

ELDERS AND UNDUE INFLUENCE INTER VIVOS: LESSONS FROM THE UNITED KINGDOM?

ABSTRACT

As the population ages, legislatures and courts in Australia and the United Kingdom will find it necessary to re-evaluate the effectiveness of the law in cases concerning elderly litigants. It is already becoming apparent that elders in both jurisdictions are attempting to use undue influence inter vivos to set aside gifts and guarantees. This article seeks to compare and contrast the application of the doctrine in both jurisdictions with special reference to the recent (rather than the old) case law. It will be argued that while both jurisdictions share a common legal heritage, the jurisprudential underpinnings of the doctrine and its application have diverged in significant respects. Overall, courts in the United Kingdom have enhanced the doctrine of undue influence and applied it less strictly than Australian courts, thereby protecting elders more comprehensively from the effects of undue influence. It will be contended that Australian lawyers and judges can learn important lessons from the approach to undue influence inter vivos in the United Kingdom generally and particularly its application in elder cases.

I INTRODUCTION

As the overall population in Australia ages,¹ there will be a need to review the relevance and effectiveness of the law from the perspective of the elderly, taking into account legal developments in other Western countries with ageing populations, such as the United Kingdom.² It has

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¹ In 2001, 12.4 per cent of the Australian population was aged 65 years or over; and 3 per cent were 80 years or older. However, it is predicted that by 2051, 26.1 per cent of the population will be 65 years or older and 9.4 per cent of the population will be 80 years or older: Australian Bureau of Statistics Catalogue 4102.0 (2002) 2.

² Indeed, in comparison to Australia, it appears that the United Kingdom has a larger aged population. The Office for National Statistics found that in 2001, 21 per cent of the population was 60 years or older and that 1.9 per cent of the population was over 85 years: www.statistics.gov.uk/census2001/demographic-uk.asp, at 15 November 2002.

become increasingly evident that elders³ present special problems and are particularly vulnerable to a wide variety of abuses, including financial abuse relating to their money and assets.⁴ Part of the reason for their vulnerability is the ageing process itself in which a person's mental and physical powers decline. Moreover, elders suffer from medical conditions which may not necessarily lead to complete mental incapacity, but which will considerably impair their capacity and willingness to act in their long-term best interests.⁵ However, what has become particularly troubling is that apparently alert, active and healthy elders have entered into transactions that have not been for their personal or economic well-being. Indeed, sometimes they have done so without obtaining independent advice. It has only been well after transferring funds or the execution of the relevant documentation that the elder has realised the terrible consequences of his or her actions and has sought legal advice to challenge the validity or enforceability of the transaction.

One important legal doctrine requiring re-examination is undue influence *inter vivos*. The doctrine originated in the United Kingdom, substantially developing in the nineteenth century⁶ and becoming part of Australian law by virtue of statute.⁷

³ For the purpose of this article elder will mean any person of pensionable age. In Australia, this is generally 65 years: see J Cummins, *Guaranteeing Someone Else's Debts: Submission by the Centre for Elder Law, University of Western Sydney* (2000) 1 fn 1, to the New South Wales Law Reform Commission, Issues Paper 17 (2000). In the United Kingdom, the pensionable age is 60 for women and 65 for men: see generally Help the Aged, *Background Briefings: The Older Population* <<http://www.helptheaged.org.uk/advice/infopoint.html>> at 15 November 2002.

⁴ David Cripps et al, 'Abuse of Older People: Issues for Lawyers' (2002) 1 *Elder Law Review* 14 <<http://www.uws.edu.au/law/elderlaw/cripps.pdf>> at 16 October 2002; R Smith, 'Fraud and Financial Abuse of Older Persons' (2000) 11 *Current Issues in Criminal Justice* 273.

⁵ For example, dementia and Alzheimer's disease are related to the ageing of the brain and lead to mental impairment: see L Whalley, *The Ageing Brain* (2001) Chapter 8.

⁶ Denis Browne, *Ashburner's Principles of Equity* (2nd ed, 1933) 38. See for example *Gibson v Jeyes* (1801) 6 Ves 266; 31 ER 1044; *Hatch v Hatch* (1804) 9 Ves 292; 32 ER 615; *Huguenin v Baseley* (1807) 14 Ves 273; 33 ER 526; *Wood v Downes* (1811) 18 Ves 120; 34 ER 263; *Taylor v Obee* (1816) 3 Price 83; 146 ER 198; *Griffiths v Robins* (1818) 3 Madd 191; 56 ER 480; *Dent v Bennett* (1839) 4 My & CR 269; 41 ER 105; *Gibson v Russell* (1843) 2 Y & CCC 104; 63 ER 46; *Archer v Hudson* (1844) 7 Beav 551; 49 ER 1180; *Allfrey v Allfrey* (1847) 10 Beav 353; 50 ER 618; *Nottage v Prince* (1860) 2 Giff 246; 66 ER 103; *Rhodes v Bate* (1865) LR 1 Ch App; *Williams v Bayley* (1866) LR 1 HL 200; *Wright v Vanderplank* (1855) 2 K & J 1; 69 ER 669; *Bainbrigge v Browne* (1881) 18 Ch D 188; *Allcard v Skinner* (1887) 36 Ch D 145.

⁷ The reception of English law into the Australian colonies meant that all common law and statute law which existed in England became part of the law of the colonies: s 24

Since the nineteenth century, undue influence *inter vivos* has continued to be part of the staple law of both countries.⁸ It has been used regularly with varying success in cases concerning elders both in Australia and the United Kingdom. Indeed, some of the important seminal decisions in both countries have involved elders.⁹ In more recent times, elders have continued to bring actions based on undue influence *inter vivos* in situations where:

Australian Courts Act 1828. The relevant date for New South Wales, Tasmania, Queensland and Victoria was 28 July 1828; for South Australia, 28 December 1836; for Western Australia, 1 June 1829. Notwithstanding the general reception of English law, it was found for practical reasons that not all English statutes were appropriate. Moreover, the common law did not remain fixed at the date of reception. Important developments in English law were considered to be latent in the common law: note generally P Parkinson, *Tradition and Change in Australian Law* (2nd ed, 2001) 119–20. Therefore, the development of undue influence in England throughout the nineteenth century would have been absorbed into Australian law. For a nineteenth century Australian decision on undue influence, see *Symons v Williams* (1875) 1 VLR 199.

⁸ For helpful discussions of the law in Australia, see *Johnson v Buttress* (1936) 56 CLR 113; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002) Ch 15; Anthony J Duggan, 'Undue Influence' in P Parkinson (ed), *The Principles of Equity* (2nd ed, 2002) Ch 11; G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed, 2000) Ch 7. For a helpful discussion in respect to the United Kingdom see: *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773; Jill E Martin, *Hanbury & Martin: Modern Equity* (16th ed, 2001) 854–64; John McGhee, *Snell's Equity* (13th ed, 2000) Chapter 38; Philip H Pettit, *Equity and the Law of Trusts* (9th ed, 2001) 674–6; Robert A Pearce and John Stevens, *The Law of Trusts and Equitable Obligations* (1998) 72–4; Sir Guenter Treitel, 'Contract: General Rules' in P Birks (ed) *English Private Law* (2000) Vol II, 78–9; Alistair Hudson, *Equity & Trusts* (3rd ed, 2003) Chapter 20; Graham Virgo, *The Principles of the Law of Restitution* (1999) 251–83; Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (5th ed, 1998) 358–75; J Beatson, *Anson's Law of Contract* (27th ed, 1998) 277–87; Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3rd ed, 2002) 101–12; Steve Hedley, *A Critical Introduction to Restitution* (2001) 187–201.

⁹ For Australia note: *Spong v Spong* (1914) 18 CLR 544; *Watkins v Combes* (1922) 30 CLR 180; *Johnson v Buttress* (1936) 56 CLR 113; *Bank of New South Wales v Rogers* (1941) 65 CLR 42; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573. For the United Kingdom note: *Williams v Bayley* (1866) LR 1 HL 200; *In re Coomber*; *Coomber v Coomber* [1911] 1 Ch 174; [1911] 1 Ch 723; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127; *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *Goldsworthy v Brickell* [1987] 1 Ch 378; *In re The Estate of Brocklehurst* [1978] Ch 14; *Cheese v Thomas* [1994] 1 All ER 35.

- (a) Elders have given money or property to a person, such as a relative or caregiver upon whom they have been dependent for regular assistance or their daily necessities;¹⁰
- (b) Elders have transferred or mortgaged property, particularly to a relative, in order to ensure that they obtain accommodation and care and to avoid institutionalisation;¹¹
- (c) Elders have formed romantic liaisons and given money or transferred property to a person, generally younger than the elder;¹²
- (d) Elders have transferred assets to a relative who has worked in the family business;¹³
- (e) Elders have transferred or mortgaged property in order to raise urgently needed capital or income;¹⁴ and

¹⁰ For Australia note: *Federov v Yakimov* (Unreported, Supreme Court of NSW, Needham J, 5 December 1991); *Michaletos v Stivactas* (1992) ANZ ConvR 90; *Stivactas v Michaletos [No 2]* [1993] Aust Contract Reports ¶90-031; *Nattrass v Nattrass* [1999] WASC 77 (Unreported, Commissioner Buss QC, 25 June 1999). In relation to the United Kingdom note: *In re Craig Deceased* [1971] 1 Ch 95; *Langton v Langton* [1995] 2 FLR 890; *Farquhar v Boyd* (Unreported, Chancery Division, Campbell J, 14 March 1997); *Special Trustees for Great Ormond Street Hospital for Children v Rushin* (Unreported, Chancery Division, Rimer J, 19 April, 2000); *Casimir v Alexander* [2001] WTLR 939; *Glanville v Glanville* [2002] EWHC 1271 (Ch); *Meredith v Lackschewitz-Martin* [2002] EWHC 1462 (Ch); *Re Morris (deceased)*.

¹¹ For Australia, note *Ryan v Tooth* (Unreported, Supreme Court of NSW, Bryson J, 24 September 1993); *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001); *Urane v Whipper* (2002) NSW ConvR ¶55-992. For the United Kingdom, note *Langton v Langton* [1995] 2 FLR 890.

¹² For Australia: *Chapman v Trajan* (1987) ANZ ConvR 264; *Briggs v Scott* (1990) 14 Fam LR 31; *Scott v Briggs* (1991) 14 Fam LR 661; *Le Bourisot v Coulthard* [1997] Aust Contract Reports ¶90-082. For the United Kingdom: *Hanna v McGeevey* (Unreported, Queens Bench Division, Murray LJ, 30 July 1993); *Clarke v Prus* (Unreported, Chancery Division, Knox J, 8 March 1995).

¹³ For Australia, see the *Archer* litigation: *Archer v Archer* [1999] NSWCA 24 (Unreported, Priestley, Meagher and Powell JJA, 23 February 1999); *Archer v Archer* [1999] NSWCA 286 (Unreported, Mason P, 20 July 1999); *Archer v Archer [No 2]* [1999] NSWCA 500 (Unreported, Windeyer J, 27 May 1999); *Archer v Archer* [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000); *Archer v Archer [No 2]* [2000] NSWCA 315 (Unreported, Windeyer J, 9 November 2000). For the United Kingdom: the old authority *In re Coomber*; *Coomber v Coomber* [1911] 1 Ch 174; [1911] 1 Ch 723.

¹⁴ This has been particularly the case in the United Kingdom: *Hughes v MacPherson* (Unreported, Court of Appeal (Civil Division) Sir Richard Scott VC, Thorpe and Judge LJ, 17 March 1999). Note also in relation to a middle aged woman: *Banco Exterior Internacional SA v Thomas* [1997] 1 WLR 221. Such an agreement can also take place in a commercial context involving transactions tailored to meet the

- (f) Elders have acted as a guarantor for a relative, often mortgaging their major asset, the family home.¹⁵

However, critical consideration of the application of the doctrine to elders in both jurisdictions has been generally neglected.¹⁶ The purpose of this article is to review how undue influence is applied to elders in Australia and the United Kingdom and to compare and contrast the recent (rather than the old) case law in both jurisdictions. In order to undertake this task, it will be necessary to describe the law briefly, contrast different doctrinal approaches where relevant and compare and

interests of elders: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1999] Lloyd's Rep PN 496.

¹⁵ For Australia: *Sinclair v Galluzzo* (Unreported, Supreme Court of NSW, Spender AJ, 9 November 1994); *Jacobs v Shugg* (Unreported, Supreme Court of Victoria, O'Bryan J, 24 May 1996); *IOOF Australia Trustees Ltd v Oxenham* [1997] SADC 3740 (Unreported, Judge Allan, 19 December 1997); *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1; *Couper Holdings Pty Ltd (In liq) v Bell* [1999] WASC 232 (Unreported, Owen J, 24 November 1999); *Wilby v St George Bank* (2001) 80 SASR 404. For the United Kingdom: *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *Coldunell Ltd v Gallon* [1986] 1 QB 1184; *State Bank of India v Soni* (Unreported, Court of Appeal (Civil Division) Sir Stephen Brown P, Hobhouse, Ward LJ, 17 February 1997); *Portman Building Society v Dusangh* [2000] 2 All ER 221; *Greene King plc v Stanley* [2001] EWCA Civ 1966; *Wright v Cherrytree Finance Ltd* [2001] 2 All ER (Comm) 877.

¹⁶ This is the case compared to the protection of a wife providing a guarantee or security for her husband's liabilities. This is the result of important decisions concerning this issue in both jurisdictions. In Australia, the special equity in favour of wives in *Yerkey v Jones* (1939) 63 CLR 649, 671–86 (Dixon J) was re-affirmed by a majority of the High Court in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. Kirby J was critical of the *Yerkey v Jones* principle and did not apply it (421–9). In the United Kingdom, the seminal decisions in this area in which the doctrine of notice has also been applied are: *Barclays Bank plc v O'Brien* [1994] 1 AC 180 and *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773. Some exceptions where the problem has been identified in Australia include: G E Dal Pont and D R C Chalmers, above n 8, 201–2; Juliet Cummins, 'Relationship Debt and the Aged: Welfare v Commerce in the Law of Guarantees' (2002) 27 *Alternative Law Journal* 63. In relation to the United Kingdom note: Peter Birks and Chin Nyuk Yin, 'On the Nature of Undue Influence' in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (1995) 57, 91; Megan Richardson, 'Protecting Women who Provide Security for Husband's, Partner's or Child's Debts: The Value and Limits of an Economic Perspective' (1996) 16 *Legal Studies* 368; Michael J Trebilcock and Steven Elliot, 'The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements' in P Benson (ed), *The Theory of Contract Law: New Essays* (2001) 45; Gerard McMeel, *The Modern Law of Restitution* (2000) 102; A Tettenborn, above n 8 [4–26].

contrast the outcomes in the case law. It will be argued that while Australia and the United Kingdom (with the exception of Scotland)¹⁷ share the common law tradition, the jurisprudential underpinnings of the doctrine and its application have diverged in significant respects. Therefore, it cannot be assumed that in both jurisdictions a similar outcome would necessarily follow on the same set of facts. Overall, courts in the United Kingdom have enhanced the doctrine of undue influence and applied it less strictly than Australian courts, thereby protecting elders more comprehensively and concretely from the effects of undue influence. In contrast, the doctrine operates in a piecemeal fashion in Australia, with the unfortunate effect that elders have found it more difficult to rely upon it. It is contended that Australian lawyers and judges can learn important lessons from the approach to undue influence inter vivos in the United Kingdom, particularly in its application in elder cases.

The discussion will be divided into four parts. Part II will consider the doctrine of actual or express undue influence. It will be argued that while elders in both jurisdictions are less likely to bring an action based on actual undue influence than presumed undue influence, it still appears that Australian courts have set higher thresholds. In Part III, the presumption of undue influence will be considered, with special emphasis upon the criteria of a relationship of trust and confidence and manifest disadvantage. It will be contended that higher thresholds and uncertainty about important criteria for presumed undue influence have rendered it a less effective means of setting aside transactions in Australia than in the United

¹⁷ The article refers to the United Kingdom, rather than simply England and Wales and Northern Ireland because developments in the English common law have been watched closely in Scotland and Scottish judges have been active in extending developments in common law undue influence to Scottish law: see R Russell, 'Royal Bank of Scotland v Etridge (No 2): The end of a sorry tale?' [2002] *Scots Law Times* 55. Much of Scotland's private law is derived from the civil law. Roman law has been a material source of law in that country: David M Walker, *The Scottish Legal System* (8th ed, 2001) 38–41. The House of Lords is the supreme court of appeal from both English and Scottish courts in civil business: 343. Walker has commented that: 'The consequence of this strange jurisdiction has been the introduction of much English law into Scotland, much of it then or subsequently misunderstood, and the assimilation of much Scots law to English, usually to the detriment of the native rules': 172. In relation to the question of binding decisions, it is important to note that some but not all decisions of the House of Lords will be binding. Walker has pointed out that decisions on Scottish appeals are binding as are decisions in non-Scottish appeals on United Kingdom statutes which have applicability to the United Kingdom generally: 444. Decisions of the House of Lords on issues of general law raised in non-Scottish appeals are only persuasive, but highly so. Walker observes that it can be difficult to determine what are 'questions of general jurisprudence' in the light of the fact that that English Lords assume that the same principles of law apply in Scotland: 444.

Kingdom. Part IV will focus upon the situations where elders provide a personal guarantee or a security to a financial institution at the behest of an adult child or caregiver. It will be argued that the law in the United Kingdom provides greater and more immediate protection to elders than Australian law. In Part V some concluding remarks are made.

II ELDERS AND ACTUAL OR EXPRESS UNDUE INFLUENCE

A *An Overview of Actual Undue Influence*

Both Australia and the United Kingdom maintain a distinction between actual or express undue influence and presumed undue influence;¹⁸ and have generally described actual undue influence in similar terms.¹⁹ Both jurisdictions retain common law duress and the relationship of common law duress and actual undue influence remains unsettled.²⁰ In *Allcard v Skinner*,²¹ Lord Lindley pointed out that in order to prove actual undue influence, it is necessary to show that

¹⁸ In relation to Australia, see *Johnson v Buttress* (1936) 56 CLR 113; A J Duggan, above n 8, [1108]–[1110]; G E Dal Pont and D R C Chalmers, above n 8, 186. In relation to the United Kingdom, see *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189–90 (Lord Wilberforce); *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 795 (Lord Nicholls); P H Pettit, above n 8, 674; R A Pearce and J Stevens, above n 8, 72; J McGhee, above n 8, [38–10]; Sir G Treitel, above n 8, 78. However, in relation to the United Kingdom, Lord Clyde suggested in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 815–6 that the division between actual and presumed undue influence ‘appears illogical’ and ‘to confuse definition and proof.’ A breakdown of the division has been presaged by commentators: see Andrew Phang and Hans Tjio, ‘The Uncertain Boundaries of Undue Influence’ [2002] *Lloyd’s Maritime and Commercial Law Quarterly* 231, 232–3.

¹⁹ In part, this is due to the fact that Australian courts and commentators have relied on statements in the United Kingdom: for example, A J Duggan, above n 8 [1108]; G E Dal Pont and D R C Chalmers, above n 8, 189–90.

²⁰ In *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, Lord Nicholls (795) and Lord Hobhouse (820) remarked upon the overlap between actual undue influence and duress, but did not determine whether one ought to be subsumed under the other. A decision on this issue by the High Court of Australia is still awaited: see Fiona Burns, ‘Undue Influence’ in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 690. Having examined British and Australian case law, Birks and Chin concluded that actual undue influence ought to be treated as a form of duress: P Birks and C N Yin, above n 16, 57, 63–7, while in contrast Malcolm Cope has suggested that duress ought to be subsumed into actual undue influence: M Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985) [158]. The fact that this issue has not been

there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor.²²

Such conduct would be considered to be undue influence when, as Dixon J in *Johnson v Buttress*,²³ pointed out, ‘the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act.’²⁴ Actual undue influence must be affirmatively proved.²⁵ There must be an opportunity to influence and a causative nexus between the exercise of the undue influence and the transaction.²⁶ One issue which has arisen, particularly in the United Kingdom, is whether proof of actual undue influence is solely determined by evidence of plaintiff-sided conduct, namely, the plaintiff’s impaired consent rather than evidence of wrongdoing by the defendant.²⁷ In *Royal Bank of Scotland v Etridge*²⁸ the English Court of Appeal indicated it would be necessary to show that there had been some kind of improper conduct affecting the claimant’s ability to exercise an independent and free will.²⁹ On appeal, the House of Lords did not suggest that it disagreed with this approach. Indeed Lord Nicholls, referring to undue influence generally, pointed to ‘an exercise of improper or “undue” influence’.³⁰ In Australia, this issue does not appear to have provoked the same level of academic debate³¹ and it has been assumed that actual undue influence has redressed both impaired consent and the defendant’s unconscionable behaviour

resolved in either jurisdiction does not appear to have prevented the application of actual undue influence in cases concerned with elders.

²¹ (1887) 36 Ch D 146.

²² *Ibid* 181. See also *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 794–5 (Lord Nicholls); R A Pearce and J Stevens, above n 8, 72; G E Dal Pont and D R C Chalmers, above n 8, 189–90.

²³ (1936) 56 CLR 113.

²⁴ *Ibid* 134. See also *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 794–5 (Lord Nicholls); J McGhee, above n 8 [38–10].

²⁵ *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 839 (Lord Scott); P H Pettit, above n 8, 675; A J Duggan, above n 8 [1108].

²⁶ See A J Duggan, above n 8, 190; Sir G Treitel, above n 8, [8.202]; G Virgo, above n 8, 255.

²⁷ For the arguments that actual undue influence is determined by plaintiff-sided conduct, see P Birks and C N Yin, above n 16, 57, 63–7.

²⁸ [1998] 4 All ER 705.

²⁹ *Ibid* 712.

³⁰ *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 795 (Lord Nicholls).

³¹ Generally the issue appears to have been ignored: see for example, A J Duggan, above n 8 [1108]; G E Dal Pont and D R C Chalmers, above n 8, 189–90.

affecting the plaintiff's independent judgment.³² However, statements from the High Court about undue influence generally have emphasised the plaintiff's impaired consent as a significant criterion.³³

In the United Kingdom, it is no longer necessary to show that the transaction was manifestly disadvantageous to the plaintiff.³⁴ However, if the transaction is manifestly disadvantageous to the person alleging actual undue influence, then that will constitute additional evidence supporting the claim that undue influence was in fact exercised.³⁵ In Australia the position is less clear. Commentators have generally suggested that manifest disadvantage was never part of Australian law,³⁶ that proof of manifest disadvantage is a helpful evidential factor that the transaction was procured by improper means (but not a requirement),³⁷ or that proof of manifest disadvantage will only become a problem in presumed undue influence when the transaction is for value.³⁸ As will be shown below, although proof of manifest disadvantage is generally not required in Australia, this is not necessarily the situation in every case.

B *Actual Undue Influence and Elders*

In both jurisdictions, there have been several recent cases where elders (or their representatives) have sought to argue that there was evidence of actual undue influence. However, the number of cases is small compared to cases alleging presumed undue influence, because the elder has borne the onus of proving that the defendant's improper actions affected or impaired the elder's capacity to make an independent and free judgment.³⁹ Courts in both jurisdictions will probably set aside transactions where the facts are extreme and it can be demonstrated that the defendant had the ability to exercise influence so that the elder was prevented from acting independently. For example:

³² See for example the comments of Dixon J in *Johnson v Buttress* (1936) 56 CLR 113, 134.

³³ *Bridgewater v Leahy* (1998) 194 CLR 457, 478 (Gaudron, Gummow and Kirby JJ).

³⁴ *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 796 (Lord Nicholls); *CIBC Mortgages plc v Pitt* [1994] 1 AC 200. Note also the discussion in J McGhee, above n 8, [38-10]; Lord Goff of Chieveley and G Jones, above n 8, 358; J Beatson, above n 8, 279; P Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and Disgorgement* (2000) 194.

³⁵ *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705, 713; J McGhee, above n 8 [38-10].

³⁶ R P Meagher, J D Heydon and M J Leeming, above n 8 [15-120].

³⁷ G E Dal Pont and D R C Chalmers, above n 8, 197.

³⁸ A J Duggan, above n 8 [1110] and [1116].

³⁹ This can be a difficult task: see S Hedley commenting on the United Kingdom, above n 8, 190.

- a) The elder feared violence if he or she did not enter into the transaction;⁴⁰
- b) The elder feared threats to prosecute himself or herself or a relative;⁴¹
- c) There has been deliberate concealment of crucial financial information so that the elder could not make a fully informed judgment; or⁴²
- d) The mental health of the elder was so impaired at the time of the transaction that he or she was unable to exercise any independent will whatsoever.⁴³

However, there are two significant differences in the application of actual undue influence in the United Kingdom and Australia.

First, in situations which do not fall within the categories described above, Australian courts may demand a higher level of proof of actual undue influence than their United Kingdom counterparts. Australian courts may require strong evidence that the will of the elder was completely overborne rather than simply evidence of constant pressure or coercion. A comparison of a case from each jurisdiction will illustrate the point. In the English decision, *Langton v Langton* ('*Langton*'),⁴⁴ an ill elder was dependent upon the defendants for his care. In order to ensure that he would remain in his own home and would not be sent to an institution for the aged, he conveyed the home to the defendants, fearing they would not otherwise care for him. Later, relations between the parties became disagreeable and the defendants asked him to leave. AWH Charles, Deputy Judge of the Chancery Division found that

...the defendants exerted such pressure and influence on the plaintiff that he was pressured into entering into the deed of gift and did so because of such pressure and felt that he had no other option if he was to keep the defendants happy...the plaintiff was concerned that if he did not keep the defendants happy by complying with their wishes they might cease to look after him.⁴⁵

⁴⁰ For example *Ransome v Leeder* [1994] CLY 2246.

⁴¹ For example *Williams v Bayley* (1866) LR 1 HL 200 which was followed in the Australian decision in *Public Service Employees Credit Union Co-Operative Ltd v Champion* (1984) 56 ACTR 39.

⁴² See, for example, the decision of the English Court of Appeal in *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923 concerning a guarantee provided by a spouse and the Australian decision in *Couper Holdings Pty Ltd (In liq) v Bell* [1999] WASC 232 (Unreported, Owen J, 24 November 1999).

⁴³ See, for example, the English decision *Clarke v Prus* (Unreported, Chancery Division, Knox J, 8 March 1995).

⁴⁴ [1995] 2 FLR 890.

⁴⁵ *Ibid* 902.

The court set aside the gift, *inter alia*, on the basis of actual undue influence, notwithstanding the fact that the evidence indicated that when the elder executed the deed of gift, he did not wish to enter into it and knew what he was doing.⁴⁶

In the Australian case, *Urane v Whipper* (*'Whipper'*),⁴⁷ an elder was also ill. He sought the assistance of his daughter who insisted that she could not care for him in his home. Instead, alternative arrangements were made to sell their respective properties and find suitable accommodation in which both the elder and the daughter's family could reside. The elder reluctantly signed a deed of family arrangement. He confirmed that he had no interest in the new property (which in fact had been purchased, in part, by the proceeds of the sale of his home) and was entitled to reside in the new residence 'without expense for as long as he may wish or his health permits.'⁴⁸ Notwithstanding the fact that the elder had effectively made a substantial gift of the proceeds of sale and had not been independently advised, the court held that there was no evidence of actual undue influence. The court found that the elder's will had not been overborne. Rather, the elder had understood and resignedly accepted the compromise between the parties.⁴⁹

Yet, in *Langton* the elder had also acquiesced to the defendant's demands that the house be transferred to them. In both cases, the elders had disposed of significant assets, hoping to secure permanent care within the family environment. One possible explanation for the different outcomes in the cases was the question of the credibility of the defendants. In *Whipper*, the court considered the daughter a credible witness, noting that she had been concerned about her father.⁵⁰ In *Langton*, the defendants lacked credibility because they had also skilfully taken some of the elder's money.⁵¹ However, in doctrinal terms, the different outcomes may be explained by the existence of the alternative doctrine of unconscionable dealing.⁵² In Australia, there is a broad doctrine of unconscionable dealing⁵³ which may be applied to a wide variety of transactions whereas in the United Kingdom, it is limited to transfers for consideration.⁵⁴ In *Whipper*, Windeyer J was able to rely on the doctrine of unconscionable dealing and held that the deed of family arrangement

⁴⁶ Ibid.

⁴⁷ (2002) NSW ConvR ¶155-992.

⁴⁸ Ibid [16].

⁴⁹ Ibid [24].

⁵⁰ Ibid.

⁵¹ [1995] 2 FLR 890, 901-2. The court also found that the answers that they provided concerning their conduct were unsatisfactory.

⁵² This is considered in Part III (A) below.

⁵³ This is discussed below at Part III (A). For a discussion of unconscionable dealing in Australia, see Anthony J Duggan, 'Unconscientious Dealing' in P Parkinson (ed), *The Principles of Equity* (2nd ed, 2003) Ch 5.

⁵⁴ J E Martin, above n 8, 863.

was unconscionable because the elder was disadvantaged and the daughter had taken advantage of this weakness.⁵⁵ However, in *Langton* this choice was not available to the court because it held that the doctrine of unconscionable dealing did not apply to gifts.⁵⁶ The court in *Langton* also set aside the gift on the basis of presumed undue influence.⁵⁷

Secondly, as noted above, in Australia it is not completely clear whether manifest disadvantage remains a requirement for actual undue influence or merely an additional evidential factor contributing to a finding of actual undue influence. There have been several cases concerning elders where the criterion of manifest disadvantage has neither been referred to nor applied.⁵⁸ However, in *Couper Holdings Pty Ltd v Bell*,⁵⁹ the court noted the present uncertainty of the law and decided that it was necessary to determine whether the transaction was disadvantageous to the elder. In that case the elder had provided a mortgage over her only major asset to secure the liabilities of her son and his business associates. The court held that manifest disadvantage had been demonstrated because of the risk of enforcement and the fact that the elder had nothing to gain from the transaction.⁶⁰ In this case, the elder was successful notwithstanding the additional manifest disadvantage test. However, the application of actual undue influence in Australia could be restricted, particularly in transactions involving consideration if it were contended that the consideration was adequate. This raises the broad problem of what constitutes ‘manifest disadvantage’ which will be considered in the context of presumed undue influence below.⁶¹

III PRESUMED OR RELATIONAL UNDUE INFLUENCE

In relation to actual undue influence, the possible differences in outcome in each jurisdiction may be attributed to the subtle factual variations in particular cases or an expectation in Australia that the plaintiff must prove more clearly that his or her will was overborne in the transaction. However, the law of presumed or relational undue influence in Australia and the United Kingdom has diverged markedly. The overall focus and doctrinal components of presumed undue influence have been treated very differently in each country.

⁵⁵ (2002) NSW ConvR ¶55-992 [27].

⁵⁶ [1995] 2 FLR 890, 908–9.

⁵⁷ Ibid.

⁵⁸ For example *Archer v Archer* [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000); *Wilby v St George Bank Ltd* [2001] SASR 404; *Urane v Whipper* (2002) NSW ConvR ¶55-992.

⁵⁹ [1999] WASC 232 (Unreported, Owen J, 24 November 1999).

⁶⁰ Ibid [119].

⁶¹ See Part III (B) (2) (b).

A *Doctrinal Divergence – The Purpose of Presumed Undue Influence and Its Relationship to Unconscionable Dealing*

In both jurisdictions there has been considerable debate about the relationship between and overlap of presumed undue influence and unconscionable dealings.⁶² It is not the purpose of this article to deal with these issues at length. Rather, it is important to highlight that there may be a correlation between the nature and scope of unconscionable dealing and the way that the framework for presumed undue influence is constructed and interpreted in each jurisdiction. Any comparison of presumed undue influence in Australia and the United Kingdom must take account of both doctrinal consistencies and distinctions.

Australian courts have embraced a generalised notion of unconscionable dealing.⁶³ A plaintiff must prove that a special disadvantage exists, that the defendant was

⁶² For example, I J Hardingham, 'Unconscionable Dealing' in P D Finn (ed), *Essays in Equity* (1985) 1; Paul D Finn, 'The Fiduciary Principle' in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 1; Andrew Phang, 'Undue Influence Methodology; Sources and Linkages' (1995) *Journal of Business Law* 552; R Flannigan, 'The Fiduciary Obligation' (1988) 9 *Oxford Journal of Legal Studies* 286; David Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *Law Quarterly Review* 479.

⁶³ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. To the extent that some eminent commentators have suggested that presumed undue influence is becoming relegated to a relatively unimportant place: see Sir Anthony Mason, 'The Place of Equity and Equitable Doctrines in the Contemporary Common Law World – An Australian Perspective' (1994) 110 *Law Quarterly Review* 238, 249. Paul Finn, writing extra-judicially, has commented that: 'Undue influence, in contrast, is of no great interest to us': see Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in W R Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present and Future* (1998) 251, 257. Nevertheless, there have been some cases in Australia where elders have pleaded presumed undue influence either in alternative to unconscionable dealing: *Tessman v Costello* [1987] 1 Qd R 283; *Baburin v Baburin (No 2)* [1991] 2 Qd R 240; *Mitchell v 700 Young Street Pty Ltd* [2001] VSC (Unreported, Cummins J, 23 April 2001); *Stivactas v Michaletos [No 2]* [1993] Aust Contract Reports ¶90–031; *Mollross v Post* (Unreported, Supreme Court of Tasmania, Zeeman J, 23 December 1992); *Sinclair Galluzzo* (Unreported, Supreme Court of NSW, Spender AJ, 9 November 1994); *Grineff v Chusov* (1999) NSW ConvR ¶55-915; *Archer v Archer* [2000] NSWCA 314 (Unreported, Court of Appeal, Handley JA, Beazley, Fitzgerald JA, 7 November 2000); *Le Boursicot v Coulthard* [1997] Aust Contract Reports ¶90–082; *Wilby v St George Bank* (2001) 80 SASR 404; or exclusively: *Ryan v Tooth* (Unreported, Supreme Court of NSW, Bryson J, 24 September 1993); *Briggs v Scott* (1990) 14 Fam LR 31; *Scott v Briggs* (1991) 14 Fam LR 661; *Federov v Yakimov* (Unreported, Supreme Court of NSW, Needham J, 5 November 1991); *McKeering v Rattle* (Unreported judgment, Supreme

aware of the disadvantage and took advantage of it. Then the onus is upon the defendant to show that the transaction was fair.⁶⁴ The existence of an invigorated general doctrine of unconscionable dealing⁶⁵ (and legislative counterparts)⁶⁶ has led to plaintiffs in Australia pleading undue influence and unconscionable dealing as alternative bases for relief.⁶⁷ In the light of the robust doctrine of unconscionable dealings, the Australian High Court has taken care to demarcate undue influence and the doctrine of unconscionable dealings. In *Commercial Bank of Australia Ltd v Amadio*, Deane J provided the classic descriptive statement:

The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.⁶⁸

Therefore, the court has emphasised that the touchstone of actual or presumed undue influence is whether the plaintiff has exercised an independent and free will. As will be shown below, such a delineation of undue influence has shaped the criterion of relationships of trust and confidence in presumed undue influence.⁶⁹

In the United Kingdom, unconscionable dealing has been a relatively limited and under-utilised doctrine. It has been generally confined to bargains with expectant heirs⁷⁰ and dealings with poor and ignorant persons.⁷¹ The doctrine does not appear

Court of Queensland, White J, 5 May 1995); *Chapmen v Trajan* (1987) ANZ ConvR 264.

⁶⁴ For a helpful discussion of the criteria and important legislation, see *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; A J Duggan, above n 53, Ch 5; J E Martin, above n 8, 863–4; Lord Goff of Chieveley and G Jones, above n 8, Chapter 12; G Virgo, above n 8, 286–97.

⁶⁵ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

⁶⁶ For example *Trade Practices Act 1974* (Cth) Part IVA; *Contracts Review Act 1980* (NSW) s 9.

⁶⁷ An important example was the initial litigation in *Bridgewater v Leahy* (1998) 194 CLR 457. However, by the time the case proceeded to the High Court the claim was based on unconscionable dealing solely.

⁶⁸ (1983) 151 CLR 447, 474 (Deane J); note also *Bridgewater v Leahy* (1998) 194 CLR 457, 478 (Gaudron, Gummow and Kirby JJ); Sir A Mason, above n 63, 249; Sir Anthony Mason in 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 *Anglo-American Law Review* 1, 6–8.

⁶⁹ Part III (B) (2) (a).

⁷⁰ Sir Guenter Treitel, *The Law of Contract* (10th ed, 1999) 383; J McGhee, above n 8 [38–28]. Note also the importance of the UK's *Consumer Credit Act 1974*, which is beyond the scope of this article.

to apply to gifts,⁷² and the prospect of expanding the doctrine has become evident only recently.⁷³ Accordingly, plaintiffs have predominantly pleaded either actual or presumed undue influence to the virtual exclusion of the doctrine of unconscionable dealing.⁷⁴ Consequently, courts have not felt compelled to distinguish between the two doctrines, instead sometimes conflating both. In *Royal Bank of Scotland plc v Etridge (No 2)* ('*Etridge*')⁷⁵ Lord Nicholls broadly sketched the kinds of factors which would describe presumed undue influence, stating that

[t]he principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.⁷⁶

⁷¹ Sir G Treitel, *ibid*; J McGhee, *ibid* [38–27].

⁷² *Langton v Langton* [1995] 2 FLR 890; J E Martin, above n 8, 863.

⁷³ See, for example, *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 151 (Nourse LJ); *Hart v O'Connor* [1985] 1000 (Appeal from the Court of Appeal of New Zealand); S Hedley, above n 8, 204; and the apparently broader statement of principle in G Virgo, above n 8, 286–97. For cases involving elders where the unconscionable dealing has been pleaded as an alternative to undue influence, note: *Portman Building Society v Dusangh* [2000] 2 All ER 221; *Hadjiconstantinou v Charalambous* (Unreported, Chancery Division, Rimer QC, 12 November 1993); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1999] Lloyd's Rep PN 496.

⁷⁴ There are a number of cases involving elders where undue influence rather than unconscionable dealing has been pleaded: for example *In re The Estate of Brocklehurst* [1978] 1 Ch 14; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *Goldsworthy v Brickell* [1987] 1 Ch 378; *Morritt v Wonham* (Unreported, Chancery Division, Walker QC, 11 December 1992); *Hanna v McGreevy* (Unreported, Queen's Bench Division, Murray LJ, 30 July, 1993); *Forsdike v Forsdike* (Unreported, Court of Appeal (Civil Division) Staughton, Pill, Mummery LJJ, 21 February 1997); *Hughes v MacPherson*, (Unreported, Court of Appeal (Civil Division) Sir Richard Scott VC, Thorpe, Judge LJJ, 17 March 1999); *Love v Love* (Unreported, Court of Appeal (Civil Division) Brooke, Chadwick LJJ, 11 March, 1999); *Davies v Dobson* (Unreported, Chancery Division, Geoffrey Vos QC, 7 July, 2000); *Re Morris (deceased)*; *Special Trustees for Great Ormond Street Hospital for Children v Rushin* (Unreported, Chancery Division, Rimer J, 19 April 2000); *Wright v Cherrytree Finance Ltd* [2001] 2 All ER (Comm) 877; *Meredith v Lackschewitz-Martin* [2002] EWHC 1462 (Ch); *Greene King plc v Stanley* [2001] EWCA Civ 1966.

⁷⁵ [2002] 2 AC 773.

⁷⁶ *Ibid* 795–6.

He also described presumed undue influence as a situation where a person ‘has acquired over another a measure of influence, or ascendancy, of which the ascendant person takes unfair advantage’.⁷⁷ It is clear that these expositions do not fully accord with the Australian approach because, in Australia, vulnerability, exploitation and taking unfair advantage are probably better considered under unconscionable dealing rather than undue influence. For example, Sir Anthony Mason, writing extra-judicially,⁷⁸ criticised the decision in *National Westminster Bank plc v Morgan*⁷⁹ in which Lord Scarman suggested that presumed undue influence involved ‘the victimization of one party by the other’.⁸⁰ Mason contended that victimisation was a description apposite to unconscionable dealing or actual undue influence rather than presumed undue influence.⁸¹ However, it is important to emphasise that the descriptions provided by the House of Lords and the High Court are not mutually exclusive. While Lord Nicholls referred to vulnerability and exploitation, he also considered characteristics which could be identified with the narrower Australian interpretation of undue influence such as trust and confidence, reliance, dependence, ascendancy and control. Indeed, it will be contended below that these characteristics remain at the core of presumed undue influence in the United Kingdom as well.

B *Categories of Presumed or Relational Undue Influence*

In both jurisdictions, presumed or relational undue influence has not required that the plaintiff prove affirmatively that there was actual influence.⁸² Instead, it has been incumbent upon a plaintiff to show that there were strong circumstances from which undue influence could be presumed. There are, broadly speaking, two categories of presumed undue influence.

⁷⁷ Ibid 795.

⁷⁸ Sir A Mason, above n 68, 9.

⁷⁹ [1985] AC 686.

⁸⁰ Ibid 705.

⁸¹ Sir A Mason, above n 68, 9–10. Nevertheless, commentators in the United Kingdom have identified presumed undue influence not only with impaired consent, but also exploitative conduct: for example, G Virgo, above n 8, 258.

⁸² For Australia see *Johnson v Buttress* (1936) 56 CLR 113, 134; A J Duggan, above n 8, [1111] & [1115]. For the United Kingdom, see for example *Bank of Credit and Commerce SA v Aboody* [1990] 1 QB 923, 953; *Barclays Bank plc v O’Brien* [1994] 1 AC 180, 189–90.

1 *The Automatic Presumption of Undue Influence*

In the first category (sometimes referred to as Class 2A),⁸³ there are certain relationships which automatically, as a matter of law, raise the presumption that undue influence has been exercised. Relationships which are deemed automatically to constitute relationships of influence are similar in both jurisdictions.⁸⁴ They are parent and (young and dependent) child,⁸⁵ guardian and ward,⁸⁶ religious adviser and devotee,⁸⁷ solicitor and client⁸⁸ and doctor and patient.⁸⁹

(a) *Elders and the Automatic Presumption*

The relationship between an adult child and elderly parent does not constitute an automatic relationship of undue influence in either the United Kingdom or Australia.⁹⁰ In the past, old age did not confer any special status on the elderly.⁹¹ It

⁸³ See *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189.

⁸⁴ For Australia, see *Johnson v Buttress* (1936) 56 CLR 113, 134; R P Meagher et al, above n 8 [15–055]; A J Duggan, above n 8, [1112]; G E Dal Pont and D R C Chalmers, above n 8, 187. For the United Kingdom, see *Barclays Bank v O'Brien* [1994] 1 AC 180, 189; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 795 (Lord Nicholls); J E Martin, above n 8, 855; J McGhee, above n 8, [38–11]–[38–19].

⁸⁵ For example: *Hatch v Hatch* (1804) 9 Ves 292; 32 ER 615; *Archer v Hudson* (1844) 7 Beav 551; 49 ER 1180; *Allfrey v Allfrey* (1847) 10 Beav 353; 50 ER 618; *Wright v Vanderplank* (1855) 2 K & J 1; 69 ER 669; *Bainbrigge v Browne* (1881) 18 Ch D 188; *Kerr v Western Australian Trustee Executor and Agency Co Ltd* (1937) 39 WALR 34; *Lamotte v Lamotte* (1942) 42 SR (NSW) 99; *West v Public Trustee* [1942] SASR 109; *Phillips v Hutchinson* [1946] VLR 270; RP Meagher et al, above n 8, [15–055]; M Cope, above n 20, [169]–[174].

⁸⁶ For example, *Hatch v Hatch* (1804) 9 Ves 292; 32 ER 615; *Taylor v Johnston* (1882) 19 Ch D 603; RP Meagher et al, above n 8, [15–055]; M Cope, above n 20, [175].

⁸⁷ For example *Huguenin v Baseley* (1807) 14 Ves 273; 33 ER 526; *Nottidge v Prince* (1860) 2 Giff 246; 66 ER 103; *Allcard v Skinner* (1887) 36 ChD 145; *Morley v Loughnan* [1983] 1 Ch 736; RP Meagher et al, above n 8, [15–055]; M Cope, above n 20, [176]–[178].

⁸⁸ For example *Gibson v Jeyes* (1801) 6 Ves 266; 31 ER 1044; *Wood v Downes* (1811) 18 Ves 120; 34 ER 263; *Rhodes v Bate* (1865) LR 1 Ch App; *Wright v Carter* [1903] 1 Ch 27; *Dowsett v Reid* (1912) 15 CLR 695, 707 (Barton J); *Haywood v Roadknight* [1927] VLR 512, 520 (Lowe J); RP Meagher et al, above n 8, [15–055]; M Cope, above n 20, [179]–[180].

⁸⁹ For example *Dent v Bennett* (1839) 4 My & CR 269; 41 ER 105; *Gibson v Russell* (1843) 2 Y & CCC 104; 63 ER 46; M Cope, above n 20 [186].

⁹⁰ See, for example, A J Duggan, above n 8, [1112].

⁹¹ See, for example, L Bonfield, 'Was There a 'Third Age' in the Preindustrial English Past? Some Evidence from the Law' in J Eekelaar and D Pearl (eds), *An Aging World: Dilemmas and Challenges for Law and Social Policy* (1989) 37; Linda S

was generally opined that age was not an adequate reason for setting aside a transaction because a person's age did not necessarily impair that person's capacity to negotiate, enter into and comply with the terms of the transaction. This view was well expressed by Buller LJ in the eighteenth century English decision in *Lewis v Pead*⁹² where Mrs Lewis, aged 75 years, made a lease and after her death a beneficiary under her will sought to have the lease made in favour of the defendant set aside. He stated that

[t]here must be some substantial ground for supposing fraud, stated and proved. Her being old is no proof, that she was imposed upon.... We have seen the greatest abilities displayed at a greater age than 75; therefore, that alone can be no ground to presume imposition.⁹³

The modern formulation of presumed undue influence, substantially developed in the nineteenth century,⁹⁴ was shaped by such attitudes so that elders were not given any special treatment or status under it⁹⁵ (although elders were sometimes successful in claims based on presumed undue influence).⁹⁶ Therefore, compared to other vulnerable groups, elders have been required to raise a presumption of undue influence on the particular facts of the case in order to set aside inter vivos contracts and gifts.

The lack of a special legal status for the aged also affected the treatment of transactions involving elderly parents and their adult children. Parent and adult child relationships and spousal relationships were two categories which did not attract the protection of the automatic presumption of undue influence.⁹⁷ The traditional explanation for the exclusion of spouses was that gifts were explicable by reference to the close relationship of husband and wife.⁹⁸ Parental gifts and other transactions were explicable not only by the close relationship but the expectation that parents would act to advance the interests of their children, even

Whitton, 'Ageism: Paternalism and Prejudice' [1997] *DePaul Law Review* 453, 458–9.

⁹² (1789) 1 Ves Jun 19; 30 ER 210

⁹³ *Ibid* 20; 210.

⁹⁴ D Browne, above n 6, 38.

⁹⁵ It appears that the doctrine of undue influence was substantially formed in the nineteenth century: see D Browne, above n 6, 38.

⁹⁶ For example, *Filmer v Gott* (1774) 4 Bro P C 230; 2 ER 156; *Bridgeman v Green* (1755) Wilm 58; 97 ER 22; *Taylor v Obee* (1816) 3 Price 83; 146 ER 198; *Griffiths v Robins* (1818) 3 Madd 191; 56 ER 480.

⁹⁷ L A Sheridan, *Fraud in Equity: A Study in English and Irish Law* (1957) 96; M Cope, above n 20, [185].

⁹⁸ *Ibid*.

their adult children.⁹⁹ It was naively believed that the interests of older or elderly parents and children would be identical. The present state of the law in both Australia and the United Kingdom still reflects, in varying degrees, these historical antecedents and assumptions.

2 *Presumed or Relational Undue Influence Based on Fact.*

Alternatively, a plaintiff in either jurisdiction may be able to show that as a matter of fact the plaintiff reposed such trust and confidence in the defendant so that any gift, contract or transaction in favour of the defendant ought to be presumed to be the result of undue influence.¹⁰⁰ Prior to the decision in *Etridge*,¹⁰¹ the House of Lords in *Barclays Bank plc v O'Brien* classified this as a Class 2B relationship.¹⁰² However, in *Etridge*, the House of Lords appeared to discard the Class 2B category because it lacked utility¹⁰³ and forensic use.¹⁰⁴ Instead the Court emphasised that in these cases the presumption of undue influence was a 'shift in the evidential onus on a question of fact,'¹⁰⁵ similar to the common law principle, *res ipsa loquitur*. It is submitted that the abandonment of the Class 2B categorisation in the United Kingdom does not represent a source of major difference between the two jurisdictions; and will not substantially alter the approach of courts in either country. It represents a clarification of doctrine. In both jurisdictions, once a plaintiff raises a rebuttable presumption of undue influence, the burden of proof

⁹⁹ It can be said that it was normal, appropriate or necessary for a parent to make gifts to the child, even an adult child: L A Frolik, 'The Biological Roots of the Undue Influence Doctrine: What's Love Got To Do With It?' (1996) 57 *University of Pittsburgh Law Review* 841; L A Frolik, 'The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences?' (2000) 24 *International Journal of Law and Psychiatry* 253.

¹⁰⁰ For Australia, see *Johnson v Buttress* (1936) 56 CLR 113, 134–5. Important decisions under this class of undue influence include: *Spong v Spong* (1914) 18 CLR 544; *Johnson v Buttress* (1936) 56 CLR 113; *Bank of NSW v Rogers* (1941) 65 CLR 42; *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSW 30; *Union Fidelity Co v Gibson* [1971] VR 573. For the United Kingdom, see: *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326; *Barclays Bank plc v O'Brien* [1994] 1 AC, 189–90; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] AC 773, 795; J E Martin, above n 8, 855–6; J McGhee, above n 8, [38–11].

¹⁰¹ [2002] 2 AC 773.

¹⁰² Such nomenclature is known or used in Australia: see A J Duggan, above n 8, [1115].

¹⁰³ *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 842–3 (Lord Scott).

¹⁰⁴ *Ibid* 822 (Lord Hobhouse); 816 (Lord Clyde).

¹⁰⁵ *Ibid* 797 (Lord Nicholls); note 820–1 (Lord Hobhouse) and 840 (Lord Foscote).

shifts to the defendant.¹⁰⁶ In order to rebut the presumption, the defendant must demonstrate that the plaintiff exercised an independent and free judgment or was given independent advice in order to place him or her in a position of independence. It is not sufficient to show that the plaintiff understood what he or she was doing.¹⁰⁷

Instead, the significant divergence between the jurisdictions relates to the nature and scope of the criteria for raising a presumption of undue influence as a matter of fact and the combined effect of these criteria. Traditionally, a plaintiff has had to satisfy two criteria.

(a) *A Relationship of Trust and Confidence*

The plaintiff is required to prove that there was a relationship of trust and confidence between the parties. This remains a necessary condition in both jurisdictions.¹⁰⁸ From this prerequisite, two initial questions arise in the context of elders.

(i) *The Elder Parent and Adult Child Relationship*

As indicated above, in both jurisdictions neither old age nor the elder parent and adult child relationship has been a sufficient basis upon which to raise an automatic evidential presumption of undue influence. Therefore, it is necessary to consider how courts have evaluated the elder parent and adult child relationship for the purposes of raising presumed undue influence. There is a strong bond between many elderly parents and their adult children and there have been a number of cases in both jurisdictions in which courts have had to consider the possibility of presumed undue influence involving such parties.

In Australia, courts have made it clear that the existence of an elder parent and adult child relationship will not in itself satisfy the first requirement. The normal emotional ties between elders and their children would not be sufficient to give rise to presumed influence.¹⁰⁹ In the United Kingdom, the courts appear to have been

¹⁰⁶ In relation to Australia, see: A J Duggan, above n 8, [1117]; In relation to the United Kingdom, see P H Pettit, above n 8, 675.

¹⁰⁷ See A J Duggan, above n 8, [1117]; J McGhee, above n 8, [38–20].

¹⁰⁸ For example *Johnson v Buttress* (1936) 56 CLR 113, 134; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 794–6. However, it has been suggested that in Australia the requirement of an impaired consent may be a different test than the requirement of a relationship of trust and confidence. However, this does not appear to have been raised by the courts: see F Burns, above n 20, 690.

¹⁰⁹ For example, *Tessman v Costello* [1987] 1 Qd R 283; *Ryan v Tooth* (Unreported, Supreme Court of NSW, Bryson J, 24 September 1993); *Burke v State Bank of New*

less consistent, but on balance, the plaintiff has been required to prove something in addition to the parent-child relationship. For example in *Davies v Dobson*,¹¹⁰ Geoffrey Vos QC confirmed that the normal mother and daughter relationship did not establish a relationship of trust and confidence. However, it has been more readily recognised in the United Kingdom that elderly parents are vulnerable and that the elder parent and adult child relationship would be an important factor in establishing a relationship of trust and confidence.¹¹¹

(ii) Evidence of a Relationship of Trust and Confidence — Plaintiff or Defendant-Based Conduct?

As elders must provide evidence of a relationship of trust and confidence, the question of what kind of evidence has satisfied the requirement must be considered.

For some time, there has been academic debate about whether the proof of a relationship of trust and confidence is based on plaintiff-based conduct, defendant-based conduct or both. In a major article about undue influence,¹¹² Birks and Chin argued that relational undue influence examines plaintiff-based conduct and focuses on whether the plaintiff was able to exercise a free and independent will. Having reviewed the decisions of courts in both jurisdictions, they concluded that it was sufficient to show that the plaintiff had become excessively dependent upon the defendant and there was no need to prove that the defendant had acted wrongfully.¹¹³ While they relied on the High Court's emphasis upon impaired consent (rather than wrongdoing), they acknowledged that some courts in the United Kingdom defined undue influence by reference to the wrongdoing of the defendant.¹¹⁴ In contrast, the defendant-based conduct approach has highlighted that the doctrinal underpinning of equity has been to redress wrongful conduct. Therefore, the *raison d'être* of undue influence is the defendant's active or passive

South Wales (1994) 37 NSWLR 53. A similar approach has been taken in New Zealand: *ASB Bank Ltd v Harlick* [1996] 1 NZLR 655.

¹¹⁰ Unreported, Chancery Division, Geoffrey Vos QC, 7 July, 2000, 10; note also *Portman Building Society v Dusangh* [2000] 2 All ER 221; *Forsdike v Forsdike* (Unreported, Court of Appeal (Civil Division) Staughton Pill, Mummery LJ, 21 February 1997).

¹¹¹ *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, 287–8 (Brandon LJ); *Love v Love* (Unreported, Court of Appeal (Civil Division) Brooke and Chadwick LJ, 11 March 1999).

¹¹² P Birks and C N Yin, above n 16.

¹¹³ *Ibid* 67–74.

¹¹⁴ Consider for example, *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189 (Lord Browne-Wilkinson).

exploitation or wrongdoing.¹¹⁵ A third view has been that the choice between plaintiff and defendant-based conduct is ultimately a sterile and unhelpful one because courts are likely to review all the circumstances in determining the case.¹¹⁶

It is submitted that not only does each approach have merit, but that another explanation is possible which encompasses all three. This may assist an understanding of elder cases and presumed undue influence. From an evidentiary point of view, the primary (but not sole) focus of the court, will be the quality of the consent of the elder. It will be crucial to determine whether the plaintiff acted independently, in the sense that the plaintiff exercised an independent and free judgment or was given independent advice. If the plaintiff were dependent upon the defendant in some significant way, then there would be strong evidence that a relationship of trust and confidence existed. In turn, the defendant would be required to show that despite the relationship of trust and confidence, the plaintiff acted independently. As part of this determination, it will be necessary to consider not only the health and well-being of the plaintiff, but also the conduct of the defendant within this relationship of trust and confidence. Sometimes the active and unconscionable conduct of the defendant will be obvious and will lead the court to conclude that the plaintiff could not and did not act independently. However, while the dependence or independence of the elder will be an indispensable consideration, the underlying policy of presumed undue influence is to prevent the abuse of a relationship of trust and confidence.¹¹⁷ In this regard, the doctrine will address the outcome — the active or passive receipt of assets by the defendant or a transaction in the defendant's favour.

(iii) Elders and Relationships of Trust and Confidence

In the light of this continuing doctrinal debate, the dependence or independence of the elder remains an indispensable evidentiary touchstone for determining whether a relationship of trust and confidence exists. Where an elder (or the elder's representative) has been able to show that the elder was excessively dependent upon

¹¹⁵ For example, Rick Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"' (1996) 16 *Oxford Journal of Legal Studies*, 503; Matthew D J Conaglen, 'Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh' (1999) 18 *New Zealand Universities Law Review* 509.

¹¹⁶ G Virgo, above n 8, 252; S Hedley, above n 8, 195. Note in this regard *Morritt v Wonham* (Unreported, Chancery Division Walker QC, 11 December 1992).

¹¹⁷ Therefore, not surprisingly there are strong historical and doctrinal links between presumed undue influence and fiduciary obligations: R Flannigan, above n 62; A J Duggan, above n 8, [1131]; R Bigwood, 'Undue Influence in the House of Lords: Principles and Proof' (2002) 65 *Modern Law Review* 435.

the defendant, courts have held that a relationship of trust and confidence existed.¹¹⁸ The profound difference between the two jurisdictions lies in the nature of dependence and the scope of the relationship required.

In Australia, the courts have demanded strong evidence of an excessive dependence on the defendant as part of an all-encompassing relationship. Therefore, a relationship of trust and confidence has been found where the defendant has controlled and managed the elder's financial affairs¹¹⁹ and/or provided the elder with day-to-day necessities, shopping and housework.¹²⁰ The courts have focussed on dependence in the context of a relationship, rather than an isolated transaction. Moreover, it has been necessary to prove that the elder was dependent upon the recipient of the gift or favourable transaction, rather than a third party who was in a position to persuade the dependent elder to make the gift or enter into the transaction.¹²¹

While evidence of dependence remains a significant hallmark of a relationship of trust and confidence in the United Kingdom, it is not necessary for the elder to be entirely or excessively dependent, nor should the dependence occur in an all-encompassing relationship. Sometimes elders have been very dependent upon a defendant.¹²² However, it has been sufficient to demonstrate that the elder was dependent upon the defendant in relation to a specific aspect of the elder's life or for assistance in a particular transaction. Therefore, it is possible for a generally healthy and independent elder to allege that he or she was transactionally dependent

¹¹⁸ For Australia, see *Federov v Yakimov* (Unreported, Supreme Court of NSW, Needham J, 5 December 1991); *Stivactas v Michaletos [No 2]* [1993] Aust Contract Reports ¶90-031; *Le Bouriscot v Coulthard* (1997) Aust Contract Reports ¶90-082; *Grineff v Chusov* (1999) NSW ConvR ¶55-916. For the United Kingdom, see *Farquhar v Boyd* (Unreported, Chancery Division, Campbell J, 14 March 1997); *Meredith v Lackschewitz-Martin* [2002] EWHC 1462 (Ch); *Re Morris (deceased), Special Trustees for Great Ormond Street Hospital for Children v Rushin* (Unreported, Chancery Division, Rimer J, 19 April 2000); *Hammond v Osborn* (Unreported, Court of Appeal, Ward and Keene LJJ and Sir Martin Nourse, 27 June 2002).

¹¹⁹ For example *Stivactas v Michaletos [No 2]* [1993] Aust Contract Reports ¶90-031.

¹²⁰ *Federov v Yakimov* (Unreported, Supreme Court of NSW, Needham J, 5 November 1991).

¹²¹ See *Mollross v Post* (Unreported, Supreme Court of Tasmania, Zeeman J, 23 December 1992).

¹²² See *Meredith v Lackschewitz-Martin* [2002] EWHC 1462 (Ch); *Re Morris (deceased), Special Trustees for the Great Ormond Street Hospital for Children v Rushin* (Unreported, Chancery Division, Rimer J, 19 April 2000); and *Hammond v Osborn* (Unreported, Court of Appeal, Ward and Keene LJJ and Sir Martin Nourse, 27 June 2002).

on a person in some situations but not in others. In *Goldsworthy v Brickell*,¹²³ a healthy and mentally alert elder became progressively dependent upon his farm manager for the running of his farm. It was held that there was a relationship of trust and confidence; and there was no need for proof of excessive dependence or complete domination.¹²⁴ In *Investors Compensation Scheme v West Bromwich Building Society*,¹²⁵ elders borrowed funds against the security of their home under Home Income Plans which failed. It was argued successfully that the elders had, in the context of relational undue influence, reposed trust and confidence in the advisors responsible for the scheme. The court agreed, making it clear that the elders were not precluded from making a claim under relational undue influence because they lived independent lives and were capable of entering into commercial transactions. The court stated that

...although able to understand such concepts as the borrowing of money on security and the payment of interest, the claimants were not financially sophisticated people and not in a position, without the advice of persons more expert than themselves, properly to judge the risks involved in embarking on a Home Income Plan...each of the individual claimants gave unchallenged evidence that they had confidence in and placed reliance upon the advice of the [financial advisor]...¹²⁶

The broader approach of the courts in the United Kingdom is consistent with an aspect of the automatic presumption of undue influence.¹²⁷ While young children and minors are generally very dependent upon their parents, the same level of dependency may not exist between a patient and a doctor, a client and a solicitor or religious advisor and devotee. For example, a client may be transactionally dependent upon the solicitor for advice concerning legal and financial matters, but it may be very evident that the client is not dependent upon the solicitor for the broader management of his or her affairs. However, the Australian interpretation of relationships of trust and confidence suggests that elders must demonstrate a high level of dependence and that transactional reliance will not be sufficient.¹²⁸

¹²³ [1987] 1 Ch 378.

¹²⁴ Ibid 401 and 404.

¹²⁵ [1999] Lloyd's Rep PN 496.

¹²⁶ Ibid 513.

¹²⁷ See Part III (B) (1).

¹²⁸ In some cases, it is possible that a plaintiff's transactional or commercial incompetence may be dealt with under the doctrine of unconscionable dealing. It may constitute a special disability of which the defendant takes advantage, rather than a relationship of dependence. In *Vital Finance Corp Pty Ltd v Taylor* [1991] ASC ¶56-099, the Court found, inter alia, that the financier took advantage of the lessees' desperate financial situation and that the lessees lacked appropriate commercial experience and an understanding of the transaction and the documents.

(b) A Requirement of Manifest Disadvantage or Explicability?

Traditionally, the other requirement for presumed or relational undue influence was proof that the transaction was manifestly disadvantageous to the person alleging undue influence.¹²⁹ According to some judges¹³⁰ and commentators,¹³¹ the source of the manifest disadvantage requirement can be found in *Allcard v Skinner*¹³² where Lord Lindley pointed out that

... [I]f the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.¹³³

In both jurisdictions, manifest disadvantage has proved troublesome, but for different reasons; and the treatment of 'manifest disadvantage' has been a source of significant dissimilarity.

In Australia, there have been three problems associated with the manifest disadvantage criterion. First, there is some uncertainty as to whether manifest disadvantage is a requirement for presumed undue influence.¹³⁴ Arguably, an omission from the High Court's recent statements on undue influence has been the failure to address this issue.¹³⁵ This may signal that manifest disadvantage is not important. Certainly, when commenting on undue influence extra-judicially, Sir Anthony Mason observed that 'impairment of the judgment of the weaker party ... is the critical element in the grant of relief on the ground of undue influence'.¹³⁶ Moreover, it has been suggested, relying on a statement of Dixon J in *Johnson v Buttress*,¹³⁷ that manifest disadvantage is only important when the defendant

¹²⁹ For example *National Westminster Bank plc v Morgan* [1985] AC 686.

¹³⁰ For example *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 798 (Lord Nicholls).

¹³¹ A Hudson, above n 8, 652.

¹³² (1887) 36 Ch D 145.

¹³³ Ibid 185.

¹³⁴ For examples of cases at first instance where manifest disadvantage was evidently considered important see *James v Australia & New Zealand Banking Group Ltd* (1986) 64 ALR 347; *Farmers' Co-operative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399; *Quek v Beggs* (1990) 5 BPR 11-761. Note also the dicta in *Watkins v Combes* (1922) 30 CLR 180, 193-194 (Isaacs J); cf *Baburin v Baburin* [1990] 2 Qd R 101, 109 (Kelly SPJ).

¹³⁵ *Bridgewater v Leahy* (1998) 194 CLR 457, 476-478 (Gaudron, Gummow and Kirby JJ). Ultimately the application of the doctrine of unconscionable dealing decided this case.

¹³⁶ Sir A Mason, above n 68, 7, citing P Birks and C N Yin, above n 16, 57.

¹³⁷ (1936) 56 CLR 113.

attempts to rebut the presumption.¹³⁸ If this is the case, then raising a presumption of undue influence in Australia will be simply dependent upon proof of excessive dependence and the doctrine will have only a very limited use in those cases where such dependence can be proved. However, in the seminal High Court decision, *Yerkey v Jones*¹³⁹ some three years later, Dixon J pointed out that an element of a presumption of undue influence was that ‘the character of the relation itself is never enough to explain the transaction and to account for it without suspicion of confidence abused’.¹⁴⁰

Secondly, related to the fundamental uncertainty about the requirement, the meaning of ‘manifest disadvantage’ remains unclear. Should manifest disadvantage be equated simply with the financial losses associated with the making of a gift, a transaction in which property is sold at a price lower than its market value or a guarantee for which the guarantor obtains no benefit? This is arguably a narrow approach because it appears dependent upon proving monetary loss only. Alternative approaches are that the transaction will be manifestly disadvantageous if it is not accountable or explicable by reference to ‘ordinary motives on which ordinary men act’¹⁴¹ or by ‘the character of the relation’.¹⁴² The application of these different interpretations could radically affect whether manifest disadvantage is a relevant criterion and whether there is a presumption of undue influence.

Finally, there have been some strong policy arguments that manifest disadvantage should not be a requirement for presumed or relational undue influence.¹⁴³ Relying on a narrow interpretation of manifest disadvantage based on monetary loss, it has been assumed that the test may bar the case of a person who receives full consideration who, in the absence of undue influence, may not have entered into the transaction in the first place.¹⁴⁴ Just as manifest disadvantage is not a criterion for unconscionable dealing, so too it ought not be mandatory for presumed undue influence.¹⁴⁵ The problem with this approach is that it unwittingly conflates

¹³⁸ Therefore, if the defendant were able to show that the transaction was not manifestly disadvantageous to the plaintiff, then this would be evidence from which it could be inferred that the plaintiff had exercised independent judgment: note *Johnson v Buttress* (1936) 56 CLR 113, 135–6 (Dixon J); and also the comments in A J Duggan, above n 8, [1116].

¹³⁹ (1939) 63 CLR 649.

¹⁴⁰ *Ibid* 675.

¹⁴¹ For example *Spong v Spong* (1914) 18 CLR 544, 550 (Isaacs J); *Bank of Victoria v Mueller* [1925] VLR 642, 648–50 (Cussen J); *Quek v Beggs* (1990) 5 BPR [11-761], [11-764].

¹⁴² *Yerkey v Jones* (1939) 63 CLR 649, 675 (Dixon J).

¹⁴³ See A J Duggan, see above n 8, [1116].

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*.

unconscionable dealing and undue influence, whereas the High Court has been careful to demarcate the doctrines. However, more generally, it is arguable that an additional requirement of manifest disadvantage places an unnecessary burden upon the plaintiff, making his or her case for relational undue influence more difficult. Rather, it ought to be the defendant who addresses the issue of improvidence, because it is the defendant who wishes to retain the gift or maintain the transaction.

The upshot of this uncertainty in Australian law is that there has been no uniform interpretation of or approach to manifest disadvantage in elder cases. In some cases, manifest disadvantage has not been raised, considered or applied.¹⁴⁶ In other cases the court has been content to point out that the transaction was not disadvantageous (without taking into full account the circumstances the elder faced) because a refinancing transaction averted action being taken against the elder's property¹⁴⁷ or the elder obtained care within a family context.¹⁴⁸ The criterion of manifest disadvantage appears to have been applied in *Nattrass v Nattrass*¹⁴⁹ where an elder made gifts of money to a caregiver. The court differentiated between gifts of small amounts which could be explained by ordinary motives upon which a person may act¹⁵⁰ and substantial payments which could not convincingly be accounted for by friendship or gratitude; and which, accordingly, led to a presumption of undue influence.¹⁵¹

In the United Kingdom, it has been clear for some time that manifest disadvantage was a prerequisite for presumed undue influence.¹⁵² However, the requirement was tricky to apply when a wife relied on a presumption of undue influence to set aside a charge over the matrimonial home to secure the liabilities of the husband or the husband's business. It was difficult to argue that the wife suffered manifest disadvantage, although her husband's business may have financially collapsed.¹⁵³ In the light of the spousal cases, it was suggested that it may not be a universal

¹⁴⁶ For example *Sinclair Galluzzo* (Unreported, Supreme Court of NSW, Spender AJ, 9 November 1994).

¹⁴⁷ For example *Jacobs v Shugg* (Unreported, Supreme Court of Victoria, O'Bryan J, 24 May 1996).

¹⁴⁸ *Mitchell v 700 Young Street Pty Ltd* [2001] VSC (Unreported, Cummins J, 23 April 2001).

¹⁴⁹ [1999] WASC (Unreported, Commissioner Buss QC, 25 June 1999).

¹⁵⁰ *Ibid* [109].

¹⁵¹ *Ibid* [112]. Note also *Federov v Yakimov* (Unreported, Supreme Court of NSW, Needham J, 5 November 1991); *Chapman v Trajan* (1987) ANZ ConvR 264.

¹⁵² *National Westminster Bank plc v Morgan* [1985] AC 686; *Cheese v Thomas* [1994] 1 All ER 35.

¹⁵³ For example J E Martin, above n 8, 858.

requirement and may be subject to review in the future.¹⁵⁴ However, in *Etridge*,¹⁵⁵ the House of Lords not only confirmed that manifest disadvantage was an important criterion for the presumption of undue influence in a marriage context, but also acknowledged that it required clearer definition. Lord Nicholls preferred the old test in *Allcard v Skinner*¹⁵⁶ which was explained by Lord Scarman in *National Westminster Bank plc v Morgan*¹⁵⁷ as follows:

... [T]he Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.¹⁵⁸

Applying this ‘explicability’ test to the cases¹⁵⁹ before him, Lord Nicholls pointed out that the question was not whether the transaction personally benefited the wife, but whether the security or guarantee given by the wife was explicable only on the basis of undue influence. He decided that in the context of marital relationships ‘in the ordinary course’, the execution of such transactions would not be the result of undue influence.¹⁶⁰

Even prior to *Etridge*, courts in the United Kingdom had applied a ‘manifest disadvantage’ test in cases involving elders which was akin to the explicability test endorsed in *Etridge*. For example, in *Davies v Dobson*¹⁶¹ the court held that a gift of the mother’s home to her daughter was so substantial that it could not ‘be reasonably accounted for on the ground of the ordinary motives on which ordinary men act’.¹⁶² Since *Etridge*, courts in the United Kingdom have applied the explicability test.¹⁶³

¹⁵⁴ *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, 209; *Barclays Bank plc v Coleman* [2001] QB 20, 62–4; P H Pettit, above n 8, 675.

¹⁵⁵ [2002] 2 AC 773.

¹⁵⁶ (1887) 36 Ch D 145, 185.

¹⁵⁷ [1985] AC 686.

¹⁵⁸ [1985] AC 686, 704. Quoted with approval by Lord Nicholls in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 799; note also 820–2 (Lord Hobhouse) and 839–40 (Lord Scott).

¹⁵⁹ There were eight cases for consideration: [2002] 2 AC 773.

¹⁶⁰ [2002] 2 AC 773, 800 (Lord Nicholls); note also 842 (Lord Scott).

¹⁶¹ Unreported, Chancery Division, Geoffrey Vos QC, 7 July 2000.

¹⁶² *Ibid* 10, quoting Ungood Thomas J in *Re Craig Deceased* [1971] 1 Ch 95, 104. Generally the courts referred to the test as manifest disadvantage: see for example *Re Morris (deceased), Special Trustees for the Great Ormond Street Hospital for Children v Rushin* (Unreported, Chancery Division, Rimer J, 19 April 2000); *Farquhar v Boyd* (Unreported, Chancery Division, Campbell J, 14 March 1997);

It has been argued that the present explicability test is a threshold which is set too high, taking into account the fiduciary underpinnings of relational undue influence cases.¹⁶⁴ Instead the possibility rather than the probability of undue influence ought to suffice.¹⁶⁵ This will be an issue which will become important as courts in the United Kingdom continue to refine the explicability test. However, as far as elders are concerned, there are already some important trends which indicate that courts have not applied ‘manifest disadvantage’ or ‘explicability’ in a narrow fashion. First, it is very clear that courts have not interpreted the relationship between elders and their adult relatives or carers in the same way that courts, including the House of Lords in *Etridge*, have interpreted the spousal relationship. In *Etridge*, Lord Nichols emphasised that a wife’s gift or guarantee in favour of her husband was ‘in the ordinary course’ and was explicable by the relationship between the parties. In contrast, modern courts have recognised that the interests of elders and their adult children or caregivers are not necessarily identical. An elder’s gift or guarantee in favour of an adult child or caregiver is not explicable by ‘ordinary motives’ or ‘in the ordinary course.’ Instead, courts have carefully reviewed the circumstances of the case in order to determine whether it was explicable by the relationship or by undue influence.¹⁶⁶

Secondly, courts in the United Kingdom have not confused an elder’s motivation for entering into a transaction with the explicability test. An elder will enter into a transaction because he or she believes that the outcome will be for his or her benefit. For example, the elder may enter into arrangements for accommodation or care¹⁶⁷ or to obtain an annuity.¹⁶⁸ However, courts have considered whether in fact

Love v Love (Unreported, Court of Appeal (Civil Division) Brooke and Chadwick LLJ, 11 March 1999); *Langton v Langton* [1995] 2 FLR 890. In some other cases, manifest disadvantage was simply assumed without further discussing the issue: *Investors Compensation Scheme Limited v West Bromwich Building Society* [1999] Lloyd’s Rep PN 496; *Mahoney v Purnell* [1996] 3 All ER 41.

¹⁶³ See, for example, *Glanville v Glanville* [2000] EWHC 1271 (Ch); *Meredith v Lackschewitz-Martin* [2002] EWHC 1462 (Ch); *Greene King plc v Stanley* [2001] EWCA Civ 1966.

¹⁶⁴ R Bigwood, above n 117, 449–50.

¹⁶⁵ *Ibid.*

¹⁶⁶ See, for example, *Davies v Dobson* (Unreported, Chancery Division, Geoffrey Vos QC, 7 July 2000); *Greene King plc v Stanley* [2001] EWCA Civ 1966; *Wright v Cherrytree Finance Ltd* [2001] 2 All ER (Comm) 877.

¹⁶⁷ *Davies v Dobson* (Unreported, Chancery Division, Geoffrey Vos QC, 7 July 2000); *Brown v Palmer* (Unreported, Court of Appeal (Civil Division) Peter Gibson and Millett LJJ, Sir John Balcombe, 27 October 1997); *Love v Love* (Unreported, Court of Appeal (Civil Division) Brooke and Chadwick LJJ, 11 March 1999); *Langton v Langton* [1995] 2 FLR 890; *Casimir v Alexander* [2001] WTLR 939.

the transaction was for the benefit of the elder or whether it could only be explained objectively on the basis of undue influence.¹⁶⁹

Thirdly, courts have been highly suspicious when elders have transferred either their only major asset or substantial assets to relatives or caregivers¹⁷⁰ or to persons the elder has known for only a short time.¹⁷¹ Generally, courts have found that such transactions were manifestly disadvantageous.¹⁷² In the light of the elder's financial circumstances and age, courts have considered the transactions highly improvident and only explicable by undue influence. Equally, courts have viewed with considerable scepticism those transactions where elders have simply handed over substantial assets as part of an informal arrangement of care without security of tenure or agreed mechanisms to regulate disputes.¹⁷³

(c) *The Combined Effect of the Criteria for Presumed Undue Influence*

In the United Kingdom, 'manifest disadvantage' or 'explicability' has emerged as a valuable tool in cases involving elders. Elders have presented evidence of the deleterious nature and consequences of the gift or transaction and courts have objectively evaluated whether the transaction could be explained by 'ordinary motives' or whether its improvidence indicates that it could only be explained by some kind of undue influence perpetrated by the defendant. The first requirement, a relationship of trust and confidence, focuses on the close relationship between the parties. The explicability test filters the contested transaction in order to make sense of the elder's actions, to differentiate small or insignificant transactions from large ones and to afford the elder the opportunity to provide further evidence for relational undue influence. Therefore, the court has an opportunity to evaluate

¹⁶⁸ *Hughes v MacPherson* (Unreported, Court of Appeal (Civil Division) Sir Richard Scott VC, Thorpe, Judge LJJ, 17 March 1999); *Investors Compensation Scheme Limited v West Bromwich Building Society* [1999] Lloyd's Rep PN 496.

¹⁶⁹ It has been pointed out that it is an objective test which is applied: see G Virgo, above n 8, 261.

¹⁷⁰ For example, *Re Morris (deceased), Special Trustees for Great Ormond Street Hospital for Children v Rushin* (Unreported, Chancery Division, Rimer J, 19 April 2000); *Farquhar v Boyd* (Unreported, Chancery Division, Campbell J, 14 March 1997); *Hughes v MacPherson* (Unreported, Court of Appeal (Civil Division) Sir Richard Scott VC, Thorpe, Judge LJJ, 17 March 1999).

¹⁷¹ *In re Craig Deceased* [1971] 1 Ch 95.

¹⁷² Cf *Re Coomber; Coomber v Coomber* [1911] 1 Ch 174; [1911] 1 Ch 723 and *Casimir v Alexander* [2001] WTLR 939, where the reward of adult child's dutiful service explained the elder's gift.

¹⁷³ *Cheese v Thomas* [1994] 1 All ER 35; *Langton v Langton* [1995] 2 FLR 890; *Love v Love* (Unreported, Court of Appeal (Civil Division) Brooke and Chadwick LLJ, 11 March 1999).

objectively whether the transaction is so improvident that it could only be the result of undue influence. This test has enhanced the effectiveness of presumed undue influence by ensuring that even if a court decides to define broadly relationships of trust and confidence, the court must evaluate the transaction on the basis of whether it is only explicable by undue influence. When attempting to rebut relational undue influence, a defendant has to address not only whether there is a relationship of trust and confidence, but also whether the transaction is only explicable by undue influence.

In contrast, in Australia the manifest disadvantage test has been generally interpreted as an unnecessary restriction on the scope of presumed undue influence. The irony is that the abandonment of a manifest disadvantage or explicability test in some Australian cases, may have the opposite effect from what was intended. Far from expanding the reach of relational undue influence, the absence of the requirement may have narrowed it. If the entire or major focus of the doctrine has become the plaintiff's impaired consent within a relationship of trust and confidence, then there are two consequences. First, it will only be incumbent upon the plaintiff to provide evidence of dependency. The possible improvidence of the transaction will not be thoroughly presented to the court (or investigated by the court)¹⁷⁴ and the apparent independence of the elder will overshadow the possible improvidence of the transaction.¹⁷⁵ Therefore, in relation to 'independent' elders, courts have appeared willing to assume that an elder had acquired a benefit from the transaction although a substantial asset had been transferred; and the elder had entered into care arrangements in which he or she had not secured tenure or there was no agreement as to how to deal with disputes.¹⁷⁶ Equally, unlike their United Kingdom counterparts, elders who live independently and who are self reliant have been unable to rely upon evidence of transactional dependence despite the improvidence of the transaction.¹⁷⁷

Secondly, if an elder proves a dependency relationship and the evidential burden shifts to the defendant, a critical issue will be what kind of evidence the defendant

¹⁷⁴ For example, *Mollross v Post* (Unreported, Supreme Court of Tasmania, Zeeman J, 23 December 1992).

¹⁷⁵ For example, *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported judgment, Cummins J, 23 April 2001); *Wilby v St George Bank* (2001) 80 SASR 404; *Sinclair v Galluzzo* (Unreported, Supreme Court of NSW, Spender AJ, 9 November 1994).

¹⁷⁶ For example, *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001); *Mollross v Post*, (Unreported, Supreme Court of Tasmania, Zeeman J, 23 December 1992).

¹⁷⁷ For example, *Sinclair v Galluzzo* (Unreported, Supreme Court of NSW, Spender AJ, 9 November 1994). A helpful decision from New Zealand is *ASB Bank Ltd v Harlick* [1996] 1 NZLR 655.

has to produce in order to rebut the presumption. Is it sufficient for the defendant to deal with the relationship of trust and confidence and the plaintiff's impaired consent? Or, is the defendant required to present evidence on the explicability of the transaction or its improvidence? If the former is the case, then arguably, the nature of the transaction will fall from the picture or become of secondary importance only. If it is the latter, then the defendant will be required to address an issue which may not have been considered in order to raise the presumption in the first place. Yet, the reason why the plaintiff commenced the action against the defendant was because he or she believed that the transaction was improvident and inconsistent with 'ordinary motives.' Therefore, the plaintiff ought to be required to address manifest disadvantage not only to clarify the improvidence of the transaction, but also to enable him or her to present the evidence for relational influence as strongly as possible.

It is submitted that it has been assumed that manifest disadvantage is an unnecessary burden which, if an applicable criterion, is concomitant with financial loss rather than, for example, a broad notion of explicability. Yet the application of manifest disadvantage need not discriminate against transactions where adequacy of consideration or financial loss is not the issue. The fact that the transaction was made in the first place may indicate that undue influence has been exercised. For example, in the English decision *Meredith v Lackschewitz-Martin*,¹⁷⁸ an elderly woman with a mild cognitive impairment transferred property to her son in a series of transactions, to the exclusion of her daughter for whom she had equal affection. Several years previously, the mother had adamantly disagreed to make one of the transfers to the son, because of her affection for the daughter. It was this factor (rather than simply the fact that transfers without consideration had been made) that led the court to set the transactions aside.¹⁷⁹ Conversely, elders have made substantial gifts to children which the courts have held were not manifestly disadvantageous because they were explicable by the child's dutiful devotion to the parents.¹⁸⁰ In the light of these kinds of situations, it is not surprising that some Australian courts have retained some kind of manifest disadvantage test, preserving the integrity the doctrine.¹⁸¹

¹⁷⁸ [2002] EWHC 1462 (Ch).

¹⁷⁹ *Ibid*, [35].

¹⁸⁰ For example *In re Coomber*; *Coomber v Coomber* [1911] 1 Ch 174; [1911] 1 Ch 723; *Casimir v Alexander* [2001] WTLR 939.

¹⁸¹ For example, see New South Wales *Quek v Beggs* (1990) 5 BPR 11-761, which did not deal with a transaction involving an elder.

IV ELDERS ACTING AS GUARANTORS

In both jurisdictions, elders have acted as guarantors principally for the liabilities of adult children.¹⁸² However, there are considerable differences in the treatment and protection of elders where undue influence is pleaded.

At present, the position in Australia remains in a rudimentary state. Elders must rely on the general law of undue influence *inter vivos*. In order to set aside a guarantee or a security in favour of a financial institution, an elder must first establish actual undue influence by the debtor or a presumption of undue influence. As indicated above, this is not easy because there may not be sufficient evidence of actual influence or excessive dependency.¹⁸³ Then the elder must fix the financial institution with liability for the debtor's actions. Broadly speaking, there are two bases upon which an elder may rely. First, an elder may argue that the financial institution entrusted the debtor with the documentation and relied on the debtor to procure its execution. Therefore, the debtor became the agent of the institution.¹⁸⁴ The problem with this approach is that it can be difficult to draw the line between cases where there has been a delegation of authority and situations where the debtor has simply taken the initiative to deliver the documents and have them signed.¹⁸⁵ Secondly, the elder may argue that the financial institution had actual or constructive notice of the actual or presumed undue influence, entitling the elder to have the transaction set aside. The problem with this approach is that it will be difficult to gauge what constitutes 'constructive notice,' other than perhaps that the

¹⁸² In relation to Australia, see *Sinclair v Galluzzo* (Unreported, Supreme Court of NSW, Spender AJ, 9 November 1994); *Jacobs v Shugg* (Unreported, Supreme Court of Victoria, O'Bryan J, 24 May 1996); *IOOF Australia Trustees Ltd v Oxenham* [1997] SADC 3740 (Unreported, Allan J, 19 December 1997); *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1; *Wilby v St George Bank* (2001) 80 SASR 404; *Couper Holdings Pty Ltd (In liq) v Bell* [1999] WASC 232 (Unreported, Owen J, 24 November 1999). For the United Kingdom: *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *Coldunell Ltd v Gallon* [1986] 1 QB 1184; *Greene King plc v Stanley* [2001] EWCA Civ 1966; *Wright v Cherrytree Finance Ltd* [2001] 2 All ER (Comm) 877; *Portman Building Society v Dusangh* [2000] 2 All ER 221; *State Bank of India v Soni* (Unreported judgment, Court of Appeal (Civil Division) Sir Stephen Brown P, Hobhouse, Ward LJ, 17 February 1997).

¹⁸³ For example, *Sinclair v Galluzzo* (Unreported, Supreme Court of NSW, Spender AJ, 9 November 1994); *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1; *Wilby v St George Bank* (2001) 80 SASR 404.

¹⁸⁴ Note generally *Challenge Bank Ltd v Pandya* (1993) 60 SASR 330.

¹⁸⁵ See the comments in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 193–184 (Lord Wilberforce); and note *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 133–4 (Debelle and Wicks JJ); *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001) [19].

financial institution has sufficient information about the relationship of the elder and the debtor to put it on inquiry about the actions of the debtor.¹⁸⁶ The existence of a parent-child relationship will not in itself be sufficient to place the financial institution on inquiry.¹⁸⁷

In *Burke v State Bank of New South Wales* ('*Burke*'),¹⁸⁸ Santow J appeared to co-join agency and notice to set aside additional liabilities of the debtor's elderly parents, although he did not discuss actual or presumed undue influence. In this case, the parents had mortgaged their home as security for their son's liabilities. Later, they signed further documents which they believed constituted a rollover of the loan, but which augmented their legal responsibilities to the creditor because there had been an increase in the loan accommodation to the son. They were unaware that the son was on the verge of bankruptcy. The son took the documents to his parents' home, presented and held them in a way that they could not read them and asked them to sign. The elders accepted that they were liable for the original loan and interest on the original loan, but contended that they were not liable for the additional amounts because the bank was aware or ought to have been aware of a relationship of trust and confidence. The elders had not obtained independent advice. Santow J held that the normal relationship of parent and child would not be sufficient to require the bank to act automatically on the basis that undue influence could be exercised.¹⁸⁹ However, His Honour applied the general principle concerning the execution of documents and the doctrine of notice, stating that

where a guarantee is procured by a son (or child) from a parent which *ex facie* is not for the benefit of the parent and where in addition the creditor would be aware that the parent reposed trust and confidence in the child, then there will be the same 'substantial risk' that it may be obtained from wrongdoing. While the emotional ties of parent to child reinforce this risk, that is not sufficient to give rise to such constructive notice by itself, without those other elements. I am satisfied that all of those elements were present here.¹⁹⁰

Santow J held that the later transaction could be set aside.

Despite the favourable outcome, *Burke* shows the limitations of the approach to elders and guarantees in Australia. The fact that the transaction involves an elder,

¹⁸⁶ Consider *Bank of New South Wales v Rogers* (1941) 65 CLR 42.

¹⁸⁷ *Burke v State Bank of New South Wales* (1994) 37 NSWLR 53, 77; *Tessman v Costello* [1987] 1 Qd R 283, 293; *Ryan v Tooth* (Unreported, Supreme Court of NSW, Bryson J, 24 September 1993) [45].

¹⁸⁸ (1994) 37 NSWLR 53.

¹⁸⁹ *Ibid* 77.

¹⁹⁰ *Ibid*.

or more particularly an elderly parent, does not of itself impose further obligations on the financial institution or subject the transaction to special scrutiny. Accordingly, there must be some additional circumstances requiring action by the institution. This may be contrasted with the protection afforded to wives. While the spousal relationship is not protected under the automatic presumption of presumed undue influence, a wife may rely on the presumption of an invalidating tendency when she guarantees her husband's liabilities without receipt of consideration.¹⁹¹ However, it appears that an elder is unable to rely on the presumption of an invalidating tendency when, for example, the elder guarantees the liabilities of an adult child. In the well-publicised High Court decision in *Garcia v National Australia Bank Ltd* ('*Garcia*'),¹⁹² the court held that even if there were no evidence of actual undue influence, a financial institution is taken to understand that a wife reposes trust and confidence in her husband.¹⁹³ Therefore, a wife would be able to have a guarantee or security set aside if the creditor had not taken appropriate steps to inform the wife about the transaction or ascertain that it had been fully explained to her.¹⁹⁴ While a majority of the court anticipated that the invalidating tendency¹⁹⁵ could be applied to de facto and same-sex relationships, the position of elders and particularly elderly parents was not considered. Accordingly, the protection offered to spouses and de factos in *Garcia* appears unavailable to them. In lower courts, it has been suggested that elders, like wives, ought to be entitled to the protection of independent advice¹⁹⁶ or that elderly and poorly educated parents ought to be protected against better educated children¹⁹⁷ or that the *Garcia* approach ought to apply to older parents.¹⁹⁸ However, these views remain to be tested.

Up to the early 1990s, the attitude of the courts in the United Kingdom was similar to the Australian approach. Elders were able to have a guarantee or security set aside on the basis of undue influence, if the elder could show actual undue influence or a presumption of undue influence and that the debtor, usually the adult child, had acted on behalf of the financial institution.¹⁹⁹

¹⁹¹ *Yerkey v Jones* (1939) 63 CLR 649, 671–86 (Dixon J).

¹⁹² (1998) 194 CLR 395.

¹⁹³ *Ibid* 408–9 (Gaudron, McHugh, Gummow and Hayne JJ), 440–43 (Callinan J).

¹⁹⁴ *Ibid* (Gaudron, McHugh, Gummow and Hayne JJ).

¹⁹⁵ The invalidating tendency was adopted in preference to the doctrine of notice in United Kingdom cases: *ibid*, 403–11; cf Kirby J who rejected the invalidating tendency and adopted a modified *O'Brien* approach: 421–34.

¹⁹⁶ *Salerno and Salerno v Saunders* (1993) 173 LSJS 362, 365–6 (Judge Burley).

¹⁹⁷ *Alderton v The Prudential Assurance Co Ltd* (1993) 41 FCR 435, 448 (Heerey J).

¹⁹⁸ *State Bank of New South Wales v Layoun* (2001) NSW ConvR ¶55-984.

¹⁹⁹ *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; cf *Coldunell Ltd v Gallon* [1986] 1 QB 1184.

The decision in *Barclays Bank Ltd v O'Brien* ('*O'Brien*')²⁰⁰ introduced the doctrine of notice to guarantee cases and began an integrated approach towards undue influence, guarantees and personal relationships which is absent in the Australian context. In this case, a wife successfully sought to have her guarantee of her husband's business liabilities set aside. The House of Lords held, inter alia, that a bank or financial institution would be put 'on inquiry' and would have constructive notice of wrongdoing when the guarantee was not in the wife's interest and there was a substantial risk that the husband had committed a legal or equitable wrong (such as undue influence or misrepresentation). If the financial institution was put 'on inquiry', it was required to warn the guarantor about the transaction and the financial risks and advise her to take independent advice. However, the decision was not confined to spousal relationships. The court confirmed that it also applied to parent and adult child relationships.²⁰¹ Accordingly, since that decision, there have been several cases involving elders where *O'Brien* was applied.²⁰²

In *Etridge*,²⁰³ the House of Lords clarified the law by setting out the steps which a financial institution must take to avoid constructive notice of undue influence. The case has had an impact upon the way elders are treated, although the immediate facts concerned spousal guarantees. The court endorsed a two-tier system dependent upon whether the financial institution was actually aware of facts suggesting undue influence. When the financier is not aware of any impropriety, it is put 'on inquiry' because the wife's consent may have been procured by undue influence. The financier is required to undertake certain tasks, including: to communicate directly with the wife about the transaction, disclose financial information about the transaction to the wife's solicitor and obtain from the wife's solicitor a written confirmation that the transaction and its implications were explained to her.²⁰⁴ If these steps are followed, then in the event that there is actual or presumed undue influence, the financial institution would not be fixed with constructive notice of undue influence. However, where the financier has evidence suggesting undue influence or impropriety, it must inform the wife's solicitor of the facts²⁰⁵ and take steps to counterbalance the undue influence,²⁰⁶ although it is unclear precisely what these would be. Importantly, this scheme for dealing with spousal guarantees is applicable in a wide variety of situations, 'in every case where

²⁰⁰ [1994] 1 AC 180.

²⁰¹ Ibid 198.

²⁰² *Wright v Cherrytree Finance Ltd* [2001] 2 All ER 877; *Portman Building Society v Dusangh* [2000] 2 All ER 221; *National Westminster Bank plc v Amin* (Unreported, Court of Appeal (Civil Division), Mummery and Clarke LJ, 9 December 1998).

²⁰³ [2002] 2 AC 773.

²⁰⁴ Ibid 803–6 (Lord Nicholls).

²⁰⁵ Ibid 800, 811–12 (Lord Nicholls).

²⁰⁶ Ibid 843 (Lord Scott).

the relationship between the surety and the debtor is non-commercial'.²⁰⁷ Therefore the *O'Brien* doctrine, refined by *Etridge*, applies to elders, particularly in the context of their relations with family members. Lord Nicholls pointed out that

[t]he older generations of a family may exercise undue influence over a younger member, as in parent-child cases...Sometimes it is the other way round, as with a nephew and an elderly aunt...²⁰⁸

While the criteria prescribed by the House of Lords will be further interpreted and clarified by the courts,²⁰⁹ it is clear that as far as elders are concerned, there exists a protective scheme in place where elders are asked by relatives, particularly children, to act as guarantor. In the absence of evidence of undue influence, it is still incumbent upon the financial institution to ensure that before the elder enters into a guarantee or provides security, the elder is provided with professional advice and understands the nature and effect of the transaction. In this regard, the law in the United Kingdom offers elders entering into guarantees a higher and more immediate form of protection than Australian law because it is incumbent on financiers to insist on an appropriate level of advice before the documents are executed.

V COMMENT AND CONCLUSION

The doctrine of undue influence *inter vivos* was the product of the nineteenth century. During that period, old age did not confer any special legal status upon the elderly because age did not prevent an elderly person from negotiating, executing or complying with the terms of a contract or gift. Therefore, the elderly were not accorded any special protections or treatment under the doctrine of undue influence. In any event, elders did not comprise a large proportion of the population, so that their predicaments and crises were not as evident as a social problem. However, our understanding of the problems of the elderly has dramatically changed in recent years because, demographically, the aged have become an identifiable and enlarged group within society, so their special needs and vulnerabilities have become more evident and have been the subject of scientific investigation. As the population continues to age, it is likely that there will be increasing demands for the law to take into account the age and special circumstances of the elderly. Legislatures and

²⁰⁷ Ibid 814 (Lord Nicholls).

²⁰⁸ Ibid. For a similar observation, see *State Bank of India v Soni* (Unreported, Court of Appeal (Civil Division), Sir Stephen Brown P, Hobhouse, Ward LJJ, 17 February 1997), 6.

²⁰⁹ For example, what constitutes a non-commercial relationship? See Georgina Andrews, 'Reducing the Solicitor's Burden?' (2001) 5 *Mountbatten Journal of Legal Studies* 78.

courts may have to determine whether and to what extent old age confers a special legal status upon an elder when he or she seeks to set aside a transaction on the basis of undue influence.

In the United Kingdom, an elder may be able to utilise the doctrine of undue influence successfully for two inter-related reasons. First, undue influence inter vivos is firmly entrenched in that jurisdiction. The criteria for both actual undue influence and presumed undue influence have been well-established; and the recent decision in *Etridge* has clarified both the significance and the meaning of 'manifest disadvantage' or 'explicability' for presumed undue influence, even though it has been suggested that the threshold is too high.²¹⁰ Secondly, the law of undue influence inter vivos in the United Kingdom is in a healthy transition from the limited nineteenth century attitude towards a realistic assessment and appreciation of the needs of elders. It is true that the relationship of elderly parents and adult children remains outside the automatic presumptive relationship. Instead, elders must prove a relationship of trust and confidence. However, courts have made it clear that elders do not have to be entirely or excessively dependent in order to raise a presumption of undue influence. Moreover, the courts have been wary of transactions which strip elders of their sole major asset or a significant proportion of their assets. Generally such transactions will be persuasive evidence that undue influence was exercised and are only explicable by reference to the undue influence. Yet, the most potent examples of the shift in attitude are the House of Lords decisions in *O'Brien* and *Etridge* where the doctrine of notice in guarantee cases was extended beyond spousal, de facto or same-sex relationships. The court has made it indisputably clear that when elderly parents act as guarantors for their adult children, financial institutions are placed 'on inquiry'. In addition, situations where elders act as guarantors for other family members, friends or caregivers will also place financial institutions 'on inquiry'.

However, the one major defect of the judicial approach to elders and undue influence is the lack of a comprehensive method. The message is unmistakable when dealing with an elder who will not obtain any benefit from a guarantee. The financial institution must vigilantly implement the scheme outlined in *Etridge* and ensure that the elder understands the nature of the transaction and the risks to which he or she is exposed. However, where an elder does not act as a guarantor, the elder must prove actual undue influence or presumed undue influence before the issue of independent advice becomes important. Therefore, recipients of assets or parties with whom the elder deals are not obliged to arrange advice or even suggest that the elder seeks professional and independent advice. Nevertheless, the financial and personal effect upon elders providing substantial gifts can be equally deleterious. It is submitted that it may be necessary for the House of Lords or the legislature to

²¹⁰ R Bigwood, above n 117, 435.

consider the broader questions of: whether professional and independent advice ought to be a mandatory requirement in all transactions involving substantial assets belonging to elders; and what procedural and substantive form such advice would take.

There are different problems associated with undue influence in Australia. In this jurisdiction, undue influence *inter vivos* is a less stable doctrine. First, while overall the principles for actual undue influence have been settled, there is considerable uncertainty associated with presumed undue influence. There have been conflicting views about whether manifest disadvantage is or is not a fundamental criterion. Therefore, some courts have not considered manifest disadvantage at all. Where courts or commentators have considered manifest disadvantage as a criterion, the interpretation has become entangled with questions of monetary loss to the plaintiff, rather than whether the transaction was, for example, only explicable by undue influence.

Secondly, in the light of the doctrinal problems, it is not surprising that in cases involving elders, undue influence *inter vivos* has not evolved in the same way as in the United Kingdom. As in the United Kingdom, elders must prove actual undue influence or a relationship of trust and confidence. However, courts have required the elder demonstrate excessive dependence within a relationship (rather than a transaction) of trust and confidence. A consistent and rigorous manifest disadvantage or explicability test has not been applied. Therefore, courts have appeared more willing to assume that an elder has acquired a benefit from the transaction even when he or she transferred a substantial asset or entered into care arrangements under which he or she had not secured tenure and there was no satisfactory dispute resolution provision.

Overall, courts have also been reluctant to take the initiative and impose proactive and protective obligations upon financial institutions where elders act as guarantors and the transaction may be procured by undue influence. Instead an elder must fix the financial institution with liability for the debtor's actions by showing that the institution appointed the debtor as its agent or that the institution had actual or constructive notice of the undue influence. Whether the elder understands the effect of the transaction is unimportant unless the existence of independent professional advice can be used to rebut actual or presumed undue influence.

Therefore, undue influence *inter vivos* generally and its application to elders specifically, is at an important crossroads in Australia. Courts will have to decide whether doctrinal problems, particularly those associated with manifest disadvantage, ought to be resolved in order to re-invigorate the doctrine. Moreover, courts need to consider whether the circumstances of the elderly ought to be more carefully integrated into the overall application of the doctrine; and whether courts

should require that elders are provided with independent professional advice before they make a substantial gift or sign a guarantee.

It could be argued that the limitation of undue influence generally in Australia (and the application of the doctrine specifically to elders) will be offset by the existence of other doctrines, such as unconscionable dealing.²¹¹ Although this article has been concerned with a comparison of undue influence in Australia and the United Kingdom, a couple of observations may be made. As discussed above,²¹² the High Court has emphasised the continued importance of undue influence as a distinct and separate doctrine; and that its function is different from unconscionable dealing. Undue influence is primarily concerned with the quality of consent of the weaker party whose will is overborne, while unconscionable dealing is principally concerned with the active and wrongful conduct of the stronger party. In undue influence cases the vulnerability of the plaintiff is caused by a misplaced reliance upon the defendant within a relational context — a relationship of trust and confidence. In contrast, unconscionable dealing has been centred on the disabling condition of the plaintiff, of which the defendant was aware and took advantage, rather than some special relationship between the parties. Therefore, it is strongly arguable that there will be cases where a defendant has not wrongfully taken advantage of the plaintiff's disability and the plaintiff will not be able to rely on unconscionable dealing. However the plaintiff may be able to argue that at the time of the transaction, the plaintiff's capacity for independent decision-making was impaired.²¹³ Further, presumed undue influence, in particular, redresses the active or passive abuse of pre-existing relationships of trust and confidence. As the discussion above indicates, there are many situations where an elder has transferred assets to or entered into a guarantee for an adult child or relative. The adult child or relative has been able to obtain a benefit from the abuse of a pre-existing relationship between the parties rather than the simple exploitation of a disability such as old age. Therefore, the doctrine of undue influence *inter vivos* may be better suited to deal with such situations than unconscionable dealing. Finally, it should not be assumed that unconscionable dealing is a panacea for elders alleging wrongdoing. Courts have applied the criteria for unconscionable dealing rigorously

²¹¹ Note Part III (A).

²¹² Part III (A).

²¹³ For example in *Stivactas v Michaletos [No 2]* [1993] Aust Contract Reports ¶90-031 a mentally impaired elder transferred property to her nephew. The nephew arranged to have her legally advised, but the court held that the advice had been inadequate. In this case, the court held that presumed undue influence arose in favour of the elder because of her dependence upon the nephew for the management of her affairs. However quite correctly, unconscionable dealing was not pleaded by the plaintiff or raised by the court, because there was no suggestion on the facts that the nephew had taken advantage of the elder's disabilities.

and some elders have been unable satisfy the criteria.²¹⁴ Therefore, before further neglecting the potential of undue influence *inter vivos*, it is timely for Australian courts and commentators to reflect on the development of undue influence in elder cases in the United Kingdom.

²¹⁴ There are several cases which indicate that old age will not be sufficient evidence of special disadvantage and that knowledge that a person was elderly may not be sufficient to set aside a contract or gift as unconscionable: *Commonwealth Bank of Australia v McGlynn* (1995) ANZ ConvR 81; *Yunan v Beneficial Finance Corporation Ltd* (1995) ANZ ConvR 213; *Tarzia v National Australia Bank* (1996) ANZ ConvR 380; *Bruinsma v Menczer* (Unreported, Supreme Court of NSW, Santow J, 16 November 1995); *Bayne v Karaliamis* (2001) ANZ ConvR 181.

