.C.R. 147 (C.A.). For comments on this case, *see* Wedderburn, *Economic Duress*, 45 MOD. L. REV. 556 (1982); Tiplady, *Concepts of Duress*, 99 L.Q.R. 188 (1983); and Napier, *Economic Duress, Restitution and Industrial Conflict*, 42 CAMB. L.J. 43 (1983).

[16] That is, the second trilogy: *Syros Shipping Co.*, *Alec Lobb* and *Universe Tankships*, *supra* note 15. The first trilogy comprised *The Siboen*, *supra* note 11, *North Ocean Shipping Co.*, and *Pao On*, *supra* note 15. Elsewhere the author has commented on this first trilogy of cases where the coerced will theory was adopted: *see* Ogilvie, *Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract*, 26 McGILL L.J. 289 (1981).

[17] Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1510 (1980); Bridge, *The Overlap of Tort and Contract*, 27 McGILL L.J. 873 (1982); Burrows, *Contract, Tort and Restitution — A Satisfactory Division or Not?*, 99 L.Q.R. 217 (1983).

[18] [1976] A.C. 104, [1975] 2 All E.R. 465 (P.C.).

[19] That "illegitimacy" is a requisite for duress of the person, in the opinion of the majority, is evident. *Id.* at 118-20, [1975] 2 All E.R. at 474-76.

[20] *Id.* at 121, [1975] 2 All E.R. at 477 (Lord Wilberforce and Lord Simon).

was self-conscious, that is, he acted as he did because he was forced to do so.[21] The burden of proof is on the defendant to show that the illegitimate action did not induce the plaintiff to enter the transaction, and the illegitimate means need be but one reason for the submission.[22]

That *Barton* posed more questions than it answered confirms the view that common law duress is a crude doctrine once its meaning is extended beyond actual or threatened violence to the person so as to vitiate consent. Indeed, on the facts, it is not clear why the Privy Council had to import a notion of illegitimacy into the discussion in the first place. Traditionally threats to murder are in themselves sufficient to vitiate any agreement so induced and if the plaintiff in *Barton* was truly coerced into submission, then there can be no quarrelling with the result.[23] However, the Privy Council eschewed this simple precedent-based approach and asserted that duress required the exercise of illegitimate pressure. It thereby begged the question of what constitutes illegitimacy in addition to actual or threatened violence to the person. On the facts of the case, this was not required. Moreover, the search for an appropriate answer was, perhaps, confused by citation of the oft-quoted words of Mr. Justice Holmes, "subjected to an improper motive for action".[24] Motive *per se* is irrelevant, "improper" is legally vague and there is no necessary causal connection between subjection and response.

In *Barton*, illegitimate conduct clearly included criminal behaviour, and one cannot cavil at that. However, what else it might cover is left uncertain. Other questions remain. Why should "illegitimacy", whatever it might mean, be imported into the concept of duress? Must the conduct in question be illegitimate *per se* or merely produce an illegitimate result? How should it be integrated with the will theory of contractual obligation? Does it not suggest the introduction of some sort of tortious standard of duty into contract? Is this justifiable? Must both illegitimate conduct, however that is defined, and an overborne will be required for a finding of duress, or merely an overborne will? Does the concept of illegitimacy really create a standard more objective than the subjective determination of whether a particular will was coerced, or are competing concepts of illegitimacy themselves the subjective expressions of individual judicial minds?

The somewhat anomalous importation of a broad notion of illegitimacy is *prima facie* more difficult to justify in duress of the person than it is in economic duress. It is hardly surprising then that two recent

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[21] *Id.*

[22] *Id.* at 118-19, 121, [1975] 2 All E.R. at 474-75 (Lord Cross), 477 (Lord Wilberforce and Lord Simon).

[23] In fact, the main division within the Privy Council was over the factual issue of whether the plaintiff was really coerced into entering the agreement and was not, with the advantage of knowing that it was to his disadvantage, attempting to get out on the pretence of duress. The majority was willing to overturn the trial decision on this issue whereas the minority was not.

[24] Fairbanks v. Snow, 13 N.E. 586, at 598 (Mass. 1887).

cases[25] have picked up and embroidered illegitimacy into the developing doctrine of economic duress. The third case (and the first in time) in the recent trilogy, *Syros Shipping Co. SA v. Elaghill Trading Co., The Proodos C*[26] simply asserts that the coerced will test is the proper one for the arbitrator. Economic duress, however, was not an important issue in the case, so it need not be considered further.

In *Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd.*,[27] economic duress was argued as one of several reasons for which an agreement of lease and lease-back of a tied garage should be vitiated. Lobb Ltd. was a small family company, of which Mr. Lobb and his mother were the sole directors and shareholders. It was formed in 1964 to purchase the Lobbs' freehold interest in a garage so as to enable them to continue the business. To finance the development of the site, Lobb Ltd. entered an agreement with Total whereby, in exchange for £15,000 repayable over a period of eighteen years, Lobb Ltd. undertook to sell only Total petrol for twenty years. Total was given a charge over the property and the Lobbs were guarantors. The venture proved unprofitable from the start, and in 1965 Lobb Ltd. was forced to secure bank loans. In both 1965 and 1968 it granted further charges to Total to secure further capital advances. Finally, in 1968-69 Mr. Lobb proposed to lease and rent back the garage forecourt to Total, and this resulted in the agreements which Lobb Ltd. wished to have set aside. The agreements provided, *inter alia*, for a lease to Total for fifty-one years for a premium of £35,000 plus a peppercorn rental and lease-back to the Lobbs at £2,250 *per annum* for twenty-one years. In addition there were mutual break provisions at the end of the seventh and fourteenth years, an exclusive petrol tie, a right vested in Total to determine the lease-back on six months' notice if yearly petrol sales fell below a stated amount, and an absolute prohibition on assignments. Within the very year of execution of these agreements Lobb Ltd. was again in difficulty. With Total's permission it used the lease-back as security for a bank overdraft and again, in 1973, the premises were converted into a self-service station and the rent increased to £3,500. Finally, the Lobbs sought to have the lease and lease-back set aside on the following grounds: (1) the bargain was harsh and unconscionable; (2) the bargain resulted from Total's abuse of a fiduciary or confidential relationship with the Lobbs; (3) the transaction was in substance a mortgage and improperly entered into by the parties; (4) the petrol tie was void as an unreasonable restraint of trade; and (5) the transaction was procured by economic duress. Only the arguments relating to unconscionability and economic duress are of immediate interest.

In order to deal with the allegation that the agreements were harsh and unconscionable, the learned judge attempted to formulate modern

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[25] *Alec Lobb* and *Universe Tankships*, *supra* note 15.

[26] *Supra* note 15, [1980] 2 Lloyd's Rep. at 393 (Lloyd J.).

[27] *Supra* note 15.

criteria against which the Court could measure the facts of the case. In contrast to the Uniform Commercial Code,[28] which states that unconscionability relates only to the contract and its terms, the test proposed in *Alec Lobb* focused primarily on the relative bargaining positions of the parties, especially on the conduct of the stronger party. Three elements were said to be required for a finding of unconscionability: (1) that one party be seriously disadvantaged in relation to the other because of poverty, ignorance, lack of advice or other similar circumstances; (2) that the weakness of the disadvantaged party be exploited in a morally culpable manner; and (3) that the resulting transaction be overreaching and oppressive and not merely hard and improvident:[29]

> In short, there must, in any judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) which in the traditional phrase "shocks the conscience of the court", and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.[30]

The Court found that the first element was present. Lobb Ltd. and the Lobbs personally faced bankruptcy. They were under pressure from the bank and the petrol tie for twenty-one years precluded other financial arrangements. However, neither the second nor third criterion was present. Moreover, Total did not act in a morally culpable manner; it knew throughout that the Lobbs had independent legal advice, although it did not know that Mr. Lobb was being somewhat less than honest with his solicitors regarding his true position; it did not press for a quick decision, as did the Lobbs. Indeed, Total was not overly enthusiastic about the arrangement because on the basis of professional valuation of the site and its commercial potential it was paying at least a realistic price. With regard to the third criterion, Millett, Q.C. found that the resulting transaction was not even unreasonable, and certainly not unconscionable: "[It was] in the standard form of lease which the

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[28] U.C.C. §2-302 (1982). The official comment states:

> This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the contract. . . . The principle is one of the prevention of aggression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

Cf. Multiservice Bookbinding Ltd. v. Marden, [1979] Ch. 84, at 110, [1978] 2 All E.R. 489, at 502 (Browne-Wilkinson J.), where it is asserted that it is not enough that the bargain is unreasonable but that "one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience".

[29] *Supra* note 15, at 960-61, [1983] 1 W.L.R. at 94-95.

[30] *Id.*

defendants offered to prosepective tenants, and I have no reason to think that [it was] not generally acceptable to dealers.''[31]

This formulation of unconscionability has a strongly eighteenth century flavour to it, unlike contemporary American ones such as that in the Uniform Commercial Code. The emphasis is placed on the very conduct of the stronger party rather than on its effect on the weaker party.[31a] Moreover, it is the *moral* conduct which must be scrutinized. The actual terms of the resulting transaction are perceived primarily as a mere reflection of some morally culpable exploitation of a superior bargaining position. Arguably, inequality of bargaining power is just a pre-existing condition for a finding of unconscionability and, although normally present, it is not a necessary pre-condition; oppressive terms are merely the result of unconscionability. The critical factor remains the morally culpable act itself. This will almost inevitably involve the exploitation of a superior position. Such exploitation may itself be the morally culpable deed, although it is more likely that the deed will be an independent action, the success of which presupposes bargaining superiority. Indeed, although difficult to imagine, a morally culpable deed alone, even in the absence of a markedly superior bargaining position, should be enough to found a successful cause of action if the *Lobb* definition of unconscionability is applied. The focus, then, for curial investigation is the morally culpable deed.

The restoration of ''morality'' to contract law in the late twentieth century, after its repudiation in the nineteenth century in favour of value-free scientific principles, begs the trite question: what is moral culpability? The learned judge speaks of ''some impropriety . . . shock[ing] the conscience of the court'', and of conduct ''against equity and good conscience''.[32] Yet, when he analyses the case before him, he decides that Total's use of its standard form contract is evidence of essential fairness and reasonableness in its dealings with the Lobbs, apparently oblivious of the criticism to which contracts of adhesion have been subjected, even by the courts.

It is difficult to argue with the conclusion reached by the Court. Despite the use of a standard form contract, it appears that the Lobbs were very much the creators of their own misfortunes, unlike for example, the Listers in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*[33] who entered the settlement agreement while Dunlop was in wrongful possession of the Chrysler goods and after Chrysler had started bankruptcy proceedings against them. It is much easier in *Lobb* to conclude that the Lobbs' problems were self-induced and that Total was attempting to assist them, although ultimately for selfish reasons.

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[31] *Id.* at 963, [1983] 1 W.L.R. at 96.

[31a] This was the case in the first English trilogy on the related notion of economic duress discussed in Ogilvie, *supra* note 16.

[32] *Supra* note 15, at 961, [1983] 1 W.L.R. at 95.

[33] *Supra* note 3.

However, putting aside the apparent correctness of the decision on its reported facts, it remains to ask whether moral culpability should be measured by the criteria of a standard form contract allegedly acceptable to other dealers. How does the court know of its broad acceptability? Does the fact that dealers execute such contracts mean that they think they are fair? Even if they are considered fair and reasonable by the parties generally, does that imply that they are fair for specific parties with particular problems? Does it mean that they are fair?

The application of an explicit moral test in today's pluralistic society would clearly create uncertainty in the negotiation and enforcement of contracts, in contrast to the eighteenth century when members of the litigious classes in English society shared a common understanding of acceptable and unacceptable conduct, even though those values were often transgressed in commercial dealings. The moral parameters of both society and the law were known by all who resorted to Westminster Hall to resolve their disputes. As commendable as it may be to speak openly of morality in the law, it seems unlikely that "moral culpability" in itself is enough to assist a curial determination of when to redress unfair bargains.

The shifting emphasis in unconscionability is matched by a shifting and expanded definition of economic duress, as formulated in *Lobb*. It is true that the judge invoked the definition provided by such cases, but he also went somewhat further:

> This is a branch of the law which is still developing in this country, but I accept that commercial pressure may constitute duress and render a transaction voidable, provided that the pressure amounts to a coercion of the will which vitiates consent: see *Pao On v. Lau Yiu Long* [1980] A.C. 614. Economic duress, however, is still a form of duress. A plaintiff who seeks to set aside a transaction on the grounds of economic duress must therefore establish that he entered into it unwillingly (not necessarily under protest, though the absence of protest will be highly relevant); that he had no realistic alternative but to submit to the defendant's demands; that his apparent consent was exacted from him by improper pressure exerted by or on behalf of the defendant; and that he repudiated the transaction as soon as the pressure was relaxed.[34]

The economic duress of which the Lobbs complained was the existence of the petrol tie which prohibited them from seeking help elsewhere. However, this argument carried no weight with the judge who noted that the pre-existing contract in which the petrol tie was contained had been freely negotiated. Moreover, he was uncertain as to whether the Lobbs did not have realistic alternatives and did not think that they entered the lease and lease-back agreements under any compulsion. Their financial difficulties were of their own making and in the course of the negotiations they were able to resist Total's attempts to obtain the freehold of the property. The bargain was a hard one but Total was reluctant to enter it at all.

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[34] *Supra* note 15, at 960, [1983] 1 W.L.R. at 93.

It is difficult to determine whether the learned judge was correct in finding that there was no economic duress. He does not intimate what other realistic alternatives were available or whether, given the petrol tie, Total would permit the Lobbs to resort to them without imposing a substantial penalty or protecting Total's interests. Yet at the same time, it is clear from the decision that the Lobbs pressed Total for the new agreements and were subjected to no obvious economic pressures beyond those which were self-created. They did not protest at the time they entered the agreement, nor did they repudiate the transaction; indeed they appeared to affirm it by using the proceeds to pay off other creditors and waiting ten years before launching their action to set it aside. *Lobb* gives every appearance of being a "hard case".

Of greatest interest in the case is the judge's willingness to utilize an expanded definition of economic duress, including the availability of realistic alternatives, the significance of subsequent repudiation and the exertion of improper pressure. It is difficult to see from the passage quoted above whether these are merely objective criteria for determining whether a will has been coerced, or are separate components of a test somewhat more sophisticated than that of an overborne will. As criteria they are hardly new, but as a test, their inclusion represents an advance in curial thinking about economic duress. The learned judge decided that something more than Total's refusal to waive performance of the pre-existing obligations of the petrol tie was required for a finding of improper pressure. Thus he did not feel obligated to explore what "improper" pressure might mean, although he clearly regarded it as a necessary constituent of economic duress.[35] Nor is it possible to imply a substantive content into the word "improper" from the reported facts because, as already noted, the case is a hard one. However, some observations are possible. If the import of the judge's definition is to expand economic duress beyond a coerced will test, then the requirement of improper pressure is an important development. That this may be the case appears to be substantiated by the learned justice's willingness to consider a variety of possible types of pressure. If that observation is correct, then the content of economic duress may well be shifting from a will-based content to one in which wrongfulness with its moral implications is at least as significant. Moreover, the distinction between economic duress and unconscionability, when both are based on an assessment of wrongfulness or moral culpability in the superior party's conduct, becomes difficult to make. In contrast, economic duress as explained within a will-based contractual theory of liability emphasized, not the act *per se*, but its effect on the inferior party's will. Should the

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[35] "It is not necessary to consider to what extent, in order to constitute economic duress the pressure must be improper, but it must, in my judgment, consist of something more than a refusal to waive performance of an existing contractual obligation." *Id.* at 961, [1983] 1 W.L.R. at 94.

shipowners. Both the trial judge, Parker J., and the Court of Appeal found that, pursuant to the collective agreement, each crew member was entitled to be paid his backpay in an *aliquot* share. Since each crew member had an assignable interest and the assignments in favour of the shipowner were valid, they were enforceable. The I.T.F. did not hold the sum as a discretionary trustee.[37]

The important issues, then, concerned the claim for the amount paid into the welfare fund and comprised the so-called "trust point" and the "economic duress point".[38] The latter point is of immediate concern, and revolved around two issues: (1) was there economic duress? (2) was there a statutory immunity from liability pursuant to the Trade Union and Labour Relations Act 1974?[39] The trial judge made three important findings of fact: (1) the shipowners submitted to the demand for payment as the only means available to regain the use of the ship; (2) they had no practical alternative but to submit because loss of use of their ship was financially disastrous for them; and (3) *prima facie*, tortious acts were committed by the I.T.F. The trial judge adopted the coerced will definition of economic duress and found the shipowners had been forced to execute the agreements and pay the $80,000 because of the commercial necessity that they regain the use of their ship. He noted that they were advised of the minimal prospects of obtaining an injunction, and that they acted swiftly to seek redress once the duress had terminated.[40] The Court of Appeal does not specifically address the issue of economic duress; however, its discussion of the statutory immunity conferred by T.U.L.R.A. presupposes agreement with the trial judge's finding. On the other hand, the House of Lords devoted considerable energy to defining a modern doctrine of economic duress, although this was unnecessary since the I.T.F. conceded that in procuring the blacking of the ship it had exercised economic duress, and most of the law lords accepted this concession.[41]

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[37] *Id.* [1981] I.C.R. at 146-47 (Q.B.) (Parker J.) and at 165-66 (C.A.) (Megaw L.J.).

[38] The trust point is of no immediate interest. Suffice it to note that both the House of Lords and the Court of Appeal found, on construction of the rules of the welfare fund, that it was not impressed with any trust. Rather it was established by way of contract and the fund was merely one specially earmarked for seamen's welfare purposes, although it could be used for other purposes. The $6,840 was not held on trust; thus no resulting trust could arise in favour of the shipowners and the money was not recoverable on that ground. For discussions of the trust point, *see* the comments of Megaw L.J., *id.* at 154-59; and [1982] 2 W.L.R. 803, at 812, 817, 819, 820, 824-25, 833, 836 (H.L.). *Cf.* the comments of Parker J., [1981] I.C.R. at 135-41 (Q.B.) who held that a trust had been established. *See also* Green, *Universe Tankships — "The Trust Point"*, 45 MOD. L. REV. 564 (1982).

[39] U.K. 1974, c. 52 (hereafter cited as T.U.L.R.A.).

[40] *Supra* note 15 (Q.B.).

[41] Lords Diplock and Russell clearly accepted the concession; Lords Cross, Scarman and Brandon re-examined the issue and *appear* to have decided that there was economic duress. For an extensive analysis of the law lords' discussions of economic duress, *see* text accompanying notes 54-64 *infra*.

The question remained as to whether the I.T.F. could claim the statutory immunity provided in relation to labour disputes by the Act. At issue was the combined effect of subsection 13(1) which provided that acts done "in contemplation or furtherance of a trade dispute" shall not be actionable in tort,[42] and subsection 29(1) which defined a trade dispute as a dispute "connected with . . . terms and conditions of employment".[43] The shipowners argued that the payment of $6,480 was wholly unconnected with a trade dispute within the meaning of the Act. The I.T.F. argued that it was, since the welfare fund demand was connected to the terms and conditions of the seamen's employment. Parker J. decided that, as a demand for the welfare fund only would be recoverable because unconnected with a trade dispute, it was recoverable here; considered alone it was, in his view, unrelated to terms and conditions of employment. Moreover, the Act protected only "actions in tort", not tortious-like acts; thus the contribution was recoverable because it was paid under duress.[44]

The approach of the Court of Appeal differed somewhat perhaps because the shipowners apparently conceded that subsection 13(1) might be relevant as a defence in circumstances other than those involving specific actions in tort. The learned justices declined to consider the anomaly resulting if subsection 13(1) were to apply only to actions in tort, namely, a trade union would enjoy statutory immunity if the action were framed in tort, but not if the duress did not amount to tort or the action were framed in contract.[45] The issue, then, in the Court of Appeal was whether the acts allegedly constituting the duress were in furtherance of a trade dispute. The shipowners argued again that set apart, the funds paid over in respect to the seamen's welfare were unrelated to a trade dispute as defined in the Act.

Lord Justice Megaw stated that but for *British Broadcasting Corp. v. Hearn*[46] and *N.W.L. Ltd. v. Woods*,[47] the Court would have agreed

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[42] Sub. 13(1) is as follows:
An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only —
(a) that it induces another person to break a contract of employment; or
(b) that it consists in his threatening that a contract of employment (whether one to which he is a party or not) will be broken or that he will induce another person to break a contract of employment to which that other person is a party.

[43] Sub. 29(1) is, in part, as follows:
In this Act 'trade dispute' means a dispute between employers and workers, or between workers and workers, which is connected with one or more of the following, that is to say —
(a) terms and conditions of employment, or the physical conditions in which any workers are required to work.

[44] *Supra* note 15, at 144-45 (Q.B.).

[45] *Supra* note 15, at 161 (C.A.).

[46] [1978] 1 All E.R. 111, [1977] 1 W.L.R. 1004 (C.A.).

[47] [1979] 3 All E.R. 614, [1979] 1 W.L.R. 1294 (H.L.).

with the trial judge's view that the welfare fund was unrelated to a trade dispute. However, those cases indicated that the phrase "connected with . . . terms and conditions of employment" should be given "a very wide meaning"[48] and should even include fringe benefits. Thus the Court of Appeal felt "driven"[49] to the conclusion that the contribution was related to a trade dispute within the meaning of the Act, and not recoverable.

In the House of Lords, however, there was a sharp difference of opinion on these issues. The majority (Lords Diplock, Cross and Russell) decided that the welfare fund contribution was unconnected with terms and conditions of the seamen's employment. It therefore did not enjoy statutory immunity and was recoverable by the shipowners. The minority (Lords Scarman and Brandon), agreeing with the Court of Appeal, felt that the welfare fund was not recoverable because it fell within T.U.L.R.A. Lord Diplock thought that the contributions were unconnected with the conditions of employment because the demands for payment by the I.T.F. were not made on behalf of the seamen; the shipowners were not authorized by any seaman to pay, nor was there any duty owed by the seamen to the I.T.F. to contribute to the welfare fund since the only parties to the agreements were the shipowners and the I.T.F. Indeed, payment to the fund had little if anything to do with the seamen; the payments were merely contributions to the I.T.F. and could be put to whatever use the I.T.F. thought best. In the final analysis, there was nothing to suggest that a crew member of the Universe Sentinel could benefit from the payments.[50]

In contrast to these views, Lord Scarman in his dissenting judgment stated bluntly that there was no evidence to suggest that the I.T.F. welfare fund was anything but that which it was called: "[I]t would be unjust to the point of cynicism to impute to the I.T.F. any intention other than to use the fund for the purpose set forth in those conditions."[51] He further stated that it was unreal to infer that, because the seamen themselves were not obliged to contribute to the fund, their employer's obligation to pay on their behalf was not one related to employment. The welfare contributions were part of the total package and were incorporated into the special agreement which had to be posted on board the

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[48] *Supra* note 46, at 120, [1977] 1 W.L.R. at 1015 (Raskell L.J.).

[49] *Supra* note 15, at 163. The C.A. further noted in *obiter dicta* that sub. 13(1) did not permit the segregation of consequences of actions, that is, if the result or consequence was in some way referable to the "*act* . . . in contemplation or furtherance of a trade dispute", then that was enough to bring the case within the T.U.L.R.A. (emphasis added).

[50] *Supra* note 15, at 79, [1982] 2 W.L.R. at 817-18 (H.L.) (Lord Diplock). *See also* the comments of Lord Cross, *id.* at 81-83, [1982] 2 W.L.R. at 819-22, and of Lord Russell, *id.* at 86, [1982] 2 W.L.R. at 825. It should also be noted that Lord Diplock thought that the C.A.'s interpretation of *Hearn* and *Woods* was too broad: *id.* at 79-81, [1982] 2 W.L.R. at 817-19.

[51] *Id.* at 90, [1982] 2 W.L.R. at 830.

ship.[52] Lord Brandon likewise agreed that the contributions were related to employment.[53]

None of the courts seem to have considered seriously the question of whether there was a "trade dispute" in the first place. The I.T.F.'s concession that its conduct amounted to actionable economic duress, provided its demands related to the terms and conditions of employment within subsection 13(1), apparently distracted the courts' attention. Arguably there was no "trade dispute" within the meaning of T.U.L.R.A.; rather the I.T.F.'s actions amounted to blackmail, so that its threats were clearly unlawful, regardless of the Act. Section 13 merely provides immunity for actions in tort; therefore the I.T.F. should have been found liable in economic duress. Even if one accepts that section 13 is intended to guide public policy in such issues, it is clear that while trade unions should be protected from tortious actions in relation to industrial disputes, there is no reason why they should not make restitution of money paid, especially when their acts were wrongful, although not tortious, in the first place.

It is against this background, then, that the law lords' discussions of economic duress should be considered. In the judgments, especially in that of Lord Scarman, it is clear that the illegitimacy of the pressure is of greater significance than it was in earlier cases[54] and that the test for duress proposed in *Barton v. Armstrong*[55] has been adopted for economic duress cases. Of the law lords who discuss in any detail the modern meaning of economic duress, Lord Scarman provides the most thoughtful analysis though in essence both Lords Diplock and Cross concur. However, in light of the parties' concession that the I.T.F.'s conduct constituted economic duress, it should be kept in mind that the law lords' discussion of this issue was *obiter dicta*.

The importance of identifying the rationale for the evolving concept of economic duress was stated by Lord Diplock:

> The rationale is that his apparent consent was induced by pressure exercised on him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind.[56]

In short, Lord Diplock appears to suggest that economic duress requires a coerced will *and* an illegitimate means of pressure. For the purposes of the appeal, Parliament had defined in T.U.L.R.A. what was legitimate and illegitimate in relation to industrial actions. Given the concession made by both parties that subsection 13(1) provides general guidance as

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[52] *Id.* at 90-91, [1982] 2 W.L.R. at 831.

[53] *Id.* at 95-96, [1982] 2 W.L.R. at 835-36.

[54] That is the first trilogy. *The Siboen*, *supra* note 11, *North Ocean Shipping Co.* and *Pao On*, *supra* note 15.

[55] *Supra* note 18.

[56] *Supra* note 15, at 75-76, [1982] 2 W.L.R. at 813.

apparent assimilation of economic duress with unconscionability continue, a re-interpretation of this area of contract law will be necessary.

That the courts are moving toward a concept of economic duress more sophisticated than one based on the overborne will theory was evident in the recent House of Lords decision, *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation*.[36] The facts of the case were somewhat complex. They concerned a ship, the Universe Sentinel, which was owned by the appellants and was registered in Liberia. She sailed under a Liberian flag and was under a twenty year time charter to Texaco. On 17 July 1978, the ship docked at Milford Haven and discharged her cargo by the following day. However she was prevented from sailing because the respondent trade union, the I.T.F., had organized a blacking by tugboat crews. The blacking was not lifted until 29 July, after the ship owners had yielded to a number of demands made by the I.T.F. The dispute arose out of the I.T.F.'s campaign to black "flag of convenience" ships with a view to protecting, primarily by unionization, their crews from the exploitation which they suffered. The I.T.F.'s policy was to issue "blue certificates", entitling ships which had voluntarily complied with their wage rate and guidelines for conditions of work to be exempt from blacking. The Universe Sentinel had no such certificate. In the course of negotiations, throughout which it was clear that the ship would be unable to sail unless the owners acceded to the I.T.F.'s demands, several proposals were presented to the shipowners for signature. Two agreements were reached, one called the special agreement on a standard printed form, and a second called the typescript agreement. The first provided, *inter alia*, that the appellant would subscribe to the terms of employment contained in the standard I.T.F. collective agreement and incorporate them into individual contracts of employment. These provisions included payment, on behalf of each seaman, of a contribution to the Seafarers' International Welfare Protection and Assistance Fund, and the prominent display of the special agreement, the ITF collective agreement and the blue certificate on board the ship. Of the $80,000 handed over when the agreement was executed, approximately $6,480 constituted the contribution to the welfare fund; the rest was the estimated backpay owed to the Universe Sentinel's crew members. Individual contracts of employment were also signed with most of the crew members before the ship sailed. Backwages were calculated according to the typescript agreement upon the difference between the actual rates of pay and those prescribed pursuant to the I.T.F. collective agreement.

The ship sailed on 29 July and on 10 August 1978 the shipowner's solicitors demanded the return of the $80,000 on the ground that the agreements were void because of economic duress. Shortly thereafter some of the crew members assigned their interests in the backpay to the

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[36] *Supra* note 15.

to legitimate and illegitimate union activities, Lord Diplock thus acknowledges that the actions were legally legitimate since the trade union enjoyed statutory immunity for similar conduct in tort. Economic duress need not be tortious in nature. Moreover, the remedies differ insofar as economic duress gives rise to an action in restitution for money or property exacted under the duress and the avoidance of a contract induced by it. Lord Cross' analysis of the ingredients is virtually identical.[57]

Several comments can be made. First, the coerced will theory appears to have surfaced yet again; Lord Diplock not only begins his discussion by invoking the first English trilogy[58] but persists in speaking of "apparent consent". The fallacy that the victim of duress does not *really* consent was exploded as long ago as the late nineteenth century by Mr. Justice Holmes.[59] It has since played at most a minor supporting role in American jurisprudence on economic duress. The reality is that presented with the choice of two evils, the victim naturally chooses the lesser evil with genuine consent, even if compelled by duress. In any case, the subjective, psychological assessment of "apparent consent" or of a coerced will is surely beyond the intuitive powers of the most discerning judges!

Secondly, Lord Diplock provided little guidance to the meaning of "illegitimate pressure". Some obvious questions therefore arise. Does "illegitimate" mean unlawful, or would some lawful but nevertheless unfair conduct also provoke a finding of economic duress? If illegitimate means unlawful only, does it extend beyond criminal, tortious or breach of contract actions? Lord Diplock merely asserted that economic duress could be co-extensive with tort. Does "illegitimate" apply to the act of pressure *per se* or to the effect of the pressure on the party in his particular circumstances? Must bankruptcy be the party's only alternative to submission? These questions could not arise in this case, in spite of the applicability of T.U.L.R.A. The conduct of the I.T.F. was clearly illegitimate because, as found by the trial judge, it amounted to unlawful seizure and detention of the ship, thereby placing the owners in a disastrous financial position. There would certainly have been a finding

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[57] *Id.* at 81-82, [1982] 2 W.L.R. at 819-20.

[58] *The Siboen*, *supra* note 11, *North Ocean Shipping Co.* and *Pao On*, *supra* note 15.

[59] Fairbanks v. Snow, *supra* note 24; Union Pac. Ry. Co. v. Pub. Serv. Comm'n of Missouri, 248 U.S. 67, at 70 (1918): "It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." *See also* Llewellyn, *What Price Contract — An Essay in Perspective*, 40 YALE L.J. 704, 728 n.49 (1931); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLITICAL SCI. Q. 470 (1923); Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV 603 (1943); Dalzell, *Duress by Economic Pressure, Part I*, 20 N. CAROLINA L. REV. 237, 241 (1942); Ogilvie, *supra* note 16.

of illegitimate conduct, had the context not been that of industrial relations. And finally, one more question arises: why should "illegitimacy" be a component of economic duress at all, or a test for its presence?

Lord Scarman reiterates the view that the modern doctrine of economic duress is comprised of a coerced will *and* illegitimate pressure, but tips the balance of importance toward the latter. His formulation of both components is more sophisticated than any other to date in Anglo-Canadian jurisprudence and restates the coerced will theory as follows:

> Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him.[60]

Lord Scarman attempts to disguise the novelty of this statement by the subsequent assertion that this "thread of principle" has existed in the concept of duress from its earlier days.[61] Absence of choice as an evidentiary matter can be shown, *inter alia*, by protest, the absence of independent advice or a declaration to seek legal redress.

Lord Scarman's modest assertion of historical continuity should not blind us to the fact that he has discarded the overborne will fallacy and admitted that the victim's consent is intentional and real. Once that is accepted, it is not unexpected that the focus of economic duress is turned to some other element, in this case, the legitimacy of the pressure used. The objective reality, as evidenced by the plaintiff's compliance with the objects of the duress, is accepted for what it appears to be and curial attempts to discuss the subjective matter of whether a will has been coerced or overborne are eschewed. It is ridiculous in any case, when dealing with corporate bodies, whether large companies or large trade unions, to speak of one such body coercing the "will" of another. The outstanding issue, then, is the re-definition of economic duress.

Adopting the view of Lord Wilberforce and Lord Simon in *Barton v. Armstrong*,[62] Lord Scarman states that the pressure must be a kind which the law does not regard as legitimate, that is, it must be more than the ordinary, or even overwhelming, pressures of commercial life. The determination of legitimacy is dependent on two factors: (1) the nature of the pressure; and (2) the nature of the demand which the pressure is intended to procure.[63] Lord Scarman concedes that the pressure applied may, in its nature, be unlawful or lawful, thus implying that economic duress is not confined merely to criminal, tortious or breach of contract cases. Whether a threat, in itself lawful, is rendered unlawful for the

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[60] *Supra* note 15, at 88, [1982] 2 W.L.R. at 828.
[61] *Id.*
[62] *Supra* note 18, at 121-22, [1975] 2 All E.R. at 476-77.
[63] *Supra* note 15, at 89, [1982] 2 W.L.R. at 828-29.

purposes of a finding of economic duress is determined by the second factor, the nature of the demand.[64] On the facts of the present case, the issue was determined by Parliament in subsection 13(1) which provided a statutory immunity for actions in furtherance of a trade dispute. Lord Scarman was therefore foreclosed from further consideration of the issue.

Assuming that the illegitimacy of the pressure is a determinant of economic duress, several observations may be made about Lord Scarman's position. First, his implicit recognition that perfectly lawful actions may constitute pressure sufficiently illegitimate to justify judicial redress represents a significant advance from the common law origins of duress of the person, rooted as they were in criminal threats to persons or property. The legal adage, "It is never duress to threaten to do what there is a legal right to do", has therefore been shaken. Secondly, the statutory test provided in subsection 13(1) for the legitimacy of the demand unfortunately restrained Lord Scarman from investigating further the actual nature of the demand. This could have been examined in at least three ways: (1) in itself, that is, is the demand *per se* such that justice requires judicial intervention; (2) from the perspective of the coercing party, that is, what is the result of the victim's compliance in relation to advancing the stronger party's interests; and (3) from the perspective of the victim, that is, what is the real effect on him of submission? In the case under discussion, the demand *per se* was prescribed by statute, but the question remains: what is it about the nature of the demand that results in economic duress in other cases? The answer to this raises the fundamental question of what the real nature of economic duress is and the subsidiary one of whether illegitimacy, however it may be defined, should be an important constituent of the legal test. These issues will be further considered below.

IV. Economic Duress

The historical evolution of economic duress has been traced elsewhere[65] and so only the main points need be recounted here. Common law duress emerged in the late twelfth century as an adjunct of legal control over crime and tort. Until the eighteenth century, restitutionary relief was granted where actual or threatened physical violence to the person had procured a transfer of property. The assumption implicit in this formulation was that the presence of a clearly

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[64] *See* Thorne v. Motor Trade Ass'n, [1937] A.C. 797, at 806, [1937] 3 All E.R. 157, at 160 where Lord Atkins states: "What [one] has to justify is not the threat, but the demand . . .".

[65] *See especially* Dalzell, *supra* note 59; Dawson, *Economic Duress — An Essay in Perspective*, 45 Mich. L. Rev. 253 (1947); Beatson, *Duress as a Vitiating Factor in Contract*, 33 Camb. L.J. 97 (1974); Ogilvie, *supra* note 16.

wrongful action would result in the coercion of a victim's will. In the nineteenth century, a will-based theory of contract law provided an explicit rationale for this fundamentally simple medieval doctrine. In the eighteenth century, duress of the person was extended to cases involving economic pressure where there was wrongful seizure or detention of property. Duress of goods was said to justify judicial redress since interference with personal property was also wrongful in tort. In *Astley v. Reynolds*,[66] the King's Bench ordered restitution of unlawfully detained pledged goods because their owner required them immediately and could not wait for a successful outcome in trover. In England, the expansion of the application of duress came to a dead end after the decision in *Skeate v. Beale*.[67] This case limited duress of goods to restitution of property which was transferred at the time of the duress and declined to avoid executory agreements for future transfer. Only recently has this illogical distinction been discarded.[68] However, it should be emphasized that until the decision in *The Siboen and the Sibotre*[69] in 1975, there was little evidence that duress played a vitiating role in commercial relationships. Moreover, whether a case was one of duress of the person or of goods, the test remained one of coercion of the will.

In contrast, American jurisprudence since the early nineteenth century has been considerably less inhibited, and exhibits a rich variety of fact situations where the courts have made a finding of economic duress, as well as of theories propounding what economic duress is or should be.[70] Anglo-Canadian jurisprudence is remarkably impoverished by comparison;[71] acknowledgement of economic pressures which would justify judicial intervention came late in the day, and still lacks substantive jurisprudential justification. After completing an extensive examination of Canadian cases on practical compulsion, one academic commentator noted:

> One comment can certainly be made in the light of the cases which have been considered and compared as regards their effects and their rationale. The true

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[66] 2 Str. 915, 93 E.R. 939 (K.B. 1732).

[67] 11 Ad. & E. 983, 113 E.R. 688 (K.B. 1841).

[68] *See, e.g.*, R. GOFF & G. JONES, THE LAW OF RESTITUTION 168-70 (2d ed. 1978); Beatson, *supra* note 65 *passim*; Ogilvie, *supra* note 16, at 294-95.

[69] *Supra* note 11.

[70] *See* the American articles, *supra* note 65 and Dalzell, *Duress by Economic Pressure, Part II*, 20 N. CAROLINA L. REV. 341 (1942); Dawson, *Duress Through Civil Litigation I*, 45 MICH. L. REV. 571 (1947); Note, *Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis*, 53 IOWA L. REV. 892 (1968); Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979); Galt, *Economic Duress: A Rethinking After Totem*, 8-9 U.C.L.A.-ALASKA L. REV. 197 (1980); Mather, *Contract Modification Under Duress*, 33 S. CAROLINA L. REV. 615 (1982).

[71] For recent discussions of Canadian developments in regard to economic duress and the virtually indistinguishable concept of "practical compulsion", *see* G. FRIDMAN & J. MCLEOD, RESTITUTION 200-29 (1982), and G. KLIPPERT, UNJUST ENRICHMENT 156-70, 329-36 (1983).

> and final extent of the idea of "practical compulsion" as it has evolved in Canadian courts is still very much a matter of conjecture.[72]

Historically then, duress, both by itself and in conjunction with other contractual doctrines, has served varying functions in the redress of contractual bargains. It seems fairly clear that, until well into the eighteenth century, the functions it served paralleled those served by crime and tort within the common law. Outrageous conduct resulting in serious loss could not be countenanced in law on purely intuitive moral grounds. However, with the evolution of a will-based theory of contract law in the course of the next century, the functional significance between duress of goods and duress of the person seems to have changed. Needless to say, any indication that the victim had "consented" raised an almost irrebuttable presumption of a valid binding agreement. Thus, duress came to be conceived of as a rare situation in which a subjective will was actually overborne and other contractual doctrines were preferred in order to circumvent unfair or unwanted bargains. The embarrassing notion of duress therefore played little part in nineteenth century contract law.

The most important contractual doctrine which superseded that of duress (and incidentally, that of unconscionability) was the doctrine of consideration. This became increasingly technical and formalistic in its role within contract law, and therefore was well suited to the objective standards of adjudication favoured by nineteenth century courts. The rule that the courts would not look to the adequacy of the consideration, reflecting as it did the philosophical perspective that contract-making was a private matter for the parties and not the courts, was favoured by a bench strongly imbued with nineteenth century politico-economic and philosophical ideals. The motives, reasons or forces behind an agreement were personal matters; the existence of apparent consent was sufficient to vindicate curial non-intervention. Such judicial redress as occurred was an equitable matter and was usually on the grounds of unconscionability. However, the Chancery was not entirely insulated from contemporary attitudes and was thus somewhat reluctant to exercise its discretion as liberally as it had in earlier centuries, in the absence of clear fraud or abuse of a fiduciary position.[73]

In addition to an increasing reliance on adequacy of consideration as the functional criterion for adjudicating the fairness of bargains, it should also be noted that the courts' past reluctance to interfere with agreements on grounds of economic duress may also have been rooted in a fear of overturning compromise agreements. Such cases may have factually overlapped with real duress cases and could thereby appear misleading. The common law's preference for finality of settlement and avoidance of

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[72] G. FRIDMAN & J. MCLEOD, *id.* at 212.

[73] Dawson, *supra* note 65, at 276-88.

the expense of litigation would have produced a natural reluctance to intervene in such cases.[74]

The question remains as to what function a doctrine of economic duress, however defined, should play in the modern law of contract,[75] and whether other doctrines, for example tort,[76] unconscionability[77] or unjust enrichment,[78] are more suited to the needs of modern contract-making.

V. Economic Duress and "Wrongfulness"

The perceptible shift in economic duress from a will-based emphasis to a moral-based one in *Barton*,[79] *Lobb*[80] and especially *Universe Tankships*,[81] raises the issue of the role of "illegitimacy" or "wrongfulness" in a sophisticated doctrine of economic duress. If the test involves some illegitimacy in the nature of the transaction as well as the overbearing of the victim's will, it becomes necessary to devise a working definition, and to define what aspects of the transaction might be wrongful. It is also necessary to decide whether wrongfulness refers to some specific substantive fault in the transaction or whether it applies to any part of the transaction which satisfies some independent criteria of "being wrong". Coercion of the victim's will tended to constitute the wrongful or illegitimate act in the past. However, recent cases suggest that the wrongfulness inhering in the transaction is something more. Whatever else it might be, it appears at least to involve a "moral" or "fault" concept.

It remains then to examine wrongfulness in respect to economic duress. It would appear that illegitimacy may be present in one or more of the several parts making up a transaction in which economic duress has been alleged: in the pretransactory relationship of the parties; in the nature of the offending act; or in the effects which the act produces. The following analysis will focus on the act *per se* and its effects. However, several statements should first be made regarding the pre-contractual relationship of the parties.

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[74] Dalzell, *supra* note 70, at 374-77; Beatson, *supra* note 65.

[75] The comparative law aspects of this topic, although beyond the scope of this paper, are of considerable interest. *See, e.g.*, Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 Tulane L. Rev. 345 (1937) and *Unconscionable Coercion: The German Version*, 89 Harv. L. Rev. 1041 (1976).

[76] *See* Note, *Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis*, *supra* note 70. The interrelationship of economic duress and tort will be raised briefly *infra*.

[77] *See* Hillman and Mather, *supra* note 70.

[78] *See* Dawson, *supra* note 65, at 282-88; G. Klippert, *supra* note 71, at 329-36.

[79] *Supra* note 18.

[80] *Supra* note 15.

[81] *Id.*

At the expense of seeming trite, it must be noted at the outset that legal transactions, like all social transactions, are necessary for individual human existence in the modern world. Moreover, there is an element of pressure in all such relationships, including contractual transactions: we are forced to hand over money in order to eat bread. We would prefer to have both. That coercion is a necessary part of life was well expressed in the narrower context of the criminal law by Sir James Fitzjames Stephen. When opposing a defence of duress in murder, he wrote:

> Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder "If you do it I will hang you". Is the law to withdraw its threat if someone else says "If you do not do it I will shoot you"?
>
> Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured a wide door would be open to collusion, and encouragement would be given to associations of malefactors, secret or otherwise. No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.
>
> These reasons lead me to think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most though not in all cases.[82]

Similarly, economic life consists of the struggle between various coercive forces. Governments can compel obedience under threat of seizure of private property. The individual contract of employment is coercive; it is a command in the guise of an agreement. The employee must accept the commands or face unemployment and even destitution. The essence of collective bargaining in labour relations is coercion and power, a struggle for ascendency between two competing aggregates. It is not entirely surprising therefore that economic duress should make an appearance in *Universe Tankships*.[83] And, as the late Professor Robert L. Hale so persuasively showed, coercion is inherent in the making and performing of all contracts.[84] The issue, then, in economic duress is not the existence of coercion *per se*, but the distinction between those

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[82] A HISTORY OF THE CRIMINAL LAW OF ENGLAND, vol. II, 107-08 (1883) cited in D. STUART, CANADIAN CRIMINAL LAW: A TREATISE 383-84 (1982).

[83] In this regard, *see* Note, *Economic Duress*, 45 MOD. L. REV. 556 (1982).

[84] *Supra* note 59, especially 38 POLITICAL SCI. Q. 470 (1923) and 43 COLUM. L. REV. 603 (1943).

agreements which the courts should strike down from those which they should uphold.[85]

A second trite observation is that there can never be perfect bargaining equality between negotiating parties. Thus something more than mere superiority is required in order to incur legal liability. Moreover, as was shown in *United States v. Bethlehem Steel Corp.*,[86] parties with apparent bargaining superiority may be coerced into unwanted agreements by apparently weaker parties; thus wartime conditions conspired to coerce the American government into entering shipbuilding contracts with Bethlehem Steel on whatever terms the company proposed.[87] Bargaining superiority means the power to manipulate and to coerce. It is the actual exercise, not the mere possession, of that power, however that concept is defined by law.

A third trite observation is that a victim's suit for legal redress is, from one perspective, a formal expression of the victim's feeling that he has been unfairly and unjustly treated. Many cases of course will be spurious. A "victim" may acquiesce in the belief that this will coincidentally further his own aims; subsequently he may wish to avoid the transaction because his expectations have been frustrated. The courts, however, are well-equipped to discern such situations.[88] This was demonstrated in *Lobb*,[89] where a substantial delay in seeking judicial redress condemned the economic duress argument. In addition to delay, subsequent affirmation once the pressure has been removed will also prove fatal to a plea of economic duress.[90] More difficult are the cases in which the courts must determine genuine economic duress in the absence

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[85] The reality of coercion in contractual negotiations was expressed by Black J. in U.S. v. Bethlehem Steel Corp., 315 U.S. 289, at 302 (1942): "[I]f the government's abandonment of its position is to be regarded as evidence of compulsion, we should have to find compulsion in every contract in which one of the parties makes a concession to a demand, however reasonable, of the other side." Or to quote the oft-cited words of Kerr J. in *The Siboen*, *supra* note 11, at 336: "[The plaintiff] was acting under great pressure, but only commercial pressure, and not under anything which could in law be regarded as a coercion of his will so as to vitiate his consent."

The view that necessity will force a person to make concessions which he would not otherwise have made is of respectable lineage. As Lord Northington L.C. stated in Vernon v. Bethell, 2 Eden 110, at 113, 28 E.R. 838, at 839 (Ch. 1762): "Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose on them." *See also* Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) and U.S. v. Bethlehem Steel Corp., 315 U.S. 289, at 302 (1942) (Frankfurter J.).

[86] *Id.*

[87] The Supreme Court held for Bethlehem Steel on other grounds, but acknowledged that economic duress was a legitimate basis for relief.

[88] In the author's view, the majority of the Privy Council in Barton v. Armstrong, *supra* note 18, was wrong in rejecting the trial judge's finding that the plaintiff was merely trying to escape from an agreement which turned out to be less advantageous than he first thought. The dissenting opinion is preferable.

[89] *Supra* note 15.

[90] This was shown in the *Atlantic Baron*, *supra* note 15.

of objective signs such as protest, undue delay or subsequent affirmation. Where, then, does the wrongfulness in the transaction reside?

If we first examine the act or the demand which is alleged to produce the pressure or the coercive force to which the victim succumbs, it can be said that the act will be either legal or illegal. The current thesis is that for a finding of economic duress, the act should be wrongful in the sense that it is also a crime, a tort or a breach of contract.[91] In other words, the act should be independently illegal, regardless of the transaction which results. It also should constitute the economic duress for which the courts will provide redress. It is impossible and undesirable to challenge this argument legally. The law of contract cannot countenance conduct which is legally wrongful in the law of tort[92] or in criminal law. It is also convenient from the contract lawyer's perspective that decisions as to what constitutes "wrongful" have already been made for him. However, the successful avoidance of a contract so induced depends on the act or demand being adjudged wrongful according to an independent criterion, not a principle of contract law *per se*, unless one argues that the contract was really avoided because of illegality. Indeed, it could be said that where a court gives redress for economic duress on the ground that the conduct in question is a crime or a tort, it is really invoking the doctrine of illegality. The agreement is simply founded on an illegal action and is thereby tainted with illegality. Such an agreement should of course be avoided!

Where the meaning of illegitimacy or wrongfulness is supplied by another branch of the law, the decision is easy and one need not inquire too closely into the moral meaning of "wrongfulness" in the law of contract. The hard cases, on the other hand, are those in which the coercive acts are *prima facie* lawful, although done for coercive purposes. Commercial pressure is not always economic duress. But the legal maxim, "It is never duress to do what one has a legal right to do", has been exploded, especially in the United States[93] where the courts

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[91] *See, e.g.*, Beatson, *supra* note 65; Sutton, *Duress by Threatened Breach of Contract*, 20 McGILL L.J. 554 (1974); Rafferty, *The Element of Wrongful Pressure in a Finding of Duress*, 18 ALTA. L. REV. 431 (1980). In *Universe Tankships*, *supra* note 15, at 89, [1982] 2 W.L.R. at 829 (H.L.), Lord Scarman remarked, "Duress can, of course, exist even if the threat is one of lawful action; whether it does so depends on the nature of the demand."

[92] Especially important here is the overlap between economic duress and the economic torts, especially intimidation, inducement of breach of contract and conspiracy. Although the economic torts are somewhat difficult to define and categorize it seems impossible, upon analysis, to distinguish their legal function from the function of economic duress within the contractual context. *See generally* J. HEYDON, ECONOMIC TORTS (2d ed. 1978); Burns, *Tort Injury to Economic Interests: Some Facets of Legal Response*, 58 CAN. B. REV. 103 (1980); Elias and Ewing, *Economic Torts and Labour Law: Old Principles and New Liabilities*, 41 CAMB. L.J. 321 (1982). On overlap problems, *see generally* the recent articles cited *supra* note 17.

[93] Fidelity and Casualty Co. of New York v. United States, 490 F.2d 960, at 966 (Ct. Cl. 1974). *See* Rafferty, *supra* note 91, *passim*.

have found economic duress in many different circumstances, although the actions were lawful in the sense that they were not independently illegal.[94] How, then, should lawful actions which amount to economic duress be distinguished from those which do not? What is the "illegitimacy" or the "wrongfulness" in a lawful action?

These questions necessarily elicit an inquiry into the moral basis of contract law, or at least into the values which the law of contract, in particular the doctrine of economic duress, should protect in the late twentieth century. Value or "moral" judgments in contract law are difficult because of the lingering predominance of the "value-free" will theory which left these issues to the voluntarily contracting parties and because the moral homogeneity of an officially Christian society in which the propertied, and therefore legally aware classes, knew the rules, although not necessarily following them, has been replaced by a morally pluralistic society in which competing and often conflicting value systems must be accommodated. The eighteenth century certainties, expressed in such vague concepts as unconscionability, are no longer serviceable without substantial changes in their content. Presumably, however, reasonable people would still accept their general thrust.

Given the widespread acceptance of pluralism, it would seem to follow that the general function of the law should be to afford its legal protection. This involves the maintenance of a personal space within which each individual may, if he wishes, exercise his full humanity without the incursion of the collective's demands. Correlative with this right is the duty to accept personal responsibility for self-induced misfortunes. These presumptions imply a right which is increasingly regarded as a fundamental one in modern society, that is, the right to earn a living in a reasonable and self-acceptable manner.[95] Human dignity and self-worth in such activity is commonly acknowledged.

If the foregoing is widely accepted, a new definition of wrongfulness in economic duress might possibly be formulated. This would replace the moral judgment as traditionally perceived with a concept reflective of those values widely thought necessary for a pluralistic society which is tolerant of the individual. In the commercial sphere, this would mean that if economic duress is to be defined in terms of the wrongfulness inhering in the act *per se*, then that wrongfulness must consist of pressure which, however lawful, effectively drives the victim into dire economic straits. In other words, it deprives him of his basic right to earn his living as he might wish. Actual bankruptcy need not be

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[94] Dalzell, *Duress by Economic Pressure, Part I*, *supra* note 59, and *Part II*, *supra* note 70, displays the great variety.

[95] Although the right to employment is not enshrined in any statute, it is submitted that the principle is implicitly recognized in the Constitution Act, 1982, Part I, Canadian Charter of Rights and Freedoms, para. 6(2)(*b*): "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right . . . to pursue the gaining of a livelihood in any province."

the sole consequence; other severe consequences arising when the victim acquiesces would suffice. Compelling an individual to acquiesce in these circumstances violates this right in a way not tolerated by prevailing social values. Normally, then, only individuals and small "one-man" or private family companies could plead economic duress successfully; a large public or a multinational company is unlikely to founder as a result of one "forced" transaction.

Ironically, this analysis represents a re-definition and retrenchment of nineteenth century liberalism insofar as the value of the individual has been restored, even if somewhat accommodated to the needs of the collective. More important, from the practical perspective, is that no "moral" analysis or definition for "wrongfulness" is required. Instead the court need only make a commercial decision as to how far coercion may be exercised before it drives the victim beyond the economic point of no return. This falls within the commercial experience of most judges so that problems in application should be virtually eliminated, provided sufficient financial evidence is presented. These decisions, however, may make for hard cases. The application of the criteria requires the judiciary to have an acute political sense of what a society thinks the relationship between that society and the individual should be. Functionally, the curial application of this criteria implies a "duty" or tortious approach to contractual relationships since the courts must declare certain types of contractual conduct to be unacceptable if the delicate balance between the individual and the common good is to be maintained.

The above attempt to define wrongfulness in the coercive action has, of necessity, been confined to situations where the act or demand is independently lawful. In this context, the consequence or effect of the action is important in devising a test for economic duress. There are three possible constituents into which the effect could be divided: the effect in itself; the effect of the act on the coercer; and the effect of the act on the victim. The first possibility is meaningless from the lawyer's perspective since the consequence can be significant only within the context of a transaction or a series of connected events to which legal liability might attach. The latter possibilities, however, warrant closer examination.

The effects of coercive conduct on the coercing party may be categorized as internal, that is, the effects on his private moral being, or as external, that is, how his personal economic position has been improved as a result of his conduct.

Historically the moral implications of the coercer's actions have not escaped the courts' attention. Arguably, the great principles which equity has invoked in redressing unfair bargains imply crucial concern, not just for the effect of the conduct on the victim, but also for its effect on the perpetrator. Undue influence, unconscionability and even inequality of bargaining power are laden with moral innuendo. As noted earlier, unequal bargaining power is characteristic of all legal relationships and is therefore really a pre-condition for some other legal reason for judicial

intervention. For example, in *Lloyd's Bank Ltd. v. Bundy*,[96] Lord Denning M.R. suggested that while the absence of independent legal advice is not always fatal, it almost certainly is when the superior party had not secured this for the party with lesser bargaining power. Undue influence focuses on the abuse of a fiduciary or other special relationship. In other words, it focuses on the immoral exploitation of a superior position rather than on the results of the abuse. The American *Restatement on Contracts* demonstrates the point:

> Where one party is under the domination of another, or by virtue of the relationship between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is avoidable.[97]

Likewise, the traditional equitable formulation of that umbrella-concept, unconscionability, stressed the nature of the act which shocked the court's conscience insofar as it reflected some reprehensible abuse of superiority. As noted earlier, the Uniform Commercial Code subsequently shifted the emphasis to the resulting contract, although *Lobb*[98] retains the original focus, namely the "moral culpability" of the action.

All three concepts comprise the same elements: a superior bargaining party, a "wrongful" act, an overborne will and harmful consequences for the victim. Each emphasizes a different aspect and, in so doing, reflects its distinctive historical origin. Thus, undue influence reflects Chancery's concern for fair dealing in fiduciary relationships and its tendency to stigmatize the "immorality" of the conduct. In contrast, duress, which evolved from medieval notions of crime and tort, focused on the nature of the act or conduct itself. And, of course, unconscionability is about conscience.[99]

If a modern law of contract reflects concern for the personal consequences of economic duress on the coercing party, there are clearly suitable doctrines available. On the other hand, all are heavily laden with subjective value judgments as to what is "unconscionable" and are therefore less useful in the moral pluralism of the late twentieth century.

The coercing party may also be affected externally by his conduct in that his economic position may change. Clearly, if it has deteriorated, he is unlikely to seek judicial redress; he could hardly be heard to rely on his own coercive, and possibly illegal, conduct! On the other hand, it has been argued that the real function of economic duress is to prevent unjust enrichment, and that this function was not perceived earlier because of

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[96] [1975] Q.B. 326, at 337, [1974] 3 All E.R. 757, at 765.

[97] Section 497 (1932).

[98] *Supra* note 15.

[99] *See* Beatson, *Unconscionability: placebo or pill?*, 1 OXFORD J. LEGAL STUD. 426 (1981) for a reformulation of the conceptual uncertainties in unconscionability in terms of a distinction between procedural and substantive unconscionability.

the absence of a theory of restitution and the limited scope of common law remedies.[100]

Gain is undoubtedly an object of the coercion. But considered alone, that would attract no legal attention. Rather the significance of the gain resides in the *means* by which it was achieved: was it an *unjust* enrichment? The legal focus, then, is on what is the specific "unjustness" of the transaction, in particular, the gain by the coercing party. The "unjust"-ness is normally understood to relate to the unjust means by which the gain was extracted. In other words, it refers to some illegitimacy or wrongfulness in the entire transaction. However, beyond asserting that the gain was unjustly got, the notion indicates little else. It is a pointer to some reprehensible occurrence, and its restitution to the victim is dependent upon a determination of the wrongfulness within the transaction. The question remains of what precisely should stigmatize the transaction in the eyes of the law.

What must be examined, then, to determine what the wrongfulness in economic duress is, is the effect or consequences on the victim. This can be viewed in two ways: the effects on him personally, insofar as he submits to or acquiesces in the demands; and the consequences following his submission, in particular, how his material well-being is harmed. The former need not occupy much space. As indicated earlier,[101] the current judicial focus on the overborne will is fallacious. The courts should accept the objective reality of consent provided it accurately reflects a subjective agreement to the lesser of two evils. In any case, at the intuitive level, it is not an overborne will about which the victim is complaining, but the detrimental position into which he has been forced. Judicial scrutiny should focus on this.

In the first instance, it is the position into which the victim has been forced which provokes his outcry for relief. Even if his will has been coerced as presently understood in judicial decisions, he would have no complaint unless he had been seriously prejudiced.[102] Thus, it is the victim's interests, not his will, which the court is called upon to protect. The coercive act or demand, the relative bargaining positions of the parties and the outcome for the stronger party are mere incidents, albeit causal incidents. In the hard cases, where the act or demand is considered lawful in itself, the illegitimacy or wrongfulness in the transaction must necessarily reside in the consequences of the victim's coercion. The consequence for the coercing party is his unjust enrichment, but this is merely an incidental consequence of the transaction, not a reason for the law to avoid it. It would appear therefore, that the wrongfulness must reside in the effects of the coercive conduct on the victim, namely his

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[100] Dawson, *Economic Duress — An Essay in Perspective*, *supra* note 65.

[101] That is, earlier in this paper and in an earlier article, *supra* note 16.

[102] The costs and time delay inherent in litigation today will likely operate to weed out the frivolous claims.

worsened circumstances. Of what then does the wrongfulness or illegitimacy consist?

In economic duress and duress as presently defined by the courts, illegitimacy is implicitly viewed from the coercer's perspective: duress is found in the nature of the act, and is a crime, a tort or a recognized breach of contract; its incidental effect is to coerce the victim's will. This perspective could be said to reflect the prevailing moral one within which the common law has developed in that it reflects the Christian moral concern for wrongful actions in relation to their doer rather than their victims. Criminal law, for example, has traditionally focused on the criminal, not the victim, and tort could historically be said to have done likewise, although these foci are shifting. The Christian impetus for this stance is the concern for the salvation of the individual who has committed reprehensible acts against his neighbour. The equitable notions of undue influence and unconscionability, especially, demonstrate this kind of approach which holds the effect on the victim to be quite secondary. It is hardly surprising that adequate theories of restitution have been slow to develop in the common law.

In contrast, a serviceable contemporary doctrine of economic duress must have a different jurisprudential basis, reflecting less the wrongfulness of the act *per se* or the "moral" wrong committed by a party in exploiting his superior position, and more some other element of the transaction on the basis of which redress may be given.

It is submitted that the wrongfulness in the transaction should be viewed from the shifting perspective of the victim and how he is affected. No social consensus could be reached today as to what actions are wrongful *per se*, and certainly there is unlikely to be any consensus on traditional Christian interpretations, whether reflected in the Pelagian nineteenth century will theory of contract or indeed of earlier obligations-oriented contractual theories. Instead, in a society necessarily founded on the mutual toleration of a multiplicity of views, it becomes vital that both public and private law guarantee minimum standards of conduct, relating in particular to the protection of personal freedom. The interrelationship of individualism and collectivism has always existed, but its practical significance must be extensively worked out once there is a breakdown in shared value systems. Ironically, from the nineteenth century perspective an even more value-free objective approach is required. In the final analysis, however, hard decisions must still be made as to when the public collective good should be permitted to impinge on an individual's free space.

VI. Conclusion

In this rights-oriented era, it is widely accepted that all persons have a right which the law should uphold to earn their livelihood in a manner acceptable to them and generally reasonable. Thus, it is argued that the

illegitimacy or the wrongfulness in economic duress consists of pressure or conduct which seriously infringes upon or deprives a victim of this basic right and should result in judicial redress of the bargain made, that is, the restitution of unjust gains and the rescission of any contracts so induced. Such a test has several advantages. It is to a large extent objective; the courts should be able to determine from economic evidence when the financial point of no return has been transgressed. It is value-free in the traditional moral theological sense of contract law. It responds directly to the plaintiff's real complaint, unlike the doctrines of unequal bargaining power or unconscionability. It is compensatory or restitutionary in nature, not punitive; it therefore accords with the traditional contractual prejudice against remedies which punish wrongful actions. However, it is also important to concede that it represents a return to a tort or obligations approach to private legal relationships insofar as external standards of acceptable financial solvency are to be employed by the courts. Yet paradoxically, such an approach re-affirms freedom of the will in private contractual relationships, albeit within a defined ambit.

The evolution of economic duress toward a doctrine more sophisticated than its common law ancestor, duress of the person, is desirable and not unexpected. Especially laudable is the judicial willingness to consider an embryonic test which may divert the law from the superficial coerced will theory, resting as it does on an increasingly discredited general theory of contractual obligations which is of little service in the late twentieth century. The search for a theory in which moral concepts are implicitly imported into contractual analysis is equally welcome. However, the content of words such as "wrongful" and "illegitimacy" awaits further curial consideration. The most recent line of cases suggests that such consideration will be forthcoming.