THROWING THE BABY OUT WITH THE BATHWATER? FOUR QUESTIONS ON THE DEMISE OF LAWFUL-ACT DURESS IN NEW SOUTH WALES

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I INTRODUCTION

Contracts that result from the application of improper pressure by one contracting party (D) to the other contracting party (P) are, subject to possible defences available to D, revocable at the election of P. One device that regulates such victimization — at least when it takes the form of coercion through 'threat-and-demand' tactics — is the doctrine of duress. As it developed at common law, though eventually under the significant influence of equity as well,[1] the duress doctrine came to recognize two forms of improper coercion, which I shall for convenience label 'regular duress' and 'lawful-act duress'. Regular duress concerns the situation where D, in support of a specific demand, proposes to violate P's existing legal entitlements (whether sourced in criminal law, tort law, contract law, or elsewhere) that comprise the normative backdrop of P and D's pre-transactional relationship or encounter. Hence, in exercising regular duress, D threatens a consequence that would be unlawful per se, that is, if the threat were to be implemented. Lawful-act duress, in contrast, likewise takes the form of 'threat and demand', but what D conditionally proposes to do in support of his specific demand is to exercise his own *lawful* rights, liberties, or powers in a manner unwelcome to P or to P's disadvantage, typically in a way calculated to 'exploit' P's peculiar vulnerability to being pressed in the circumstances.

Lawful-act duress claims present difficult, though not insurmountable, scenarios for the traditional duress doctrine to accommodate. Now, however, there is reason to question whether that doctrine should purport to house them at all. For in *Australia & New Zealand Banking Group v Karam*,[2] the New South Wales Court of

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* Faculty of Law, The University of Auckland. This article is a revised version of a paper delivered at TC Beirne School of Law, University of Queensland, on 13 July 2007. I am grateful to the School for hosting the talk, and to the attendees who came and offered me questions and comments on the day. Kindly, Pauline Ridge also remarked on a draft. The usual caveats apply. In preparing this article I have drawn, at points liberally, on other writings of mine in the field. See especially Rick Bigwood, 'Coercion in Contract: The Theoretical Constructs of Duress' (1996) 46 *University of Toronto Law Journal* 201; Rick Bigwood, *Exploitative Contracts* (2003) ch 7.

1 As a consequence of the strictness of the common law position, equity developed a set of rules for controlling more subtle and insidious forms of coercive pressure. See generally: W H D Winder, 'Undue Influence and Pressure' (1939) 3 *Modern Law Review* 97 and 'The Equitable Doctrine of Pressure' (1966) 82 *Law Quarterly Review* 165.

2 (2005) 64 NSWLR 149 ('*Karam*'). The *Karam* approach was followed and applied in *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2007] NSWSC 12, [199]. However, in *Mitchell v Pacific Dawn Pty Ltd* [2006] QSC 198, [20]–[22], Chesterman J gave *Karam* a more restrictive reading, but nevertheless agreed that the term 'illegitimate pressure' should be abandoned. On appeal, the Queensland Court of Appeal in *Mitchell* reminded us that '[d]uress and unconscionable conduct are distinct doctrines with different bases and incidents: they are not different ways of describing the same doctrine. The expression "illegitimate pressure" is not a synonym for "unconscionable conduct"': *Mitchell v Pacific Dawn Pty Ltd* [2007] QCA 74, [7].

Appeal [3] recommended abandonment of the terms 'economic duress' and 'illegitimate pressure' in connection with lawful-act duress claims, in favour of the adoption of 'equitable principles relating to unconscionability'.[4] The Court saw this as an approach that:

> … will allow the weaker party to invoke principles of undue influence, or rights to relief based on unconscionable conduct in circumstances where the weaker party suffers from a 'special disadvantage', in the sense identified in *Commercial Bank of Australia Ltd v Amadio*.[5]

In confining the duress concept to conduct or threatened conduct that is 'unlawful' per se, and reassigning lawful-act coercion claims to other, distinctly equitable, categories (or statute where applicable), the Court thought that it was avoiding a problem of vagueness inherent in the existing jurisprudence on duress,[6] as well implementing a so-called 'principled approach'.[7] In the Court's own words:

> The vagueness inherent in the terms 'economic duress' and 'illegitimate pressure' can be avoided by treating the concept of 'duress' as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, but can be to the legitimate and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in *Commercial Bank of Australia Ltd v Amadio*.[8]

So, while the Court confirmed in *Karam* the common law's recognition of a concept of 'economic duress' as a category falling under the general duress doctrine, it also opined that that concept, as with all other forms of duress, is (or ought to be) restricted to conduct that is unlawful per se: duress does not extend to conduct that is merely 'illegitimate' or 'unconscionable' without being unlawful. Relief for conduct that involves the application of pressure, but which does not involve actual or threatened illegality, must thus turn on satisfaction of the criteria of some other exculpatory channel, such as unconscionable dealing or undue influence.

In this article I want to explore the merits, and/or demerits, of the Court's analysis of the modern duress doctrine and consequent recommendation in *Karam*. How plausible, or indeed valuable, is the doctrinal reassignment surgery performed on lawful-act duress by the Court in that case?

In that connection the findings in *Karam* provoke three obvious and fundamental questions, to which three questions I shall add a fourth that is not raised directly by the Court's explicit reasons for judgment. First, although the Court

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3 *Karam* (2005) 64 NSWLR 149 (Beazley, Ipp, and Basten JJA).

4 See (2005) 64 NSWLR 149, [57], [62].

5 Ibid [62].

6 The Court notes, ibid [61]: 'Concepts of "illegitimate pressure" and "unconscionable conduct," if they do not refer to equitable principles, lack clear meaning, outside, possibly, concepts of illegitimate pressure in the field of industrial relations.'

7 Ibid [57], [62].

8 Ibid [66].

viewed its recommendation as justifiable most significantly as an exercise in disambiguation, are the concepts of 'economic duress' and 'illegitimate pressure' really so unmanageably vague as to *require* their abandonment and resort to other, mostly equitable, categories? Secondly, if vagueness is indeed a problem, are the aforementioned concepts any more vague than the standards, criteria, and qualifying thresholds of the equitable (or statutory) alternatives preferred by the Court in *Karam*, such as 'special disadvantage' and 'unconscientious advantage-taking' inside the unconscionable dealing complaint, or 'relationship of influence' and 'inexplicable transaction' under, say, a Class 2 (presumptive) undue influence claim? Thirdly, does a 'principled approach' *require* the doctrinal shift that the Court wanted to effectuate in *Karam*? As will become clearer below, by 'principled approach' I mean a *rights-based* approach to contractual duress. In modern law, duress is treated normatively: the *legal* question of whether P acted 'under duress' cannot be extricated from the question of what D's and P's respective background 'rights' were in the circumstances of the encounter that produced the impugned transaction.

To indicate at the outset my responses to these initial three questions, I consider that the Court's judgment in *Karam* essentially begs the first two of them. It is hard to tell for certain, though, because the Court's account of the doctrines to which lawful-act duress is decanted is epigrammatic and in my view not entirely conceptually adequate for the Court's own purposes. The reader is mostly left to assume, almost platitudinously, the superiority of those other claims and how, exactly, their associated doctrines would oversee the resolution of cases involving transaction-inducing pressure applied by lawful means. Worse, the Court's analysis of the duress doctrine is less sophisticated than the voluminous jurisprudence on that subject demonstrates it can bear.[9] Basically, the Court assumes (or merely asserts) a vagueness that either does not exist or, if it does, is no worse, and certainly no less avoidable, than the vagueness inherent in the equitable alternatives to which the prior law is shunted. Obviously, merely passing difficult questions sideways will leave us with nothing demonstrably or significantly better than what went before. As to the third question, the analysis below aims to show that a 'principled' ('rights-based') approach to contractual duress — 'economic' or otherwise — permits *but does not necessitate* the suggested doctrinal move in *Karam*. The two-pronged theory of duress that emerges from Lord Scarman's celebrated speech in *Universe Tankships v International Transport Workers Federation ('The Universe Sentinel')*[10] can, *in principle*, accommodate lawful-act duress claims comfortably within its structure and analysis, and according to what motivates the law's theory of duress. Tellingly, none of the Court's discussion of the duress doctrine in *Karam* is set within, hence ordered and disciplined by, the conceptual framework of legal coercion claims adumbrated in Lord Scarman's speech (and elsewhere).

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9 There are occasional peculiarities in the Court's description of the substantive law of duress that are not necessary for my analysis below, so I shall ignore them. One worth mentioning, perhaps, is the Court's various references (see, eg, (2005) 64 NSWLR 149, [49], [55]) to 'physical duress' (or 'duress to the person') rendering the resultant transaction 'void', but this is clearly inconsistent with the Privy Council's binding advice in *Barton v Armstrong* [1976] AC 104, where it was held that physical duress (ie, threats to the person as opposed to D physically moving P's hand to sign against her will) rendered a contract merely voidable and not void. The consequence of voidability, rather than total nullification, attests to the essential juridical nature of a wrongful coercion (duress) claim, whatever its type.

10 [1983] AC 366, 400 ('*The Universe Sentinel*').

There is, however, a fourth question that emerges from the *Karam* decision, although it relates to nothing expressly said by the Court in support of its recommended innovation in the case. If the answers to the above three questions are, as I believe, all in the negative, might there nevertheless be a reason, not explicitly relied on by the Court, that warrants or justifies surrender of lawful-act duress to other concepts or equitable exculpatory categories? Indeed, if the *Karam* move can be justified at all, it is not for the reasons advanced by the Court in that case. For an argument can be mounted, it seems to me, on conceptual or doctrinal redundancy grounds, for decanting otiose legal categories into other existing doctrines capable of absorbing them and their historic burden. In the present connection that argument would be that an extension of lawful-act duress to conduct that was 'unconscionable' (in the *Amadio* sense) is but an exercise in redundancy, as the equitable doctrine of 'unconscionable dealing' (say) already covers the field; there is, accordingly, no *practical* need for a standalone judicial concept or doctrine of lawful-act duress. This sort of argument is, of course, an application of the basic law of parsimony — or 'Ockham's razor' as it is alternatively known[11] — but there are limits to the extent to which we can economize on our existing doctrinal devices in the name of achieving what is perceived to be better legal order. To compress or rearrange legal doctrines according to what they (appear to) have in common is sometimes to miss important differences between them[12] — a hazard not unappreciated by the Court in *Karam*[13] — although increasingly 'similarities' and 'differences' in this area seem to be becoming as contingent as the beholder's eye itself. Moreover, overlaps in doctrinal application need not concern us if there are advantages to maintaining separate categories despite possible duality or redundancy in practice. The law of parsimony does not demand that we 'throw the baby out with the bathwater'. We can, indeed should, repel the application of Ockham's razor to lawful-act duress if, after analysis, its retention as a discrete jural category might usefully serve to focus and control the adjudication of lawful-pressure claims in practice — a possibility, in my view, that was too hastily renounced by the Court of Appeal in *Karam*.

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[11] According to Ockham's Razor, 'plurality should not be posited without necessity.' For a convenient discussion of the principle, see, eg, M McCord Adams, *William Ockham* (1987) 143–67.

[12] Witness, for example, the havoc wrought by Lord Denning's infamous assimilation of distinct exculpatory categories into an overarching principle/doctrine of 'inequality of bargaining power' in *Lloyd's Bank Ltd v Bundy* [1975] QB 326, 339 — a move eschewed by the Court in *Karam*. The Court of Appeal's conceptual and doctrinal economizing in *Karam* is distinctly limited in the way mentioned, and the Court rightly confirmed that no such overarching principle exists in Australia, neither in general law nor under statute; see (2005) 64 NSWLR 149, [63]–[68], [100].

[13] The Court noted, after all, the warning in *Bridgewater v Leahy* (1998) 194 CLR 457, 477, [73] (Gaudron, Gummow, and Kirby JJ), that despite the overlap in legal doctrines such as 'unconscionable dealing' and 'undue influence', 'there is danger in failing to attend to the "conceptual and practical distinctions between them"': see (2005) 64 NSWLR 149, [46].

II THE FACTS AND LITIGATION IN *KARAM*

A *The Facts*

The Karams (two brothers and their wives) were the directors and shareholders of a family company, Karam Bros Footwear Pty Ltd ('the Company'), which manufactured shoes. From 1980, and over a 14-year period, the ANZ Bank ('the Bank') provided the Company with financial accommodation by way of an overdraft account and commercial bills. The Bank took various securities to secure the Company's indebtedness, beginning in 1980 with a guarantee signed by each of the Karams (described at trial as an 'unlimited guarantee'). The guarantee was supported by a mortgage over industrial land at Regents Park (where the shoe factory was located), which land was owned by the Karams individually and not the Company, and a notional deposit of mortgages registered over the Karams' dwellings, being mortgages originally provided to secure home loans.

As the Company's business grew, the Karams looked to expand and, in mid 1989, purchased industrial land at Ingleburn, on which a new and larger factory was constructed. Finance for the purchase of the Ingleburn property and construction of the new factory came from the Bank, meaning that the Company was now heavily committed in terms of its financial liabilities. At the same time, a downturn in the general economy saw the Company begin to experience financial difficulties and it was struggling to pay its creditors. In May 1992, the Bank wrote to the Karams noting that the Company was 'now under financial stress and will require a sizeable increase in Bank lending to fund it over the next three months or so'. The letter warned the Karams that unless they gave the Bank a registered mortgage debenture over the assets of the Company, and written confirmation that the sale of the unutilized Ingleburn land and the Regents Park property would be pursued, the Bank would request full clearance of the Company's debts.

Still, little changed in the parties' respective positions[14] until June 1993, when the Bank agreed to provide further financial assistance to the Company to cover purchases needed for the Company's busiest annual production period. Such assistance was to come at the price of the Karams executing various security documents. The first, signed in June 1993, was headed 'Acknowledgement' and was addressed to the Bank. In that document the Karams acknowledged that they had received independent legal and financial advice in relation to the document itself, as well as acknowledging that the guarantee, house mortgages, and other documents referred to in the Schedule to the document — essentially the unlimited guarantee, Regents Park mortgage, and other mortgages over the Karams' dwellings referred to above — had been given by the Karams to the Bank to secure to the Bank, and had always been intended to secure to the Bank, 'payment of all present, future, actual and contingent liabilities of the Company to the Bank'.[15] The second document, signed in October 1993, was a cross-deed of covenant, the simple effect of which was to oblige each of the Karams as signatories to pay to the Bank all sums of money that should from time to time be owing and unpaid by each of the other signatories, the obligation of each being several, separate, and independent of the others. It was accompanied by certificates of independent legal and financial advice, deeds of defeasance over the life policies of the Karam brothers, and letters acknowledging to the Bank that the house mortgages and the Regents Park property

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14 Certainly, there had been no property sales and no reduction in the company's level of borrowings.

15 (2005) 64 NSWLR 149, [37].

were appropriated to secure the cross-deed of covenant for the accounts of the Company and the other covenantors.[16]

The Company's finances continued to deteriorate. The Karams sold their house properties and applied the proceeds to reduce the Company's indebtedness to the Bank. In October 1995, the Bank refused to advance further funds and shortly thereafter terminated the existing facilities. The following month the Bank appointed a receiver and manager to the Company. The Company's assets were eventually sold, realizing insufficient proceeds to clear the Company's indebtedness to the Bank.

In April 1997, the Karams and the Company commenced proceedings against the Bank. They sought, inter alia, relief in relation to the securities on the ground that they were unjust for the purposes of the *Contracts Review Act* 1980 (NSW), or unconscionable under the general law.[17]

B *The Trial Court*

The trial judge, the late Justice Kim Santow of the New South Wales Supreme Court, set aside the key securities and issued a judgment in favour of the Karams with respect to so much of the proceeds of sale of their respective homes as were appropriated to reduce the Company's indebtedness to the Bank. His Honour made a number of key findings in the Karams' favour, including:[18]

- that the mortgage over the Inglewood property was valid, hence the proceeds of sale of that property were available in satisfaction of the Company's indebtedness to the Bank;
- that the mortgages over the Karams' house properties did not secure any part of the business debt of the Company, and so the proceeds of sale of those properties were not available to the Bank in diminution of the corporate debt;
- that the 1980 'unlimited guarantee', which the Bank relied on as rendering the Karams personally liable for the future indebtedness of the Company, and the Regents Park mortgage were tainted by unconscionable conduct on the part of the Bank, such that the former was limited to apply only to the 'non-Ingleburn related indebtedness of the Company', and the latter limited to cover part only of the corporate debt;[19] and
- that the 1993 acknowledgement and cross-deed of covenant were procured by the Bank 'unconscionably and by the exercise of economic duress', such that both were declared void and ordered to be set aside.[20]

In relation to the last finding, Santow J's reasons were that the acknowledgement was obtained in circumstances where the Company was under 'extreme financial pressure', and that although the Karams had received legal advice in relation to the signing of the acknowledgement, that advice was deficient because,

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16 Ibid [101].

17 The Bank cross-claimed against the Karams but was unsuccessful. It did, however, obtain judgment for the remaining debt as against the company.

18 See (2005) 64 NSWLR 149, [25]–[35].

19 Santow J varied the guarantee and Regents Park mortgage under the *Contracts Review Act* 1980 (NSW) to reflect these findings (ibid [28]–[31]).

20 Ibid [33].

owing to the unconscionable conduct of the Bank, the solicitor had not had timely access to the documents identified in the schedule, that is, before giving the advice.[21] Specifically in relation to the 'pressure' under which the Karams were found to have operated or to which they had been 'subjected', his Honour concluded that:

> … that pressure was illegitimate. I find that the circumstances of the Bank's unconscionable conduct made it illegitimate. It derived from the Bank's exploiting the financial vulnerability of the Company and the Karams in their desperate financial circumstances. Those financial circumstances, though not the Bank's doing, provided the opportunity to bring that pressure to bear to sign the acknowledgments, by the threat to cut off funding thereby collapsing the business, forcing a sell-off of the Bank's securities, preferably through the Karams selling but otherwise the Bank implicitly threatening to do so. That was the illegitimacy of the pressure on the Karams to sign the documentation and which amounted to economic duress.[22]

Santow J further held that the 'illegitimate pressure' that caused the June 1993 acknowledgment (and possibly earlier documentation) to be 'unconscionably obtained' infected the October 1993 cross-deed of covenant as well:

> This time, further pressure was being exerted to sign yet further intended reinforcement of the Bank's security position. This was recognized for what it was by [the Karams' solicitor]: duress. For in the circumstances, though the financial pressure on the Karams to meet their Bank debt was not just of the Bank's making it was accentuated by the security advantage the Bank had unconscionably obtained and by the illegitimate pressure the Bank brought to bear as attended execution of the acknowledgments earlier. The Bank was in October 1993 again seeking to retain, and indeed extend, an advantage earlier unconscionably procured by illegitimate pressure. Once such a process of illegitimate pressure commences, its effect is reinforced by any advantage obtained as a result. If thereafter further advantage by way of additional security is sought and obtained, that advantage will be seen more readily as the product of the same illegitimate pressure or at least influenced by it. And influence is enough.[23]

The trial judge, therefore, clearly saw the duress and unconscionable dealing doctrines as cross-fertilizing each other on the facts at hand: the Bank's conduct was 'unconscionable' for the purposes of equity's unconscionable dealing doctrine (as it involved exploitation by the Bank of a known special financial vulnerability in the Company), and that 'unconscionability' in turn furnished the element of 'illegitimacy' in the pressure applied for the purposes of establishing 'economic duress'.

C *The Court of Appeal*

The New South Wales Court of Appeal unanimously reversed the trial Court's findings and set aside the consequential orders of Santow J. It held that none of the relevant documents executed by the Karams had been attended by unconscionable conduct or economic duress on the part of the Bank, and hence they were enforceable according to their terms.

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21 Ibid [42].
22 Quoted ibid [93].
23 Quoted ibid [118].

According to the Court, there could be no unconscionable dealing by the Bank in the absence of a known 'special disability' on the part of the Karams at the time when the relevant documents were signed in favour of the Bank. Although the Karams were, like the elderly Amadios in the leading case at general law of *Commercial Bank of Australia Ltd v Amadio*,[24] providing securities to a bank in respect of a business that was in dire financial straits, the business in the present case was the Karams' own. Unlike the Amadios, who to the lending bank's knowledge in that case were ignorant of the financial circumstances of the debtor son's business, the Karams knew their own business, and their knowledge in that regard was identical to that of the Bank. They could not, therefore, be said to have been in a position of special disadvantage vis-à-vis the Bank, at least on the ground of information asymmetry or relative ignorance.[25]

Neither could it be said that the Bank acted unconscionably in failing to provide the Karams' solicitor with the relevant security documents referred to in the schedule to the June 1993 acknowledgment before the date by which that acknowledgment had to be signed in order, as a practical matter, to obtain the financial accommodation urgently being sought on behalf of the Company. This was despite the fact, too, that the solicitor had requested those documents several days before the acknowledgment was actually signed. The Court took the view that the provision of the documents would have made no difference, for even without seeing the documents the solicitor told the Karams precisely what the effect of the acknowledgment was, so that when they did sign they understood full well the nature and effect of what they were doing and why they were doing it.[26] What is more, because one of the Karam brothers had told the Bank that the Karams' solicitor had no instructions in relation to the provision of the financial accommodation, nor instructions to examine the existing security documentation, it followed that the Bank had not illegitimately withheld copies of the security documentation from the Karams and their solicitor.[27]

Finally, the Bank neither acted 'unconscionably' nor (*ex hypothesi*) exercised 'economic duress' in relation to the Karams on the ground of their 'desperate financial circumstances' that, admittedly, were known to the Bank. As recently confirmed by the High Court in *ACCC v C G Berbatis Holdings Pty Ltd*,[28] 'special disadvantage' is a significant threshold. Merely being impeded by 'financial difficulties' or 'pressure' from pursuing one's best interests does not alone amount to a special disadvantage, hence cannot alone suffice to establish unconscionable conduct on the part of the stronger party who is aware of those weaknesses.[29] The trial judge was in error, therefore, to treat the parlous financial state of the business as itself a form of 'illegitimate pressure' — where there was no unconscionable conduct on the part of the Bank in exploiting the financial vulnerability of the Company and the Karams, there could be nothing to render 'illegitimate' the actual pressure experienced — since once it was accepted that the Company's perilous financial circumstances were not of the Bank's own making, 'there [could be] no basis for saying that the Bank, in a legal sense, subjected the Karams to pressure.

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24 (1983) 151 CLR 447.

25 (2005) 64 NSWLR 149, [47].

26 See also ibid [98] ('the Karams were very much aware of the choice they were being required to make, between preserving their homes and preserving the Company's business').

27 Ibid [73].

28 (2003) 197 ALR 153 ('*Berbatis*').

29 (2005) 64 NSWLR 149, [68], [100].

Rather, it was the Karams who were seeking that the Bank provide additional credit, without which the Company would have to cease trading.'[30] The Court added that the Bank was under no obligation to extend the existing credit facilities, let alone without securing its own position. Indeed, '[t]he greater the financial risk, the greater the justification for increased security.'[31] The Bank, when seeking the 1993 securities, was not acting hastily in relation to some sudden and unforeseen downturn in the Company's affairs; rather, the steady deterioration of the Company's trading account was well known to both the Karams and the Bank, and had been the subject of discussion between them, for weeks, if not months, prior to the June 1993 acknowledgment being signed.[32] In short, the Bank was simply seeking security for further advances to a business that was, through no fault of the Bank, struggling and in need of financial assistance, which advances the Bank was perfectly free not to make to the Company if the Karams refused to do the Bank's bidding, and where the Karams understood full well the nature and effect of what they were doing and why they were doing it, that is, to ensure the possible survival of their business. However hard or unpalatable was the choice facing the Karams at the time, and no matter how pressed they felt in ultimately making their decision, the Karams did not, in legal contemplation, sign the impugned documentation under economic duress.

III ANALYSIS: EXPOUNDING CONTRACTUAL DURESS

In terms of result, the Court of Appeal's decision in *Karam* is unassailable. In fact, and in contrast to *Berbatis* before it,[33] *Karam* ought to be seen as an easy case. The decision of the High Court in *Berbatis* made it clear that the equitable doctrine of unconscionable dealing is not concerned to prevent a party simply taking advantage of superior bargaining power,[34] and the fact that one party (such as a seller) happens to be in a monopoly position relative to the other cannot by itself convert the application of causative pressure into duress, there being no overarching doctrine of inequality of bargaining power[35] — a legal position confirmed by the Court in *Karam* itself.[36] Prior Australian decisions, too, have long indicated 'that it is not duress where one party, faced with the prospect of the exercise of legal rights by the other, acts in accordance with the persuasion of the other because they regard their own circumstances as leaving them with little or no choice'.[37] This stance, and hence the Court of Appeal's intuitions about the Karams' duress claim in the instant case, respects and displays perfectly the philosophical underpinnings of the classical liberal conception of contract. That conception of contract, which arguably continues

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30 Ibid [95]. See also, ibid [123].

31 Ibid [68].

32 Ibid.

33 Although *Berbatis* involved lawful pressure in support of a specific demand — a threat not to renew a lease unless certain, unrelated litigation was withdrawn — the facts were arguably much closer to the unconscionability line, as Kirby J's strong dissent in the case shows. Generally, on the *Berbatis* litigation and High Court decision, see: R Bigwood, 'Curbing Unconscionability: *Berbatis* in the High Court of Australia' (2004) 28 *Melbourne University Law Review* 203.

34 See, eg, (2003) 197 ALR 153, 157 (Gleeson CJ).

35 See *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, 717 (Steyn LJ).

36 See (2005) 64 NSWLR 149, [63]–[68], [100].

37 *Frederick v South Australia* (2006) 94 SASR 545, 587 (White J), referring to *Smith v William Charlick Ltd* (1924) 34 CLR 38, *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, and *Magnacrete Ltd v Douglas-Hill* (1988) 48 SASR 565.

to predominate in Anglo-Australian common law,[38] characteristically assumes that market transactions are voluntary and uncoerced even if they are made against a background of economic necessity.[39] The fact is that the free enterprise system, within which much of modern contract law functions, generally expects and condones the use of economic strength to extract favourable terms.[40] Regarding the means employed by the Bank in *Karam* to obtain the 1993 securities, the Karams' claim was (to adapt the words of a Canadian court in a similar case[41]):

> … really a complaint against the fundamental principles of the free enterprise system — a system that the law, essentially at least, seeks to foster and protect. The simple truth is that the law permits and indeed assists the mighty corporate lenders in this country to collect the loans that they make, and, subject only to insignificant exemption, to impose economic ruin upon their debtors in the process, without the least concern for any injury to their mental or physical wellbeing. If the law permits all that, then it surely must permit the threat of all that, as well as the demand, however coarsely expressed, for equivalent security.[42]

Yet, despite the correctness of the ultimate decision in *Karam* (at least according to classical liberal tenets), the Court of Appeal's analysis of the legal principles relating to economic duress are in my view less than satisfying, and this unfortunately affects the wisdom of the Court's significant recommendation to surrender lawful-act duress claims to other equitable exculpatory categories, 'unconscionable dealing' in particular. Although more will need to be said about specific parts of that analysis below, my principal concern is that the Court, by focusing on the 'principles' or 'doctrine' of *economic* duress in particular, seemed at points to lose sight of the fact that 'economic duress' is just a species of contractual duress in general; it is not a category marked out for special conceptual treatment in its own right. Although distinctive considerations might well apply to economic duress claims in particular,[43] and despite a history of canalization of various categories or 'forms' of duress (duress to the person, duress to goods, duress *colore officii*, undue pressure in equity, and the like), the modern law of duress applies a singular, *generic* test for all private-law duress claims. That test, which was authoritatively laid down by Lord Scarman in *The Universe Sentinel*[44] and followed elsewhere,[45] was relied on by the Karams in relation to their economic duress claim

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38 See, eg, the remarks of Kirby P (as he then was) in *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 133.

39 Cf Alan Wertheimer, *Coercion* (1987) 4–5.

40 *Berbatis* (2003) 197 ALR 153 (per the majority) is a striking case in point.

41 *Burgers v Canadian Imperial Bank of Commerce* (1995) 32 CBR (3d) 64 (Ont Gen Div).

42 Ibid 78 (Misener J), as quoted by H Stewart, 'Economic Duress in Canadian Law: Towards a Principled Approach' (2003) 82 *Canadian Bar Review* 359, 362 (fn 7).

43 See, eg, the discussion by Mance J (as he then was) in *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620, 636.

44 [1983] 1 AC 366. See also *Dimskal Shipping Co SA v International Transport Workers Federation ('The Evia Luck')* [1992] 2 AC 152, 165G (Lord Goff of Chieveley), and *Attorney-General of England and Wales v R* [2004] 2 NZLR 577, 583, [15] (Lord Hoffmann for the majority).

45 For example, *The Universal Sentinel* was adopted in New Zealand in *Shivas v Bank of New Zealand* [1990] 2 NZLR 327, 344–5 (Tipping J), and in New South Wales in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 45 (McHugh JA).

in the instant case, and it is cited by the Court of Appeal with apparent approval. According to Lord Scarman, there are two elements to any duress claim:[46]

1. 'pressure amounting to compulsion of the will'; and
2. 'the illegitimacy of the pressure exerted'.

These dual elements speak to the *bilateral* (ie, two-sided) nature of duress: the first element relates to the genuineness of the consent that P signified to the impugned transaction; the second element focuses on the *legal quality* of D's conduct that produced P's signified consent. To be sure, contractual duress is illegitimate pressure — applied distinctively through the making of a credible interpersonal 'threat' of improper action in support of a specific demand — that results in 'compulsion of the will' of its victim. 'Compulsion of the will' here means that D's illegitimate pressure had the effect of reducing P's menu of options to the point where P had 'no reasonable alternative' but to succumb to D's pressure, by complying with his demand, which P did in fact do for that (significant?)[47] reason. It is important to note that the resultant transaction between D and P is not revocable at P's option merely because, in consequence of D's pressure, P did not 'truly consent' to the assumption of legal contractual responsibility — although this is in a relevant sense true — but additionally because, in the name of corrective justice, P's 'apparent consent was induced by pressure exercised on [P] by [D] which the law does not regard as legitimate'.[48] P may well have 'consented' in form or in name, but given D's causal and culpable role in the procurement (extortion) of that consent, and P's consequent removal from reasonable alternatives (to consenting) in the process, P is relieved of *responsibility* for the normal legal consequences of manifesting her contractual assent. As we shall see below, therefore, the focus of the modern law of duress is not, as some earlier significant authorities might have suggested,[49] on P's subjective state of mind or 'will' *per se* — P does not act under duress merely because she (or her legal advisers) *thinks* she does, even if in fact she has experienced quite intolerable pressure at the hands of D — but rather on the *legal nature* of the interaction between P and D, after *both* parties' rights, freedoms, and interests have been taken fairly into account.

It is also crucial to recognize from the outset that the most salient structural feature of Lord Scarman's two-pronged formulation in *The Universe Sentinel*, and certainly according to the rights-based approach to contractual duress that emerges later in his Lordship's speech, is that each element comprises an *independent* test for duress: each test is necessary, but neither alone is sufficient, to establish duress. In other words, pressure is not 'illegitimate' (under the second element) *just* because it caused a loss of freedom for P or left her with 'no practical choice' under the first

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46 [1983] 1 AC 366, 400C. Very recently in *NAV Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405, however, the New Brunswick Court of Appeal refused to recognize 'illegitimate pressure' as a condition precedent to a finding of economic duress in cases involving post-contractual modifications to executory contracts. With respect, it is difficult, if not impossible, to see how such a move can take the enforcing party's interest in freedom of action adequately into account.

47 The standard of causation appropriate to duress claims is still the subject of discussion in the case law. It is, however, unnecessary to discuss the various possibilities for present purposes. Further discussion can be found in Rick Bigwood, *Exploitative Contracts* (2003) 347–51.

48 *The Universe Sentinel* [1983] 1 AC 366, 384B–C per Lord Diplock.

49 See especially, *Pao On v Lau Yiu Long* [1980] AC 614 (PC).

element (compulsion of the will).[50] For on a rights-based approach to duress, that would only follow if P had some sort of juridical entitlement to a particular state of mind or range of options,[51] which, at least on the classical liberal conception of contract, she does not.[52] Indeed, the Court of Appeal in *Karam* seems to come close to acknowledging as much when, in disagreeing with Santow J's finding of duress at trial, it said:

> It is of importance that the absence of practical choice is only one of two elements in establishing duress. The critical issue is whether the pressure placed on the Karams by the Bank was 'illegitimate'.[53]

Granted, the independence of the two elements of duress is difficult to see in lawful-act duress claims — the very type of claim before the Court in *Karam* — as with such claims the two elements tend *functionally* to converge and overlap. This is because lawful-act duress claims are generally parasitic on the idea of D freely and consciously exploiting P's peculiar vulnerability to being pressed in the circumstances, that is, as a part of an overall coercive plan — of which more below.

The Universe Sentinel elements can be better understood if each is examined in turn, and their doctrinal and analytical relationship further explained. Since the *Karam* decision principally concerns the 'illegitimacy of pressure' arm of the duress inquiry, however, I shall owing to space constraints limit the discussion mostly to that subject alone. This is not to ignore the fact that important issues arise in connection with the 'compulsion of the will' element in the wake of *Karam*, but it is to sidestep them, at least for now.[54] Two points might briefly be mentioned at this point, however. First, it should be noted that, in law, 'compulsion of the will' has both a factual and a normative dimension. That is to say, the question of whether P was in legal contemplation 'compelled' to accede to D's demand, and hence to have acted 'legally involuntarily', is a question both of whether P was *in fact* induced by D's illegitimate pressure to accede to D's demand (ie, *factual* causation), and, notwithstanding P's subjective decision to accede for that reason, of whether P nevertheless had available to her adequate legal or extra-legal alternatives that, given her individual circumstances and characteristics, she ought reasonably to have pursued instead of surrendering to the pressure.[55] Secondly, the Court of Appeal in

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[50] Put differently still, and as modern courts have emphasized, 'legitimate' pressure does not constitute duress even though it may in fact 'compel' P to act against her will. See, eg, *Barton v Armstrong* [1976] AC 104, 121 (Lords Wilberforce and Simon of Glaisdale); *Peanut Marketing Board v Cuda* (1984) 79 FLR 368, 378 (DM Campbell J); *Equiticorp Financial Services Ltd (NSW) v Equiticorp Financial Services Ltd (NZ)* (1992) 29 NSWLR 260, 297 (Giles J); *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 292 (Kiefel J).

[51] Cf Sian E Provost, 'A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law' (1995) 73 *Texas Law Review* 629, 652.

[52] Moreover, such a conception of duress would render it redundant to speak, as Lord Scarman did in *The Universe Sentinel*, of 'wrongful' or 'illegitimate' pressure that 'compels' the victim's will.

[53] (2005) 64 NSWLR 149, [94].

[54] I shall very briefly touch on this subject in the conclusion to this article. See text accompanying n 195–196 below.

[55] This is sometimes referred to as the 'qualitative impact' or 'gravity' of the improper pressure applied. See, eg, *Huyton SA v Peter Cremer GmbH & Co*[1999] 1 Lloyd's Rep 620, 638 (Mance J); *Pharmacy Care Systems Ltd v Attorney-General* [2004] NZCA 187, [96].

Karam[56] seems to accept as correct McHugh JA's view in *Crescendo Management Pty Ltd v Westpac Banking Corporation*[57] that Lord Scarman's reference in *The Universe Sentinel* to 'compulsion of the will of the victim' was 'unfortunate', as the act of duress was 'not inconsistent with act and will, the will being deflected, not destroyed'. McHugh JA then went on, accordingly, to recommend rejection of the 'overbearing of the will theory of duress', a recommendation that was later to receive the imprimatur of Lord Goff of Chieveley in *Dimskal Shipping Co SA v International Transport Workers Federation ('The Evia Luck')*:

> It is sometimes suggested that the plaintiff's will must have been coerced so as to vitiate his consent. … I myself, like McHugh JA, doubt whether it is helpful in this context to speak of the plaintiff's will having been coerced.[58]

With respect, these are surprising concerns, and ones that fail properly to comprehend Lord Scarman's compulsion test in *The Universe Sentinel*. Of course the victim's will must have been 'coerced' for there to be 'duress' — duress is legally cognizable *coercion* after all — but obviously it need not have been completely destroyed in order to be 'coerced' in contemplation of the law. As it happens, the expression 'overborne will' in this context (and others[59]) is probably just a casual metaphor that eventually turned bad because it was later taken too literally by various courts and commentators in the field. The law would do better in this area if 'compulsion/coercion of the will' continued to be understood in its dedicated, normative, and technical sense, namely, to signify the requirement that D's illegitimate pressure must have had the effect of reducing P's menu of options to the point where P had 'no reasonable alternative' but to comply with D's demand, and that P did in fact so comply for that reason. P's will can, therefore, be legally coerced despite the fact that, strictly speaking, she 'intended' to choose and 'knew only too well what she was doing'. The conceptual crux of legal coercion (or 'involuntariness') does not lie in P's intention, knowledge, or pure psychological state, but rather in the fact that P's volition was subjected to an improper reason for *intentional* action (fear) — a reason from which, given the background scheme of rights (duties, immunities, disabilities, etc) that was the context of P and D's interaction, P ought to have been free — and that reason for intentional action produced the outcome of which P now complains and for which she seeks to disclaim 'legal responsibility'. Once an improper proposal or threat has been issued by D to P, it is the absence of reasonable means to avert the pressure that ultimately relieves P of normal responsibility for any transaction that she entered into as a result of D's pressure.

IV 'ILLEGITIMACY OF PRESSURE': THE NATURE OF THE PRESSURE EXERTED

As mentioned, most of the discussion in *Karam* concerns the second element in Lord Scarman's two-pronged formulation of duress: 'illegitimacy of the pressure exerted'. Difficulties surrounding the vagueness of that criterion in particular, as well

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56 See, in particular, (2005) 64 NSWLR 149, [52]–[54], [56].

57 (1988) 19 NSWLR 40, 45–6 ('*Crescendo*').

58 [1992] 2 AC 152, 166A.

59 Eg, undue influence; see *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J), quoted in *Karam* (2005) 64 NSWLR 149, [45], with apparent approval at [46].

as perceptions of 'principle', inspired the Court of Appeal to recommend the doctrinal reassignment move that it did. Is the criterion unmanageably vague, though? And is it 'unprincipled'? This section is dedicated to understanding the 'pressure' arm of the two-pronged duress inquiry in a principled way, with a view to answering both questions in the negative.

First, however, we must understand what in law is meant by 'coercion', for only *coercive* choice situations can give rise to the possibility of contractual duress occurring.

A *What is a 'Coercive' Choice Situation? 'Threats' versus 'Offers'*

Coercers employ a familiar technique to achieve their desired ends: a credible *threat* is issued, for the purpose of backing up a specific, and typically self-serving, *demand*. 'Sign on the dotted line or I'll slaughter your family!' 'Give me your oil painting or I'll make public your bizarre sexual proclivities!' Threats produce an unfair, wrongful, or unacceptable *choice situation* for P, such that P is in some sense *compelled* to accede to D's demand.

On the law's rights-based approach to duress, however, it is critical to distinguish at the outset between mere 'circumstances' that limit a person's alternatives non-coercively, and specific interpersonal threats that coerce. Robert Nozick once captured the distinction thus:

> Whether a person's actions are voluntary depends on what it is that limits his alternatives. If facts of nature do so, the actions are voluntary. … Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends on whether these others had a right to act as they did.[60]

On this approach, a person does not act 'involuntarily' — hence cannot be 'coerced' — if all that constrained her decision-making, when she acted, was either nature itself or else a set of alternatives presented by another person acting within his or her rights. The essence of duress, then, must be seen to lie not in the choice situation itself but rather in its *source*: in the type of behaviour, on the part of D, that created the loss of freedom of which P now complains in seeking to disclaim responsibility for a transaction that was produced as a result of D's behaviour.[61] Contractual duress is a feature of P's pre-transactional choice situation as it was created by another individual, D, and not as it existed in a state of nature, in P's own mind, or in P's pre-existing lack of alternatives for which D is not responsible.[62] As it is sometimes put, duress 'must come from without, and not from within',[63] which is an insight that seems to have been captured in *Karam* itself, when the Court of

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60 R Nozick, *Anarchy, State, and Utopia* (1974) 262.

61 Cf Wertheimer, see above n 39, 202.

62 See, eg, *Hackley v Headley*, 8 NW 511, 512, 514 (1882); *LaBeach v Beatrice Foods Corp* (1978) 461 F Supp 152; *Magnacrete Ltd v Douglas-Hill* (1988) 48 SASR 565; *Walmsley v Christchurch City Council* [1990] 1 NZLR 199, 208–9 (Hardie Boys J); *Shivas v Bank of New Zealand* [1990] 2 NZLR 327, 351–3 (Tipping J); *Familiar Pty Ltd v Samarkos* (1994) 115 FLR 443; *Asia Pacific International Pty Ltd v Dalrymple* [2000] 2 Qd R 229.

63 *King v Lewis* (1939) 4 SE 2d 464, 468. See also *Fruhauf Southwest Garment Co v US* (1953) 111 F Supp 945, 951: 'The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities.'

Appeal said: 'Once it is accepted … that the perilous financial circumstances of the Company were "not the Bank's doing", there is no basis for saying that the Bank, in a legal sense, subjected the Karams to pressure.'[64] This is again a point to which I must return below.

Still, not all pressure that is applied by one contracting party to another contracting party by way of an unwelcome conditional proposal will create a *coercive* choice situation for that other party. There is the further distinction that must be observed between 'threats' and 'offers', the dominant philosophical view about coercion being that only 'threats' can coerce; 'offers' cannot. This is because only threats have the effect of *limiting* their target's freedom, by reducing alternatives, while the effect of an offer is always to *enhance* the offeree's freedom, by increasing her alternatives; threats carry 'sanctions', whereas offers furnish 'incentives'.[65]

On the law's rights-based approach to duress, moreover, the difference between threats and offers must depend on there being an identifiable baseline set of rights or entitlements obtaining between P and D at the moment of transacting. This set of rights or entitlements comprises the normative backdrop of P and D's *particular* interaction and is the measure by which we must assess P's alternatives to determine the 'coerciveness' (or otherwise) of D's conduct in putting a credible conditional proposal to P in support of his (D's) specific demand. In other words, the crux of the distinction between 'threats' and 'offers' resides in the fact that D *threatens* P by proposing to make P *worse off* relative to the baseline set of rights or entitlements that subsists between P and D at the time of their interaction (if P does not accede to D's demand); D makes P an *offer* when he proposes to make P *better off* relative to the baseline set of rights or entitlements that subsists between P and D at the time of their interaction (if P accepts D's proposal).[66] This is simply illustrated in the following contrasting hypotheticals borrowed from Alan Wertheimer:[67]

> *The Private Physician Case*. [P] asks [D], a private physician, to treat his illness. [D] says that he will treat [P]'s illness if and only if [P] gives him $100 (a fair price).
>
> *The Public Physician Case*. [P] asks [D], a physician, to treat his illness. [D] is employed by the National Health Plan, and is legally required to treat all patients without costs. [D] says that he will treat [P]'s illness if and only if [P] gives him $100.

D is making an offer in *The Private Physician Case* because, relative to P's baseline conditions — what P is entitled to expect from D — D does not have an obligation to treat P's illness on a gratuitous basis. Relative to P's baseline in *The Public Physician Case*, though, D is issuing a threat, since P's baseline now includes

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64 (2005) 64 NSWLR 149, [95]. See also *Magnacrete Ltd v Douglas-Hill* (1988) 48 SASR 565 (claim of economic duress failed in part because D had not in any way been responsible for the pressure under which P was acting; the pressure had in fact come from an independent third-party source and was unknown to D).

65 Cf Michael D Bayles, 'A Concept of Coercion' in J R Pennock and J W Chapman (eds) *Nomos XVI: Coercion* (1972) ch 2; Bernard Gert, 'Coercion and Freedom' in Pennock and Chapman, ibid ch 3.

66 Certainly, in the offer situation, P is not left worse off relative to her baseline conditions if she refuses D's proposal.

67 Wertheimer, above n 39, 207–8.

an obligation on D's part — reflecting a correlative entitlement in P — to treat P free of charge.

The coerciveness of conditional proposals in support of specific demands, therefore, depends entirely on P's normative baseline, relative to which only 'threats' are coercive. One consequence of this structural feature of duress is that the logical order of inquiry in duress claims should, strictly speaking, be reversed from that presented and applied by Lord Scarman in *The Universe Sentinel*, among other cases. It is a conceptual mistake to begin with coercive choice situations — situations where claimants are left with 'no practical/reasonable choice' but to accede to specific demands to which they have been subjected — and then determine which of them constitute 'illegitimate pressure' necessary to establish duress. More accurately, conditional proposals that are not 'threats', because they are not 'wrongful' relative to P's baseline of entitlements vis-à-vis D, are best understood as offers that do not create coercive choice situations in the first place.[68] Accordingly, objectionable proposals that are offers cannot be assimilated to legal coercion; hence, they cannot properly fall for resolution under the duress doctrine. It would be *necessary*, therefore, in order to deal with an objectionable (eg, exploitative) offer, to resort to some other legal exculpatory device, such as the unconscionable dealing doctrine, under which P may secure relief for reasons independent of the presence of legally cognizable coercion on D's part.

The distinction between threats and offers is not merely theoretically defensible but intuitive as well, as it is often reflected in descriptions of pressure-felt situations in ordinary language. Consider, for instance, the following passage from the Court of Appeal's judgment in *Karam*:

> The critical issue is whether the pressure placed on the Karams by the Bank was 'illegitimate'. The Bank emphasised in argument that all it was proposing was an *offer* to extend the credit available to the Company on condition that the acknowledgment was signed by the Karams personally. No doubt the Company has a commercial expectation that the credit available to it would be maintained, but it had *no realistic expectation* of additional credit nor that the existing facilities would be allowed to continue, were it in default. Accordingly, on the Bank's case, it was *offering an indulgence* in return for improved security.[69]

Although there is no reason to think that the Court had in mind here the well-debated philosophical and technical distinction between threats and offers, its intuition on the subject is certainly sound, and entirely consistent with the law's rights-based approach to contractual duress. For on that approach, what the Karams could have 'realistically expected' vis-à-vis the Bank in relation to the latter's extension of additional credit to the Company conditional upon the obtaining of better security must be determined by reference to what the Bank was *legally obliged* to do toward the Karams and the Company in that regard, as those obligations would have to be written into the ex-ante set of baseline entitlements by which we are to measure the 'coerciveness' (or otherwise) of the Bank's proposal to cut off the Company's credit should the Karams refuse to execute the impugned documentation. If the Bank was, in legal contemplation, duty-bound to extend additional credit to the Company on a gratuitous basis, then of course it must follow that the Bank was, relative to the Karams' baseline conditions (ie, what the Karams had a right to expect from the Bank), making a 'threat' by proposing to make the Karams worse off

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[68] Cf Wertheimer, ibid 268.

[69] (2005) 64 NSWLR 149, [94] (emphasis added).

should they refuse to submit to the Bank's demand for improved security. As the Court of Appeal emphasized in its reasoning, however, '[t]he Bank was under no obligation to extend the credit facilities already granted, nor to do so without securing its own position.'[70] Hence, such an *absence* of corresponding 'right' would have to be written into the Karams' baseline conditions, and relative to *that* baseline, the Bank's proposal was merely an offer. This is because it operated to *increase* the Karams' options, and 'offers', on the above analysis, are simply incapable of creating coercive choice conditions, hence they incapable of supporting a duress claim, no matter how 'exploitative' we might think they are. For that reason alone the Court of Appeal was correct to hold that there was no scope for finding that the Bank had exercised 'economic duress' over the Karams.

B *'Regular' versus 'Lawful-Act' Duress*

The *Karam* decision, however, raises further complications. These concern a vital distinction that underlies the Court's reasoning, and in particular its consequent recommendation to reassign some 'duress' cases — namely, those not involving actual or threatened unlawful action — to other, mostly equitable, exculpatory doctrines. This is the distinction between what I referred to in the introduction as 'regular duress', on the one hand, and so-called 'lawful-act duress', on the other. For even though the Bank was under no obligation to extend the credit currently enjoyed by the Company, let alone on an unsecured basis, the fact remains that, at least as the law stood at the time of the Court's deliberations in *Karam*, it was juristically possible for the Bank to have exercised lawful-act duress against the Karams, that is, by applying improper pressure by *lawful* means, specifically by (implicitly) proposing to exercise its legal freedom to cut off the Company's credit in support of a demand for improved security, but in a manner that is somehow 'illegitimate' in the circumstances. Certainly on the trial judge's view of the law and the facts in the case, such 'illegitimacy' arose or derived from the Bank's 'unconscionable conduct … in exploiting the [known] financial vulnerability of the Company and the Karams in their desperate financial circumstances'.[71]

It is possible, in connection with the 'illegitimacy of pressure' inquiry under the second element of Lord Scarman's two-pronged duress analysis in *The Universe Sentinel*, above, to sharpen the distinction between regular duress and lawful-act duress by referring to his Lordship's own discussion of the concept of 'illegitimate pressure' in that case. When discussing what might in law amount to illegitimate pressure for the purposes of a duress claim, Lord Scarman, in a well-known passage curiously not cited by the Court of Appeal in *Karam*, said:

> In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support.
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> The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand. Blackmail is often a demand supported by a threat to do what is lawful, eg to report criminal conduct to

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70 Ibid [95].

71 As quoted ibid [93].

> the police. In many cases, therefore, 'What [one] has to justify is not the threat, but the demand …': see per Lord Atkin in *Thorne v Motor Trade Association* [1937] AC 797, 806. …[72]

Now, although it is unlikely that a universally agreeable test for 'illegitimacy' will ever emerge in this field, two principles, at least, have attained some stability in the case law on the subject, both of which are reflected in the above passage from *The Universe Sentinel*. The first principle is that it is perforce illegitimate for D to do or to propose to do, in support of some private demand, anything that is independently unlawful. The second principle, which is a corollary of the first, is that it is not illegitimate for D, in support of a private demand, to do or to propose to do that which D has a legal right, power, or liberty to do (vis-à-vis P at least). As Lord Scarman's passage acknowledges, however, the law has admitted an important *exception* to the second principle, which is that species of coercion commonly referred to as 'lawful-act duress'. It will clear the way for further analysis of the *Karam* decision if I expand at this point on each of the two principles just mentioned.

Principle 1: Independent Unlawfulness — The Nature of the Pressure

Under the first principle, the nature of the pressure, if independently unlawful — threats by D to assault, falsely imprison, or murder P, to destroy or detain without lawful justification P's property, to breach without excuse or compensation an existing valid contract that D has with P, and the like, all in support of private demands — are *decisively* 'illegitimate', regardless of what is being demanded in return for non-implementation of the threat. Subject to the second element in *The Universe Sentinel* being met — 'compulsion of P's will' — and to the absence of an available defence on D's part (such as estoppel or affirmation), any transaction entered into as a result of such pressure will necessarily be defeasible on the ground of duress. And although the second principle might permit exceptions (of which more shortly), the first principle can admit none. This is because, on a rights-based approach to contractual duress, the duress doctrine must function to *vindicate*, rather than to alter, the background scheme of rights and duties that are the juridical context of P and D's interaction. Although the possibility of lawful-act duress as an exception to the second principle shows that there may be justifiable limitations placed upon the exercise of D's lawful rights, powers, or freedoms in the interests of respecting P's essential autonomy in the transaction, to enforce a contract entered into as a result of a credible threat to violate P's independent rights would entail that P's juridical rights have not been adequately protected.[73] And the 'rights' that qualify for this purpose are expansive. The High Court of Australia in *Smith v William Charlick Ltd*, [74] for example, conceived of legal compulsion (duress) as encompassing credible conditional proposals to violate '*any right*' that P might enjoy vis-à-vis D. Moreover, it follows that if we are to take rights seriously, as I think we are bound to do — rights must be taken seriously *as rights* — threats to violate mere contractual rights in support of specific demands[75] must be treated equally under the pressure arm of the duress inquiry as threats against an individual's physical and/or

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72 [1983] AC 366, 401.

73 Hamish Stewart makes this point in his own rights-based account of contractual duress: 'A Formal Approach to Contractual Duress' (1997) 47 *University of Toronto Law Journal* 175, 183.

74 (1924) 34 CLR 38, 56 (Isaacs J).

75 For example, to a contract modification in favour of the threatening party.

proprietary integrity, typically protected by criminal law and/or tort law. Although some may not view breach or threatened breach of contract as a serious matter, or see it as 'unlawful' in quite the same sense as (some) crimes and/or torts, to accept that it may sometimes be 'not illegitimate' for one party to breach or threaten to breach, without offer of compensation,[76] his or her existing valid contract in support of a private demand is effectively to deny that contracts create true legal rights.[77] Granted, although Lord Scarman used the gentler language of 'illegitimacy' over 'illegality' or 'unlawfulness' in formulating his test of duress in *The Universe Sentinel*, that was necessary if the category of lawful-act duress was to be recognized as an exception to the second principle in this area, to which principle I now turn.

Principle 2: Lawful-Act Duress — The Nature of the Demand

Most successful contractual duress claims involve invocation of the first principle above, whereby the nature of the pressure is alone decisive of its illegitimacy in support of D's demand. This is because the very action threatened would itself be unlawful by virtue of the dictates of some other branch of the law (crime, tort, breach of contract rules, etc). Where the nature of the threat is not itself decisive of illegitimacy under the first principle, such as where the demand is supported by a credible conditional proposal to do what is otherwise perfectly lawful, the legitimacy (or otherwise) of the pressure can be determined only by considering the nature of the demand — that is, the end sought to be achieved — *in combination with* the pressure applied to achieve it. The court must ask: Is the pressure applied a proper means in the circumstances for supporting the specific, self-serving demand?[78]

Unsurprisingly, it cannot suffice to justify a conditional proposal directed at P that D will bring about an undesirable consequence X, unless P agrees to D's demand, by pointing to the fact that D has a *right* (privilege, freedom, etc) to do X. As Holmes J famously remarked in *Silsbee v Webber*,[79] 'it does not follow that, because you cannot be made to answer for the act, you may use the threat'.[80] Grant Lamond nicely explains:

> Statements of rights are normally shorthand approximations of more complex specifications, and rights themselves are normally defeasible by other considerations. Until we have examined the details of a particular case, … it cannot be concluded from the judgment that someone has the right to do X or that it is

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76 Even on the Holmesian view that one is always free to break a contract subject to the obligation to pay damages and possibly to a discretionary order for specific performance or injunction — a view of contractual obligation that, notably, has not been accepted in Anglo-Australian law (see, eg, *Zhu v The Treasurer of the State of New South Wales* (2004) 218 CLR 530, [129]) — in none of the economic duress cases by threatened breach of contract do we actually find a conditional proposal to breach accompanied by an offer to fully compensate the victim.

77 Cf Stewart, above n 73, 186. To be clear, it does not follow from this analysis that all transactions entered into where there has been an antecedent threatened breach of contract will be defeasible on the ground of duress, as that conclusion would also depend on whether the other limb of Lord Scarman's two-pronged test for duress, relating to the qualitative impact of the illegitimate pressure on P's range of options, had also been made out.

78 Or as Higgins J (dissenting) phrased it in *Smith v William Charlick Ltd* (1924) 34 CLR 38, 65: Despite technical legality, was D 'entitled to use, or threaten to use, the whip?'

79 50 NE 555, 556 (1898).

80 Ibid 556.

> permissible for them to threaten to do X unless someone complies with their demand, even where the demand is not in itself impermissible (i.e. it does not involve the other in doing something wrong). We need to know what X is, and what it is that is being demanded, before we can know whether the pressure is legitimate.[81]

Indeed, if one were to attempt to encapsulate the common thread that emerges from successful lawful-act duress claims in the past — though, admittedly, some of those claims were administered via equity's parallel 'undue pressure' or (non-relational) 'undue influence'[82] jurisdiction rather than the common law's duress doctrine — it would be that, in each case, there was a *seriously disjunctive relationship* between the *end* that was being sought (the demand) and the *means* that was being employed to achieve it (the application of 'lawful' pressure). Virtually all of the reported cases have involved 'blackmail'-type pressure levered against the victim's personal, psychological, or emotional interests — for example, threats to reveal to a third party non-defamatory information that would discredit, embarrass, or incriminate the victim,[83] or threats to prosecute a person in affinity with the victim in respect of conduct that is entirely unassociated with the transaction between coercer and victim[84] — rather than against her physical, proprietary, or purely economic interests. Indeed, in the passage quoted from *The Universe Sentinel* above, Lord Scarman cited blackmail as an example of lawful-act duress.[85] And although the flourishing literature on blackmail is vast and the reason(s) for the law's enmity toward the practice hotly debated,[86] it seems fair to generalize by suggesting that the illegitimacy of blackmail-type threats derives significantly, if not exclusively, from their nakedly *exploitative* flavour. Blackmail involves rank opportunism. The

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81 G Lamond, 'The Coerciveness of Law' (2000) *Oxford Journal of Legal Studies* 39, 50–1. Lamond proceeds to observe (at 51): 'my claim to exculpation if I am blackmailed need not rest on the claim that I had the *right* that certain information not be disclosed, it rests quite simply on the impropriety of the means adopted to obtain an advantage as the price for not deliberately damaging my interests'.

82 See, eg, *Robertson v Robertson* [1930] QWN, Case No 41 in [1930–1] Qd St R: an actual (Class 1) undue influence case in which a husband threatened to reveal his wife's alleged infidelities unless she transferred certain realty to him.

83 Eg, *Robertson v Robertson*, ibid.

84 See, eg, *Williams v Bailey* (1866) LR 1 HL 200; *Kaufman v Gerson* [1904] 1 KB 591; *Davies v London and Provincial Marine Insurance Co* (1878) 8 Ch D 469; *Banks v The Cheltenham Co-operative Dairy Co (Ltd)* [1911] 29 NZLR 979; *Mutual Finance Ltd v John Whetton & Sons Ltd* [1937] 2 KB 389; *Public Service Employee Credit Union Co-operative Ltd v Campion* (1984) 75 FLR 131; *Scolio Pty Ltd v Cote* (1992) 6 WAR 475; *Permaform Plastics Ltd v London & Midland General Insurance Co* [1995] 8 WWR 201.

85 For the record, it cannot be argued that because blackmail is (in most legal systems) a crime, it therefore constitutes illegitimate pressure under Principle 1 above, as unless one is talking about the bizarre possibility of so-called 'meta-blackmail' (where D says to P, 'Agree to X or I will blackmail you'; see, Russell L Christopher, 'Meta-Blackmail' (2006) 94 *Georgetown Law Journal* 739), blackmail is not duress because it involves a crime or threatened crime; it is, presumably, a crime *because* it is regarded by the state as illegitimately coercive (hence involving duress).

86 Mostly by philosophers and criminal lawyers arguing over whether blackmail should be criminalized. Lindgren, 'Unravelling the Paradox of Blackmail' (1984) 84 *Columbia Law Review* 670, 680–701, for example, notes that at least eight theories have been advanced. See also, 'Blackmail Symposium' (1993) 141 *University of Pennsylvanian Law Review* 1565.

blackmailer 'coerces' his victim by exercising, or proposing to exercise, his rights, privileges, or powers in a manner calculated to 'exploit' his victim's peculiar vulnerability to being pressed, the blackmailer having *no significant interest* in the matter beyond simply desiring the private advantage demanded.

I know of no successful lawful-act duress claim in Anglo-Australasian law where the pressure applied was against the victim's economic interests only, for example, where, in support of some specific demand, the alleged coercer has threatened not to do future business with the victim,[87] or has otherwise threatened to limit the victim's commercial opportunities,[88] even where the effect of such 'threats' is to apply quite intolerable pressure to the victim. Presumably this is because, in addition to the absence of independent unlawfulness in the pressure applied, the alleged coercer typically does have a direct economic interest in the result he seeks in such cases — that is, an interest that goes beyond simply obtaining the benefit extracted.[89] (Of course, as recognized by the Court in *Karam*, the Bank there had a perfectly legitimate commercial interest in securing its own position as the price for advancing further funds to the struggling Company, the Bank having no legal obligation to rescue the business on a gratuitous or unsecured basis. Moreover, the Bank's interest in achieving security increased proportionately with the level of risk it was taking by advancing further credit to the Company.[90])

Additionally, I know of no definitive criteria that have been settled in aid of the adjudication of the propriety (or otherwise) of pressure in the lawful-act duress context. In *CTN Cash and Carry Ltd v Gallaher Ltd*,[91] Steyn LJ famously said that we must 'focus on the distinctive features of [the] case', although this is unhelpful if we do not know just what it is that we should be focusing on as 'distinctive' to lawful-act duress claims in particular. We still require some idea as to what, exactly, is so 'objectionable', 'wrongful', or 'illegitimate' about pressure applied by lawful means in support of particular demands. In the course of his judgment,[92] Steyn LJ approved of the late Peter Birks's statement in his *An Introduction to the Law of Restitution*[93] that, in assessing the legitimacy of prima facie 'lawful' pressure, the courts must apply a 'standard of impropriety rather than technical unlawfulness'. Such a standard, Birks went on to opine, must be capable of drawing on 'social morals, not merely the law'.[94] In *Cash and Carry*, Steyn LJ also said that the court should, in purely commercial contexts where the parties are at arm's length, encourage 'fair dealing' inter se, but it should not 'set its sights too highly when the

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87 See, eg, *Smith v William Charlick Ltd* (1924) 34 CLR 38; *Eric Gnapp Ltd v Petroleum Board* [1949] 1 All ER 980; *Morton Construction Co Ltd v City of Hamilton* (1961) 31 DLR (2d) 323.

88 See, eg, *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 (refusal to continue a line of credit in the future); *Deemcote Pty Ltd v Cantown Pty Ltd* [1995] 2 VR 44 (D threatens to 'withdraw its business' from P unless P agrees to buy a commercial property from D in circumstances where approximately 10 per cent of P's business came from referrals by D).

89 Personally, though, I believe that *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 went too far in protecting the defendants' honest belief (as to their legitimate interest) in that case and was possibly wrongly decided for that reason.

90 (2005) 64 NSWLR 149, [68].

91 [1994] 4 All ER 714, 717.

92 Ibid 718, approved in *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 289 (Keifel J).

93 Peter Birks, *An Introduction to the Law of Restitution* (1985) 177.

94 Ibid 179.

critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable'.[95]

United States courts have also long adopted a broader test than mere 'legality' in relation to the legitimacy of pressure applied in support of specific demands. In the oft-cited case of *Wolf v Marlton Corporation*,[96] for example, duress was found where a person contractually bound to purchase a house in a housing development threatened to resell the house 'to an undesirable purchaser and to ruin [the vendor's] building business' unless his deposit was returned. The test for illegitimacy of pressure in that case was whether the conditional proposal, though not strictly violative of the vendor's rights, was nevertheless 'wrongful' in some broader 'moral or equitable' sense.[97]

Under the American Law Institute's *Restatement (Second) of Contracts*, §176(2), which is the particular subsection that deals with threats that are not unlawful per se,[98] the following test for impropriety of pressure in contractual coercion claims is specified:[99]

> (2) A threat is improper if the resulting exchange is not on fair terms, and
>
> (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
>
> (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
>
> (c) what is threatened is otherwise a use of power for illegitimate ends.

A number of United States cases involving so-called 'lawful' threats seem to fit into a broad conception of 'unconscionable' or 'unconscientious' (abusive, unfair, exploitative) exercise of rights or power, even though, as in Anglo-Australian law, there is no explicit 'abuse of rights' doctrine in United States common law.[100] In *Lafayette v Ferentz*,[101] for example, the Court held that a threat to strike is a legitimate means to secure higher wages, but not to force the employer to hire unwanted and unnecessay employees. Similarly, an employer who has a right to terminate a contract of employment at will may do so,[102] but not as a means of obtaining some collateral advantage, such as the release of a claim[103] or the sale of shares of stock.[104] As Dalzell encapsulated the United States position, at least as it stood in the early 1940s, pressure by technically lawful means is improper, hence 'illegitimate', if it is 'an abuse of the powers of the party making

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95 [1994] 4 All ER 714, 719.

96 154 A 2d 625 (1959).

97 Ibid 630.

98 Section 176(1) confirms the impropriety of criminal, tortious, and bad-faith threats.

99 Examples of what is envisaged by paragraphs (a) and (b) to §176(2) are provided in Comment (f) thereto, and in its accompanying illustrations.

100 For a discussion, see Joseph M Perillo, 'Abuse of Rights: A Pervasive Legal Concept' (1995) 27 *Pacific Law Journal* 37, 62–4.

101 9 NW 2d 57 (1934). Cf *NSW Association of Operative Plasterers v Sadler* (1918) AR (NSW) 159.

102 *Business Incentives Co Inc v Sony Corporation of America*, 397 F Supp 63 (1975).

103 See *McCubbin v Buss*, 144 NW 2d 175 (1966); *Mitchell v CC Sanitation Co*, 430 SW 2d 933 (1968).

104 See *Laemmar v J Walter Thompson Co*, 435 F 2d 680 (1970).

the threat; that is, any threat the purpose of which was not to achieve the end for which the right, power, or privilege was given'.[105]

It should have come as little or no surprise, then, when, in the context of so-called 'lawful' threats, Australian courts (for example) began to echo the United States position of openly recognizing duress as incorporating judicial notions of 'unconscionability' — a term that is probably more familiar to non-civilian judges and lawyers in this context than its continental counterpart, 'abuse of rights'.[106] Most famously perhaps, in a passage cited by the Court of Appeal in *Karam*,[107] McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation*[108] observed: 'Pressure will be illegitimate if it consists of unlawful threats *or amounts to unconscionable conduct*.'[109] And although some authors[110] and courts (including, it seems, the Court of Appeal in *Karam* itself) have taken the reference there to 'unconscionable conduct' to denote narrowly conduct that constitutes 'unconscionable dealing' in the *Amadio* sense, and which is regulated by the doctrine of the same name, there is actually nothing in McHugh JA's statement of the duress doctrine in *Crescendo* that requires such a circumscribed interpretation. 'Unconscionable conduct' might just as easily refer here to conduct that fails to meet the special, and highly contextual, demands of equity more broadly,[111] which would be consistent with the American Law Institute's formulation of the lawful-act duress phenomenon captured in the capacious criteria of §176(2) of the *Restatement*.[112]

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[105] J Dalzell, 'Duress by Economic Pressure II' (1942) 20 *North Carolina Law Review* 341, 364. See also *Restatement (Second) of Contracts*, §176, Illustration 16.

[106] Generally, see H C Gutteridge, 'Abuse of Rights' [1933] *Cambridge Law Journal* 22.

[107] (2005) 64 NSWLR 149, [53].

[108] (1988) 19 NSWLR 40. See also *Equiticorp Financial (NSW) v Equiticorp Financial (NZ)* (1992) 29 NSWLR 260, 297; *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50, 107 (Kirby P); *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 290 (Kiefel J).

[109] (1988) 19 NSWLR 40, 46 (emphasis added).

[110] K Mason and J W Carter, *Restitution Law in Australia* (1985) 185. See also R McKeand, 'Economic Duress — Wearing the Clothes of Unconscionable Conduct' (2001) 17 *Journal of Contract Law* 1.

[111] Which was the view of Keifel J in *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 289. Compare also *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 441 (Deane J): unconscionable conduct is that which 'commonly involve[s] the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure … in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing.'

[112] Note that this is *not*, as some might fear (see, eg, P Gillies, 'Banks, Unconsionability and Economic Duress — a Small Step Towards Deregulation?' (2006) 17 *Journal of Banking and Finance Law and Practice* 177), an 'at-large' unconscionability inquiry, risking 'introduction through the backdoor of economic duress and an expansive doctrine of unconscionability' (at 184), but rather one that *is* channeled through a specific *doctrine* — the duress doctrine (and not merely 'economic duress') — that does have a precise two-pronged structure and analytical foundations apparently not well understood by the Court in *Karam*. Channeled through the duress doctrine, any 'unconscionability' inquiry must still take into account the respective rights and freedoms of the parties, and the surrounding commercial risks, so there is no need to think that the doctrine is an inadequate filter for unmeritorious claims for relief from hard bargains. With respect, the trial Court in *Karam* simply did not understand the limitations upon the doctrine. It focused too much on the effect of the Bank's pressure on the Karams and not enough on the Bank's own rights or protected freedoms that should have been written into the Karams' legal baseline by which the duress doctrine

Unsurprising, too, has been the adverse reaction of some judges[113] and legal academics to the judicial recruitment of conscience-based language and ideas into the duress inquiry, in particular for assessing the 'legitimacy' or otherwise of pressure exerted in support of specific demands, especially when the alleged duress involved is of the 'economic' variety. Grantham and Rickett, for example, have complained that the move renders the notion of illegitimate pressure 'notoriously uncertain' and is 'merely to replace one open-textured criterion with another'.[114] And in a passage cited by the Court in *Karam*,[115] Mason and Carter doubt that 'the notion of unconscionability will prove of much assistance', expressing a preference instead for 'keeping to those better trodden and more carefully tended paths, rather than rushing down broader paths that beckon but which may in the end lead to a tangled wilderness of single instances'.[116] To my mind, however, these are reflexive, question-begging, and mostly rhetorical types of fears. It is far too easy to exaggerate the problem of 'general concepts'[117] (or 'categories of indeterminate reference'[118]) in the administration of law, when such concepts (or categories) are both unavoidable and necessary to the attainment of legal justice — legal justice of any complete and sophisticated kind, at least.[119] Nuanced justice will inevitably come at the expense of

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would measure the coerciveness (or otherwise) of the Bank's proposal to cut off funding if the Karams refused to give better security.

113 In my view, McHugh JA's use of the concept of 'unconscionable conduct' in connection with the notion of 'illegitimate pressure' in the *Crescendo* case has been unfairly criticised by later courts. For example, in *Mitchell v Pacific Dawn Pty Ltd* [2006] QSC 198, Chesterman J (at [22]–[23]) criticized McHugh JA's usage as 'unhelpful' and 'confusing', claiming that it 'begged more questions than it pretended to answer'. With respect, McHugh JA's formulation begs no questions at all. Plainly his Honour was merely introducing into the structure of Lord Scarman's two-pronged analysis of duress the concept and language of 'conscience' as a side-constraint or disability on another's legal rights in this field, consistently with Lord Scarman's conception of duress by lawful means, which McHugh JA accepted. Again, it was not a 'free-wheeling' use of the concept of 'unconscionable conduct', as many opponents seem to assume or fear.

114 R B Grantham and C E F Rickett, *Enrichment and Restitution in New Zealand* (2000) 193.

115 (2005) 64 NSWLR 149, [61].

116 Mason and Carter, above n 110, 184, [540].

117 Generally, see J Dietrich, 'Giving Content to General Concepts' (2005) 29 *Melbourne University Law Review* 218.

118 Julius Stone famously referred to categories of indeterminate reference, predicated on a 'fact-value' complex and not on mere facts: *Legal System and Lawyers' Reasoning* (1964) ch 7, Ï11.

119 See also Sir Anthony Mason, 'Contracts, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 89: '[T]he use of unconscionable conduct has been criticised because it does not lend itself to precise definition and offers no precise test to be applied. … It is then argued that the concepts and principles based on unconscionability, such as the constructive trust and estoppel, are also afflicted with uncertainty. The force of this criticism is exaggerated. In other, sometimes related, fields, we have become accustomed to dealing with concepts that do not lend themselves to precise definition — fraud, undue influence, the duty of care in negligence. Like these concepts, unconscionability involves matters of fact, degree and value judgment so that, to the extent necessary, greater guidance will come from an array of decisions in particular situations. As we strive from the formulation of principles which are predominantly directed to the attainment of justice in particular cases, we are compelled to express principles in broad terms.'

certainty to some degree. The question then becomes, how much 'certainty' can we reasonably expect, or even *want*, in an area where difficult, instance-specific, and all-things-considered judgments are inevitable, particularly given the presence of normative complexity and the variability of facts likely to be encountered in actual adjudications, many of which facts will be unknowable in advance of the applicable rules, formulations, and principles in the field? Provided that the factual and legal determinations are capable of being rendered within the framework of an analysis that is both *normatively* defensible and *conceptually* tractable (as I believe Lord Scarman's two-pronged approach in *The Universe Sentinel* is), sufficient certainty should be generated to satisfy basic rule-of-law requirements in this area. And although like most I prize linguistic precision in legal descriptions, formulations, rules, etc (because the words we choose to express ideas often reflect important substantive distinctions that are critical to law and legal reasoning), I am mindful too of Ronald Dworkin's point that 'our language and idiom are rich enough to allow a great deal of discrimination and choice in the words we pick to say what we want to say, and our choice will therefore depend on the question we are trying to answer, our audience, and the context in which we speak'.[120] It so happens, then, that, in this context at least, I am untroubled by the particular label that one chooses to capture what seems to be a common idea in relation to a universal legal problem. What one prefers as 'unconscionability', another will favour as 'abuse of rights' or 'bad faith'. But as Lord Templeman observed in *The Evia Luck*,[121] '[t]he contents of a bottle cannot be changed by altering the label'.[122] Acceptance of, or at least familiarity with, the idea behind the label is more important here than the label itself. Although it is true that no general 'doctrine' of abuse of rights or good faith exists in Anglo-Australian law — there is, of course, no generalized *doctrine* of unconscionability either[123] — there can be no denying that, in one guise or another, notions and responses captured by all of the above labels pervade discrete doctrines, rules, principles, and exceptions found piecemeal throughout Anglo-Australian common law and equity.

Once Australian courts began to accept the infusion of conscience-based ideas and criteria (or the notion of abuse of rights, freedoms, or powers) into the separate 'illegitimate pressure' arm of Lord Scarman's two-pronged duress inquiry, it became possible to recast the second principle relating to the second element of his Lordship's formulation — 'the illegitimacy of the pressure exerted' — thus:[124]

> It is not illegitimate for D to apply pressure to P, in support of a specific demand, if D merely does or proposes to do that which D has an independent legal right, liberty, or power to do, provided that such right, privilege, or power is not being exercised for a purpose that the law regards as improper (eg, beyond or in excess of

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120 Ronald Dworkin, *Law's Empire* (1985) 103.

121 *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152.

122 Ibid 162.

123 Senior Australian courts have long been at pains to signify that 'the notion of unconscionable behaviour does not operate wholly at large', unmediated by distinct legal categories and doctrinal criteria that focus, channel, and hence discipline the judicial inquiry in particular cases. See, eg, *Australian Broadcasting Corporation v Lenah Games Meats Pty Ltd* [2001] HCA 63, [98]; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 201 ALR 359, [20] (cf [83], [89]) (HCA); *Berbatis* (2003) 197 ALR 153, [42]–[43] (HCA); *Mitchell v Pacific Dawn Pty Ltd* [2007] QCA 74, [7].

124 Cf Bigwood, above n 47, 309.

> the right, privilege, or power in question), or to extract an advantage that is otherwise 'unconscionable', or 'exploitative' of P, in the circumstances.

Now granted, this is a vague statement *of principle* that cannot guide judges magically to the correct answer in every case: 'General propositions do not decide concrete cases.'[125] The devil is inexorably in the application detail — in the distinct doctrinal factors and factual circumstances that will direct adjudication in actual cases. I believe, however, that such detail is sufficiently harvestable from the decided cases on lawful-act duress (especially if one gazes further afield, for example to the United States jurisprudence on the subject), and from the emphases placed upon particular considerations by the courts in those cases: considerations such as the 'directness' of D's interest in the particular advantage demanded, the existence of any prior unfair dealing by D having the effect of increasing the effectiveness of D's threat, and the reasonableness of the alternatives open to P after D's proposed, and nakedly manipulative, exercise of rights. Inevitably lawful-act duress claims will leave judges with important 'leeways of choice' in the course of adjudication, allowing opinion to diverge among intelligent and reasonable minds, especially in the harder or more controversial cases. Once again, though, why would anyone expect (economic) lawful-act duress claims to be uncontroversial and easy, or to command or generate greater certainty than their nature or subject matter can realistically provide? This problem (reality), of course, is no different for the equitable alternatives to which the Court in *Karam* would have all future lawful-act duress claims consigned. Australian judges have made no secret of the fact that the criteria of an unconscionable dealing claim, for example — that P is 'specially disadvantaged' relative to D, and that D then took 'unfair or unconscientious advantage' of the opportunities thereby created[126] — are ineradicably normative: 'The description embodied in the word "unconscionable" ultimately refers to the normative characterization of conduct by a judge having jurisdiction in the relevant class of case.'[127] Such claims 'undoubtedly [will involve] elements of evaluation and assessment' and 'call forth a judicial response that is partly analytical and partly intuitive'.[128]

Finally, it should be mentioned that lawful-act duress claims can quite easily be accommodated within a rights-based (or 'corrective justice') model of contractual duress, wherein the 'coerciveness' of D's proposal must turn on the precise content of P's baseline of legally recognized entitlements vis-à-vis D at the time of D's proposal, relative to which baseline only 'threats' — proposals to make P worse off than where she was entitled to be ex ante submission to D's demand — are 'coercive' and hence capable of supporting a duress claim.[129] Although P's baseline of course contains D's obligations toward (or otherwise in favour of) P that exist independently in virtue of, say, criminal law, tort law, and contract law — so that it would be a 'threat' for D conditionally to propose to violate, without justification,

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[125] *Lochner v New York*, 198 US 45, 76 (1905) (Holmes J).

[126] Cf *Amadio* (1983) 151 CLR 447, 462 (Mason J).

[127] *ACCC v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491, 504 (French J), quoted with approval by Kirby J (dissenting) in *Berbatis* (2003) 197 ALR 153, 173.

[128] *Berbatis* (2003) 197 ALR 153, 175 (Kirby J). See also, *Commonwealth v Verwayen* (1990) 170 CLR 394, 441 (Deane J).

[129] It follows from this that the range of conditional proposals potentially caught by the doctrine of duress is determined directly by the spectrum of 'wrongs' defined by what may be set as P's baseline of positive or negative 'entitlements', vis-à-vis D, in particular situations or contexts.

those variously sourced obligations in support of a self-serving demand — nothing in logic or principle compels us to define P's baseline narrowly in such a way as to include only full-blown 'duties' that D may owe toward or in favour of P by virtue of the background law. Rather, P's baseline might be defined liberally to include not only D's independent duties toward or in favour of P, but also any *justifiable limitations* upon D's ordinary rights or freedoms as these might affect P in particular circumstances. Put slightly differently, the modern and fully elaborated rights-based approach to contractual duress views P's baseline as no longer determined exclusively by strict legal rights and technical standards, such as those applying to crimes, torts, and breaches of contract; it extends to consult as well the standards of decency that stem from the 'moral sense of the community' more generally, particularly as those standards may operate to qualify or restrict D's ordinary rights, freedoms, or powers through the imposition of justifiable circumstantial 'disabilities' or 'side-constraints' upon D in favour of P. If P's baseline thus contains a broad responsibility or disability upon D not to use his rights (etc) unconscientiously or exploitatively — in particular, when *creating* (and not simply 'taking advantage of') choice situations for P — then any credible proposal to do so by D in support of a specific demand will be a proposal to make P worse off relative to where she is entitled to be, hence it will be a 'threat' (or 'illegitimate pressure') capable of founding a duress claim. If the effect of that proposal is then to leave P with no 'practical' or 'reasonable' alternative than submission to the pressure exerted by D's threat, and P does in fact agree to D's demand for that reason, then P may plausibly claim that she acted legally involuntarily, when so agreeing, by reason of duress, and so in justice disclaim responsibility for the legal burdens that otherwise would have followed from the mere expression of her contractual assent according to the standard rules of contract formation.

V SPECIFIC REFLECTIONS ON THE COURT'S RECOMMENDED DOCTRINAL SHIFT IN *KARAM*

As mentioned at the outset, *Karam* is most significant for the Court of Appeal's recommended doctrinal reassignment of duress by lawful means to, inter alia, conscience-based equitable categories — undue influence and unconscionable dealing especially — that hitherto have been concerned with the regulation of a wider spectrum of objectionable bargaining behaviour than improper coercion. The chief benefits that the Court saw in such a move were avoidance of vagueness perceived to inhere in the existing law relating to duress — though to *economic* duress in particular — and implementation of a so-called 'principled approach'. In reaching its opinion the Court was influenced in particular by views expressed by McHugh JA in *Crescendo Management v Westpac*,[130] above, and Kirby P (dissenting in the result) in *Equiticorp Finance Ltd (In Liq) v Bank of New Zealand*.[131] The Court quoted the following two passages from Kirby P's judgment in the latter case — the first in which his Honour notes the vagueness in the doctrine of economic duress, and the second in which he speculates upon conflation of that

[130] With respect, however, McHugh JA's suggestion in *Crescendo* was not to adopt the equitable principles relating to unconscionability as an alternative to the duress doctrine, but rather to incorporate those principles into the two-pronged structure of a duress claim administered by that doctrine, consistent with the approach of Lord Scarman to the concept of 'illegitimate pressure' in *The Universe Sentinel*.

[131] (1993) 32 NSWLR 50.

doctrine with undue influence and unconscionability as a more 'consistent and principled' option for judges administering this area of the law:

> What precisely the law is prepared to countenance as 'legitimate' begs the question which needs to be answered in characterising particular conduct as impermissible economic duress (on the one hand) or the permissible (even necessary) operation of the market economy (on the other).[132]

> The doctrine of economic duress may be better seen as an aspect of the doctrines of undue influence and unconscionability respectively. If relief, beyond statute, is appropriate, courts would be better able to provide such relief in a consistent and principled fashion under the rubric of undue influence and unconscionability rather than by pretending to economic expertise and judgment which they generally lack.[133]

These passages, however, strike me as problematic, hence not entirely convincing, springboards for the doctrinal reassignment move sponsored in *Karam*. The first passage is curious because the idea that the law must, inside economic duress claims, determine what sorts of pressures are 'legitimate' or otherwise, and in so doing must therefore distinguish coercive proposals from non-coercive 'commercial pressure', *begs* (ie, evades, sidesteps) no question at all. It *is* the question required to be answered, and contains no logical fallacy in the nature of assuming the truth of the very thing to be proved.[134] Ironically, the problem with the second passage is that it appears to beg vital questions of its own. First, it cannot be established that the doctrine of economic duress 'may be better seen as an aspect of the doctrines of undue influence and unconscionability'[135] without a prior stable account of those other doctrines and the purposes that they serve. I am not myself confident that we are yet at that stage in respect of those replacement doctrines, undue influence, it seems, proving especially elusive nowadays;[136] and, as the *Karam* Court itself acknowledges: 'How the doctrine of economic duress fits with the equitable doctrines is unclear.'[137] (It might be thought surprising, therefore, that, in the light of that statement, the Court proceeded so comfortably to make the recommendation about doctrinal reassignment that it did!) Secondly, it is not at all clear that judges must '[pretend] to economic expertise and judgment that they generally lack' under the economic duress doctrine, when the same difficult questions about the use of economic leverage in commercial bargaining encounters

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[132] Ibid 106E.

[133] Ibid 107C.

[134] The expression 'to beg the question' is often misused. It does not mean 'to raise the question', which is how Kirby P seems to be using it above. It means to assume the truth of an argument by no evidence besides the argument itself: proof is merely a restatement of the initial premise. Clearly this is not what is going on in the passage above.

[135] I am not sure what function the word 'respectively' is playing in the second passage, so I shall ignore it.

[136] It is not, for example, possible to reconcile the approaches to relational (or presumptive) undue influence between the High Court of Australia in *Johnson v Buttress* (1936) 56 CLR 113 and the House of Lords in *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773. Generally, see Rick Bigwood, 'From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom' in J W Neyers, R Bronaugh, and S G A Pitel (eds), *Exploring Contract Law* (forthcoming 2009).

[137] (2005) 64 NSWLR 149, [61].

would, at some stage in the inquiry, be required to be addressed under the alternative equitable doctrines envisaged — *Berbatis* being a case in point for the unconscionable dealing analysis. Again, it *begs the question* to assume, as Kirby P seems to do in his second passage, that courts would somehow magically 'be better able' to provide appropriate relief under the rubric of undue influence and/or unconscionability than via the duress doctrine, when *ex hypothesi* they would be forced equally to '[pretend] to economic expertise and judgment which they generally lack' when implementing those other exculpatory doctrines.[138]

Accordingly, neither of the *Equiticorp* passages contains knock-down arguments in favour of the step ultimately championed by the Court in *Karam*. Still, it is understandable, if not occasionally intellectually untoward, that the lines of demarcation between duress and other 'fair dealing' categories, such an unconscionable dealing and undue influence, have in recent times been obscured, and in some instances obliterated altogether, by various courts and legal commentators across a variety of British Commonwealth jurisdictions. For so long as duress at common law remained confined to (threatened) independently unlawful acts such as crimes, torts, and (latterly) breaches of contract, it was generally easy to observe and maintain its distinctness from other exculpatory devices, especially equitable ones such as undue influence (including the cognate category of 'undue pressure') and unconscionable dealing. However, since equitable principles began to have their influence in this area, greater flexibility for intervention followed in the common law as well, essentially by increasing significantly the range of conditional proposals that might be considered 'improper' or 'illegitimate' for D to put to P in support of a private demand.[139] Indeed, so great has the influence of equity been in this area that some commentators have reported a 'complete fusion' of the equitable and legal rules relating to duress,[140] while others have suggested that, although there may have been no such official fusion, the several jurisdictions now 'run parallel' at least, there being no longer any substantial difference in the criteria applied as between the two.[141] This has led to claims that equitable pressure (or actual undue influence) cases have been, or henceforth should be, subsumed under the now expanded duress doctrine at common law,[142] while others have urged that the

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[138] There is a further point that it also begs the question to advocate legal change on the basis that judges generally lack economic expertise and judgment, which is of course a truism that could be applied to an awful lot of what judges routinely have to decide. Still, we entrust judges (and commercial arbitrators) with decision-making in a wide variety of contexts where perfect expertise and judgment is lacking, for example anti-trust litigation. It is generally the function of expertise testimony to inform judges or arbitrators, as best that can be done, in relation to such adjudication.

[139] In *Re Boycott* (1885) 29 Ch D 571, 576, Cotton LJ recognized that the categories of pressure were not closed and he declined to attempt to identify them positively.

[140] D W Greig and J L R Davis, *The Law of Contract* (1987) 943.

[141] I J Hardingham, 'Unconscionable Dealing' in P D Finn (ed), *Essays in Equity* (1985) 23–4; *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 290 (Kiefel J). See also, M Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985) 61, 77, [125], [157].

[142] There is enthusiastic academic support for this view. See, eg, P Birks and N Y Chin, 'On the Nature of Undue Influence' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (1995) 63–5, 88; Grantham and Rickett, above n 114, 91–2, 205).

subsumption would be better if it went in the reverse direction.[143] Still others have endorsed a category of 'duress of circumstances as a vitiating factor'[144] — a move that comprehends within the duress doctrine cases where D simply takes unfair advantage of P's particular necessity. However, these might better be conceived of as 'pure exploitation' cases that are, in orthodox legal and philosophical accounts at least, so carefully distinguished from 'coercion' or 'duress'. Instances of 'exploiting necessity' would, therefore, fall more naturally for adjudication under the unconscionable dealing doctrine rather than duress,[145] although clearly room for overlap exists in connection with lawful-act duress claims, which are the real target of the Court's significant recommendation in *Karam*.

Of course, the foregoing may not bode well for orderly coherence among the doctrines mentioned, but, as I hope to make clear below, we must remain vigilant whenever we take Ockham's razor to (what are perceived to be) redundant legal categories not to 'throw the baby out with the bath water'. Although I am untroubled by the possible application of multiple doctrines to singular fact scenarios — this merely attests to the richness of the fact scenarios themselves — intellectual and analytical distinctions must continue to be observed if they are critical to the orderly administration of the law and, in particular, if they assist judges to focus on, and in turn compel them to give precise reasons in respect of, features of the case that are distinctive to the particular claim(s) being made. In other words, mergers at the *doctrinal* level can be unsatisfactory if they might cause judges to overlook important analytical or administrative distinctions at the mundane operational level, that is, in the adjudication of particular disputes. In the remainder of this article, then, I want to consider whether any such distinctions exist in the present context, so as to undermine, or at least weaken, the Court of Appeal's doctrinal reassignment recommendation in *Karam*.

A *Reconciling Duress, Unconscionable Dealing, and Undue Influence*[146]

Both lawyers and philosophers have long drawn a distinction between 'exploitation' — *taking* unfair or unjust advantage of P's peculiar disadvantage for gain — and 'coercion' — *creating*, through credible threats, P's disadvantage itself (in order to secure to oneself some material advantage demanded). They ask: Did D make a credible conditional proposal that worsened P's options relative to some relevant normative baseline (ie, duress), or did D merely 'take unfair or unjust advantage of' a situation in which P had 'no choice', to extract a benefit that would not have been procurable in the absence of P's and D's relative circumstances (ie, non-coercive exploitation)? Lawful-act duress claims, however, place this distinction under stress, as they demonstrate that it is at times difficult, if not impossible, to disentangle these two phenomena. For in the typical lawful-act duress scenario, D's conditional proposal not to exercise his rights as the price for

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[143] See, eg, *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50, 107 (Kirby P); Cope, above n 141, 61, [125], 78, [158]); *Farmers' Co-operative Executors & Trustees Ltd v Perks* (1989) SASR 339, 405 (Duggan J, agreeing with Cope, ibid).

[144] Peter Jaffey, *The Nature and Scope of Restitution* (2000) 192; S A Smith, 'Contracting under Pressure: A Theory of Duress' [1997] *Cambridge Law Journal* 343, 370 (arguing for a 'defence of necessity').

[145] Recall that, in *Blomley v Ryan* (1956) 99 CLR 362, 405, Fullagar J included 'poverty or need of any kind' in his list of disabling conditions or circumstances that might suffice to set the stage for unconscionable dealing.

[146] This section reproduces, in an edited form, material from Bigwood, above n 47, 365–71.

not deliberately damaging P's interests is part and parcel of a calculated *process* of exploitation. It is a strategic device adopted by D solely to manipulate P's behaviour selfishly in a direction intended by D, typically for D's personal advantage, and without regard for P's own autonomy or end-status in the transaction. Accordingly, lawful-act duress could be seen as a form of 'active' victimization in the manner of 'equitable' or 'constructive' fraud, that is, as '"… an unconscientious use of power arising out of the circumstance and conditions of the contracting parties" … consist[ing] … of the active extortion of a benefit'.[147] We might legitimately ask, therefore, whether the unconscionable dealing doctrine might not comfortably accommodate such cases of 'duress', which is a short step from endorsing the doctrinal reassignment recommendation of the Court of Appeal in *Karam*. Indeed, although the unconscionable dealing doctrine is routinely used by courts to regulate 'pure' exploitation situations, active or passive, it has not been confined merely to cases involving exploitation of P's 'cognitive' or 'judgmental' deficiencies, but has been used to prevent exploitation of P's situational 'freedom' deficiencies as well (eg, P's serious volitional impairment or pressing need).[148] In Mason J's judgment in *Amadio*, for example, there is a passage that expressly concedes this possibility:

> There is no reason for thinking that the two remedies [of unconscionable dealing and undue influence] are mutually exclusive in the sense that only one of them is available in a particular situation to the exclusion of the other. Relief on the ground of unconscionable conduct [ie, 'unconscionable dealing'] will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.[149]

Ignoring the unfortunate reference here to P's 'overborne' will (again, an hyperbolic metaphor at best), it is perhaps surprising that this passage is nowhere quoted in *Karam*, as it might have assisted the Court to support its recommended surrender of lawful-act duress claims to (inter alia) unconscionable dealing and/or undue influence. For to encompass within unconscionable dealing cases where 'unconscientious advantage is taken of an innocent party whose will is … not independent and voluntary' is potentially to render lawful-act duress practically indistinguishable from unconscionable dealing in its application to cases of active exploitation by D of P's serious lack of options that D was not, at least initially, responsible for creating.

Consider, in this connection, the venerable 'drowning stranger' hypothetical — a scenario ubiquitously employed, by philosophers especially,[150] in discussions of coercion:

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147 *O'Connor v Hart* [1985] 1 NZLR 159, 171 (Lord Brightman) (citations omitted).

148 *Sturge v Sturge* (1849) 12 Beav 229, 50 ER 1049; *Mulholland v Bartsch* [1939] 1 WWR 100; *Familiar Pty Ltd v Samarkos* (1994) 115 FLR 443; *Asia Pacific International Pty Ltd v Dalrymple* [2000] 2 Qd R 229.

149 (1983) 151 CLR 447, 461. In *Berbatis* (2003) 197 ALR 153, [97], Kirby J (dissenting) recognized that someone may be specially disadvantaged because of 'the contingencies of the moment', quoting M P Ellinghaus, 'In Defense of Unconscionability' (1969) 78 *Yale Law Journal* 757, 768.

150 See, eg, R Nozick, 'Coercion' in S Morgenbesser, P Suppes, and M White (eds), *Philosophy, Science and Method* (1969) 449–50; J Feinberg, *Harm to Self* (1986) 220–5; Wertheimer, above n 39, 207; A Wertheimer, *Exploitation* (1996) 110, 137, 143.

> D encounters P, a stranger, who is drowning. D indicates to P that he will rescue P, but only if P agrees to pay him $100,000 (an exorbitant amount). There are no other potential rescuers — a fact known to both D and P. P reluctantly agrees to D's proposal, is rescued by D, and later refuses to pay the promised amount.

Is this a case of exploitation (unconscionable dealing) or coercion (duress), or perhaps both?

First, in agreeing to D's demand, has P been 'coerced' or acted 'under duress'? To answer this question, we must, on the rights-based approach to duress outlined above, determine whether D's conditional proposal not to rescue P, except upon P's agreeing to pay the sum demanded, amounts to a 'threat' capable of creating a *coercive* choice situation for P in the first place. This, in turn, is a matter of determining the precise content of P's legal baseline relative to D ex ante D's particular proposal. If, as is the age-old common law position,[151] D has *no* legal obligation to rescue P (or, say, to rescue P only at a much lower price than D proposes), such an *absence* of right must be included in P's baseline conditions. Relative to that baseline, D's proposal is an *offer*, because it operates to increase P's options. If, however, the right to beneficial intervention (absolutely or only at a better price) *is* included in P's baseline, D's proposal is a *threat* relative to it, as now it works to *narrow* P's options compared to what P has a right to expect from D (or what D has a duty to do for P).

Let us assume, for argument's sake, that D has 'exploited' P in the drowning stranger scenario above. Some commentators consider that such exploitation of a transient monopoly produced by an emergency amounts to 'coercion' as well. Weinrib, for example, writes: 'If a potential rescuer struck a bargain with a drowning person before tossing him a rope, the agreement reached would be unenforceable as unconscionable or made under duress.'[152] He cites in support the celebrated American case of *Post v Jones*,[153] in which the Court remarked that an agreement struck by greedy rescuers with whalers marooned in the Arctic was 'a transaction which has no characteristic of a valid contract'.[154] What is interesting about *Post*, though, is that although the Court in invalidating the impugned agreement said that D used its 'absolute power', and that P had 'no choice but submission',[155] the regular idiom of duress (eg, 'compulsion' or 'force') is otherwise absent from the judgment in the case.[156] Still, *Post v Jones* and cases like it[157] are taken by many to imply legal or moral *coercion*.[158] Joel Feinberg, for

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[151] See, eg, F Bohlen, 'The Moral Duty to Aid Others as a Basis of Tort Liability' (Pt 1) (1908) 56 *University of Pennsylvania Law Review* 217, 219; *Jaensch v Coffey* (1984) 155 CLR 549, 578 (Deane J).

[152] E J Weinrib, 'The Case for a Duty to Rescue' (1980) 90 *Yale Law Journal* 247, 271, citing *Post v Jones*, 60 US (19 How) 150 (1857). Compare also Smith, above n 144, 362ff (advocating a necessity defence from within the duress doctrine).

[153] 60 US (19 How) 150 (1857).

[154] Ibid 159.

[155] Ibid.

[156] Indeed, the language employed is more familiar with the notion of exploitation, or objectionable 'advantage-taking', than coercion. For example, the Court speaks of the salvor in that case as 'availing himself of the calamities of others to drive a hard bargain': ibid 160.

[157] See, eg, *Akerblom v Price* (1881) 7 QBD 129; *The Port Caledonia and The Anna* [1903] P 184; and *The Medina* (1876) 1 PD 272.

instance, argues that 'rescue'-type cases are 'coercive' because they 'manipulate a person's options in such a way that the person has "no choice" but to comply or suffer an unacceptable alternative'.[159] Yet, this is potentially to make the conceptual error of suggesting that offers to people facing 'hard choices' are coercive just because they 'exploit' the serious need of a dependent person;[160] and while exploitative proposals can coerce (if they amount to 'threats'), exploitative *offers* can never coerce, at least in contemplation of the law, as they do not reduce the options to which P is legally entitled vis-à-vis D.[161]

This draws us somewhat closer to what I consider is the true distinction between coercion (duress) and exploitation (unconscionable dealing). For as the philosopher's drowning stranger example demonstrates, even proposals by D to *improve on* P's status quo can be understood as a 'threat', and hence be potentially coercive, if D is *independently* legally obliged to rescue P, either absolutely or only on better terms than were demanded and achieved by D. Whether cases of exploitation are also cases of coercion, and hence whether instances of unconscionable dealing are also, doctrinally, instances of duress, depends on whether the case under examination can be accommodated comfortably within both the common phenomenology of duress situations — conditional proposal and demand — and the normative framework that motivates the law's theory of coercion.[162] As for the common phenomenology of duress cases, the law generally requires that the pressure of which P complains be generated by a *specific proposal* on D's part rather than having arisen simply out of P's objective situation for which D is not responsible: D must have *created* an unfair choice situation for P that he uses in support of a specific demand. Although some judges have employed the empirical phenomenology of P and D's encounter to rule out duress in particular cases (eg, where P has initiated the transaction rather than D[163]), this is a rather flimsy and haphazard method of distinguishing coercion situations from non-coercion (eg, unconscionable dealing) situations,[164] especially given the law's

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158 See, eg, R E Cooper, 'Between a Rock and a Hard Place: Illegitimate Pressure in Commercial Negotiations' (1997) 71 *Australian Law Journal* 686. For scathing criticism of such interpretations on *Post v Jones*, see Provost, above n 51, 652–3, 657ff. For Provost, *Post* must be an exploitation case, since D did not propose to violate P's (and P's crew's) rights in support of D's demands. Although the bargain struck was a product of the parties' relative circumstances, P and P's crew were merely 'forced' *by their circumstances* to consider D's *offer* to rescue; they were not 'coerced' by D.

159 J Feinberg, 'Noncoercive Exploitation' in R Sartorius (ed), *Paternalism* (1983) 208.

160 There is significant debate in the philosophical literature as to whether 'exploitative' *offers* can coerce, and also as to whether a person can be coerced by circumstantial pressures as well as by specific proposals. See, eg, the sources listed by S Altman, 'Divorcing Threats and Offers' (1996) 15 *Law and Philosophy* 218 (fn 21).

161 Cf Wertheimer, above n 39, 226; Altman, ibid 218.

162 Cf Wertheimer, ibid 229.

163 For example, in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, Purchas LJ, in finding against duress, thought it was significant that the modification was initiated by P's surveyor: ibid 21. Compare Glidewell LJ, however, who thought that it was merely necessary that P 'has reason to doubt whether [D] will, or will be able to, complete his side of the bargain': ibid 15.

164 It is a potentially unjust method of discrimination, too, since a party aware of the law of duress may be careful not to initiate the transaction, instead waiting until he is approached with a favourable proposal by the other party.

recognition that 'threats' (and presumably 'demands' as well) may be tacit and non-verbal,[165] even if they are not particularly 'specific'.[166]

The difference between unconscionable dealing and duress is perhaps more clearly seen if we instead ask whether the particular case under examination can be accommodated within the *normative* framework that motivates the law's theory of coercion.[167] This mode of distinguishing between the two is at least partly entailed by the popular phenomenology of duress, since it still requires us to understand that, in order for there to be duress, D must have by his intentional proposal forced P to choose between unwelcome consequences that *D* has imposed; but it further requires us to appreciate that this imposition is always relative to P's baseline of juridically recognized rights or 'reasonable expectations' relative to D (and not relative simply to P's present factual situation — her experiential or subjective options or expectations). In other words, there must be *independent* reasons, provided by P's background legal 'rights', for regarding D as responsible not to create choices for P that worsen her alternatives relative to those to which she is legally entitled ex ante her encounter with D. This anterior independent rights-violation feature is absent in cases where P has 'no choice' and D simply 'exploits' the opportunities thereby arising for gain.[168] Hence, for example, most bargains struck under conditions of distress or necessity will not involve duress, but possibly exploitation (or unconscionable dealing), precisely because, at least under general common law, P's baseline is not ordinarily viewed as including an entitlement to D's resources on a gratuitous basis.[169] On this view, *Karam* could never have been seen as a plausible candidate for application of the duress doctrine from the start.

Of course, the foregoing does not enable us to distinguish *all* cases of exploitation (or unconscionable dealing) from those of duress, since overlap in application may still exist depending on the content to be ascribed to P's normative baseline under the 'illegitimate pressure' arm of the duress inquiry. It may

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[165] See, eg, *Mutual Finance Ltd v John Whetton & Sons Ltd* [1937] 2 KB 389; *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298; *The Alev* [1989] 1 Lloyd's Rep 138.

[166] Hence, G Lamond, 'Coercion, Threats, and the Puzzle of Blackmail' in A Simester and A T H Smith (eds), *Harm and Culpability* (1996) ch 10, 235 (fn 40), for example, points out that there are often questions about who really initiated the transaction. D may let P know that he has incriminating material on P, while not yet making a demand. P strikes first by initiating the transaction, not waiting for D's proposal to become express. We may still want to say here, though, that D's proposal is not sufficiently explicit and specific for the purposes of the duress doctrine, but that this does not in turn preclude a finding of unconscionable dealing against D.

[167] To be sure, that theory is motivated by a concern for P having been subjected to an improper motive for action (fear), from which she, given the scheme of rights that is the context of the parties' interaction, ought to have been free.

[168] See the examples in n 62 above. Hence, having 'no reasonable alternative' is not definitive of duress. Generally, see Wertheimer, above n 39, ch 2.

[169] And if there is no duty on D to rescue P, there can, for the purposes of establishing duress, be no duty on him (if he does choose to rescue P) to rescue P only at a 'fair' price. The fact that a court may impose on P an obligation to pay on a *quantum meruit* basis does not establish an obligation on D only to rescue P upon 'fair' (*quantum meruit*) terms, since all that such an award may show is that P, if D does chose to alleviate her need or distress, has an immunity, and D a corresponding liability, in respect of any amount demanded and received by D above that which would be awarded to D on a *quantum meruit* basis.

reasonably be objected, then, that the usual distinction between 'causing' advantage and 'taking' advantage is difficult to sustain, or loses much of its force, under the normative-baseline approach to duress. The normative-baseline approach, however, should in theory equip us to see which cases of exploitation are *not* also cases of duress,[170] that is, where D has not proposed to violate P's juridical 'rights' in support of his demand (but where P is nevertheless peculiarly vulnerable to being pressed by D in support of his specific demand). Unfortunately this is not always possible either, since, as we have seen above, the modern law of duress, which recognizes the possibility of lawful-act coercion, has understood the content of P's baseline to be wider than P's strict legal rights relative to D, and has extended it as well to reflect what might be termed P's 'reasonable expectations' vis-à-vis D.[171] These include both P's strict legal rights *and* any justifiable limitations placed upon D's ordinary rights (powers, liberties) as these might affect P's transactional autonomy in the circumstances. At the risk of producing a tautology, P's baseline thus includes a broad responsibility on D's part, when creating a choice situation for P, in particular via a credible conditional proposal not to engage in (otherwise) lawful conduct in return for not visiting harmful or unwanted consequences upon P, not to 'exploit' P's known existing lack of alternatives or peculiar vulnerability to being pressed in that particular way: D acts 'coercively' (under the pressure arm of the duress inquiry) *because* he exploits P who, known to D, has no reasonable alternative than submission to D's demand (under the compulsion arm). Accordingly, lawful-act duress cases are not *functionally* different from unconscionable dealing cases in which D is guilty of actively exploiting serious relative disadvantage inter se, and so it is plausible that either doctrine could be invoked in aid of the resolution of such cases,[172] rendering one of them operationally redundant for exculpatory purposes.

From the standpoint of the basic law of parsimony (Ockham's razor), this would seem to support the Court's recommended abandonment in *Karam* of lawful-act duress as an independent legal category apart from equitable doctrines such as unconscionable dealing and undue influence (although, as mentioned in the introduction above, nowhere in the Court's reasoning is doctrinal redundancy expressly relied on as a justification for the suggested reassignment). Still, one question remains: Accepting that lawful-act duress cases are inevitably examples of unconscionable dealing (because they are invariably parasitic on the existence of known exploitation of 'special disadvantage' such as pressing need or serious

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[170] I take it as axiomatic that we can identify which cases of duress are not also cases of exploitation under the normative-baseline approach to duress, for example where D violates or proposes to violate P's strict rights unaware (and perhaps not intending) that this will have a 'coercive' effect on P's options, given her circumstances. *North Ocean Shipping v Hyundai Construction Co Ltd (The 'Atlantic Baron')* [1979] QB 705 is a good example of coercion without exploitation.

[171] According to Cooke P (as he then was) in *Gillies v Keogh* [1989] 2 NZLR 327, 331 (CA), reasonable expectations can 'carry rights'.

[172] Note that, in connection with the rescue/necessity cases, I do not consider P's baseline to include a bare obligation on D's part not to 'exploit' P (otherwise exploitation becomes duress by tautology). More particularly, P's baseline includes an obligation on D not to exploit P *by putting options to her* when P is entitled in law to expect better options from D, or not to have options put to her by D at all, given what D is seeking to achieve thereby. Blackmail-type situations are classic examples of coercive exploitation; for unlike most of the rescue/necessity cases, where D has no independent obligation to come to P's assistance, D is clearly *creating* a choice situation for P that did not exist in advance of D's decision to bargain with P.

lack of choice), are they properly to be classified as instances of 'coercion', hence duress, too? In other words, is it possible to say that, whatever doctrine is invoked by courts to adjudicate lawful-act duress claims, it should not, despite pre-*Karam* wisdom and practice, be the common law doctrine of duress, as that doctrine should only regulate the exercise of 'truly' coercive pressure and, on the appropriate content to be assigned to P's baseline on the normative-baseline approach to duress in contractual contexts, lawful-act duress scenarios simply do not involve *true* coercion?

Assistance in this connection might be found in a distinction drawn by Hamish Stewart under his 'formal approach' to contractual duress.[173] In essence, Stewart distinguishes between 'pure coercion' situations and 'improper proposals' — a distinction that seems to be supported in part by the American Law Institute's approach to duress under §176 of the *Restatement (Second) of Contracts*, above. 'Pure coercion' occurs when D proposes to do a 'legal wrong' (ie, to violate P's strict legal rights) in support of D's particular demand and this leaves P with 'no reasonable alternative' but to accede. For Stewart, this is straightforwardly a 'duress' situation under his formal approach, for it involves proposed unlawful action on D's part, namely, a proposed crime, tort, or breach of contract in support of a specific demand. Where D's proposal is not strictly unlawful, however, but nevertheless is somehow 'wrongful', 'disagreeable', or 'exploitative' (unconscionable) in a broader sense[174] — that is, it is an 'improper proposal' — it is difficult but not impossible, Stewart argues, to explain the situation as coercion under the formal approach. Whether 'improper proposals' can fall for resolution under the duress doctrine depends on whether relief for P can be justified as a limit on D's rights consistent with the 'presupposition of freedom of contract', that is, whether the limits on D's rights are connected to a concern for P's contractual autonomy (rather than to limits that may be desirable for some other, externalist reason). '[S]trictly speaking', says Stewart,

> the terms 'coercion' and 'duress' should be used only to refer to situations where [D] threatens to violate [P]'s rights; situations where there is no such threat but the proposal is nonetheless improper are normally cases of exploitation or unconscionability. There is, however, no harm in using the term 'duress' to apply to both types of cases, so long as the fact that structure of right and remedy is different in each case is borne in mind.[175]

The categories of 'improper proposal' envisaged under Stewart's approach are 'exploitation' (drowning strangers, foundering ships, and the like, where D

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[173] Stewart, above n 73. This approach is conventional in the sense that it employs, as I do, a 'legal baseline approach' to duress. Stewart's approach is 'formal' in the sense that the content of P's baseline under that approach is determined by reference to P's 'rights' rather than to other social goals extrinsic to P or to the law (ie, moral rights), including those that may underlie P's legal rights. In taking such an approach, Stewart seeks to 'exclude "open-ended disputes" from adjudications about coercion': ibid 250 (fn 76).

[174] Stewart, ibid 76, this broadly refers to the question of whether D's proposal would seriously damage P's interests, despite not violating her rights.

[175] Stewart, ibid 185. Just to make this last point clear, Stewart considers that the 'remedy' in respect of 'pure coercion' cases is always to make the contract entered into voidable at P's option, whereas the proper 'remedy' in relation to a contract procured by an 'improper proposal' *may* be imposition of fair terms, or adjustment of the terms in P's favour, only. This difference, says Stewart, 'signals an important difference in the rights involved' (ibid 213).

'exploits the fact that [P] is about to lose … her capacity to form and pursue goals as an autonomous agent'),[176] the *Restatement (Second) of Contracts* categories[177] (where D's use of the power to enter into contracts is 'parasitic' and 'malicious', designed just to injure P or to extract a benefit from her), and 'blackmail' (again, where D uses his power, for example to disseminate incriminating information about P, maliciously, with no respect for P's end-status).[178] All of these are capable of constituting 'coercion' situations on Stewart's approach, recall, not because they involve 'true' coercion — they do not, after all, result from a proposed violation of P's strict legal *rights* — but rather because they operate as justifiable limitations (disabilities, side-constraints) on what would otherwise be D's unencumbered rights, powers, or liberties.

Stewart is correct, in my view, to suggest that it is possible for the law of duress to incorporate into its structure (or into the notion of 'coercion') justifiable limitations on D's rights in the name of preserving P's contractual autonomy, for it is essentially equivalent to saying, as I have above, that such limitations comprise the content of P's normative baseline for assessing the coerciveness (ie, illegitimacy) of D's proposal for the purposes of the pressure arm of the two-pronged duress inquiry. It is also consistent with the modern judicial focus, in contractual duress contexts, on the 'illegitimacy' of D's proposal rather than its technical 'unlawfulness'. What Stewart's approach demonstrates very well, though, is that legal purists (those of formalist ilk, at least) might indeed have grounds for insisting that 'duress' should only encompass 'pure threat' situations, or conditional proposals whereby D will violate P's strict legal rights. Where P has no such rights that D proposes to violate, but D nevertheless acts or proposes to act beyond justifiable limitations on his own rights or powers in support of his demand, these cases should fall for adjudication under some other doctrine, such as unconscionable dealing or, more obviously, actual (Class 1, non-relational) undue influence, especially since those doctrines exemplify the archetypal equitable objective of preventing 'unconscientious insistence on one's strict legal rights' or 'fraud on a power'. Non-relational undue influence, for example, recognizes that although D has not made an 'unlawful' proposal strictly speaking, he is nevertheless in a position to exercise peculiar 'influence' over P, or to manipulate her in unfair (exploitative) ways, when P is vulnerable to having her freedom constrained, which freedom would not have been constrained ex ante the creation of an unfair choice situation for P by D.[179]

Now, while all this could justify in theory the Court's exercise in doctrinal reassignment in *Karam*, none of it *necessitates* the move. Indeed, to insist that all lawful-act duress claims do not involve 'true' coercion and therefore are incapable of supporting a *duress* claim would mean that we are bound also to concede that all successful acts of blackmail do not involve coercion or duress, which strikes me as highly counterintuitive. Yet, for all that, it remains unclear whether there is much, if anything, of conceptual or practical importance to be gained by seeking to decant lawful-act duress claims into the principles and criteria belonging to non-

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176 Ibid 189–92.

177 In particular, §176(2); see ibid 192–4.

178 Ibid 194–7.

179 Most actual undue influence cases have a 'blackmail' flavour to them, involving pressure levered against P's psychological or emotional interests (eg, threats to prosecute a member of P's family, or to reveal information that would embarrass or discredit P), rather than against her person or goods. See the cases cited above at n 82–84.

relational undue influence or unconscionable dealing, especially since we have seen that, although the legal account of duress is dependent on an account of rights, modern courts seem to have given a wide berth to what 'rights' are capable of embracing for present purposes, essentially to encompass P's 'reasonable expectations' about the extent or proper operation of D's own rights or powers in the particular circumstances. Despite the Court's own beliefs in *Karam* about certain equitable doctrines being competent to avoid the vagueness of, and being more 'principled' than, the (economic) duress doctrine in lawful-pressure situations, there would appear to be no normatively sensitive features of the respective types of case that would lead judges into error were they to channel their inquiry into lawful-act coercion through one doctrinal vehicle (say, duress) rather than another (say, actual undue influence or unconscionable dealing). Nor would the separation of these doctrines appear to promote better order in the law or make it more manageable, since the normative-baseline approach shows that there are no necessary or significant *analytical* distinctions between the doctrines of duress and unconscionable dealing (say) in lawful-act coercion situations. That one happens to be sourced in the common law and the other is peculiarly equitable 'should not be allowed to drive a wedge through uniting principle'.[180] To be sure, Stewart's formal approach demonstrates that there is 'no harm' in permitting the duress doctrine to administer 'improper proposal' situations, provided that we bear in mind certain critical distinctions, none of which appear to have been in the contemplation of the Court in *Karam*. Both 'pure threats' and 'improper proposals' can be incorporated into the coercion analysis if the normative-baseline analysis (ie, the independent content of P's normative baseline vis-à-vis D) permits it. If it does not, then some other doctrine must be invoked if P is to have any juridical complaint against D.

In the end, it is probably fair to say that all successful instances of actual (Class 1) undue influence (at least by way of pressure[181]) are instances of duress as well, namely, lawful-act duress.[182] All successful lawful-act duress claims are also (extreme) cases of 'unconscionable conduct' in the *Amadio* sense, but they are in my view best adjudicated under the duress doctrine rather than unconscionable dealing, since judges under the former doctrine are at least then forced to focus on the analytical features of a *coercion* situation/claim, as per Lord Scarman's two-pronged approach in *The Universe Sentinel*, and hence they are compelled to give reasons in that particular name. Situations in which D does not make an identifiable 'threat' relative to P's normative-baseline conditions (comprising both P's rights and 'reasonable expectations' in respect of the options that D may legitimately put to her in support of a specific demand) are not cases of duress. They will, however, be cases of unconscionable dealing — namely, exploitation by D of P's 'special disadvantage' sourced in P's lack of practical/reasonable alternatives — if P can satisfy the formal criteria of that jurisdiction. Finally, although the Court in *Karam* contemplated the possibility that lawful-act (economic) duress claims might also be decanted to so-called 'presumptive' (and not merely 'actual') undue influence, that is

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[180] Andrew S Burrows, *The Law of Restitution* (1993) 161. See also Andrew S Burrows, 'We Do This at Common Law But That in Equity' (2000) *Oxford Journal of Legal Studies* 1.

[181] Actual undue influence might involve misrepresentation rather than pressure. See, eg, *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773, [103] (Lord Hobhouse).

[182] In *The Eva Luck* [1992] 2 AC 152, 169B-C, Lord Goff referred to the equitable doctrine of undue influence as an 'extended form of duress'.

a hollow prospect. At least as the law stands in Australia,[183] presumptive ('relational' or 'Class 2') undue influence is a special category within the framework of *fiduciary* regulation, and so it must be distinguished sharply from duress, Class 1 undue influence, and unconscionable dealing. Unless the improper pressure involved also involves *conflictual dealing* on the part of the influential party applying the pressure, whereby the pressure is the mechanism of an unauthorized or unconsented-to diversion of value within the context of a special relation of influence — a relation 'in which fiduciary characteristics may be seen' no less[184] — 'presumptive' or 'relational' undue influence would be the wrong doctrine to apply.

VI CONCLUSION

This article set out to address four questions raised by the *Karam* decision in connection with the concept of lawful-act duress under general contract law. By way of conclusion, the four questions, posed initially in the introduction to the article, are repeated below and accompanied by their respective answers in summary form.

A *Are the Concepts of 'Economic Duress' and 'Illegitimate Pressure' So Unmanageably Vague as to Require Their Abandonment and Resort to Other, Mostly Equitable, Categories?*

If vagueness were a sufficient reason for repudiating legal concepts and criteria, large portions of current law would be eviscerated. Vagueness, to some extent, is unavoidable in relation to legal rules, principles, criteria, etc that are required to operate in the face of normative complexity, epistemological uncertainty, and circumstantial variability. The law, accordingly, is replete with vague but manageable concepts.[185] Indeterminacy usually just calls for care in application rather than rejection.[186]

If, however, the vagueness in question were truly 'unmanageable', the law might well be justified in abandoning the concept or criteria concerned. Notions of 'vagueness' and 'unmanageability' in law, though, are themselves experiential or perspectival: they tend to vary with the eye or predisposition of the observer. Still, it is doubtful whether the concepts of 'economic duress' and 'illegitimate pressure' pass the threshold into genuine unmanageability, despite the Court of Appeal thinking so in *Karam*. It is hard to imagine, even on the current state of the jurisprudence on the subject, that intelligent minds (such as those attributed to judges) are incapable of understanding the above concepts in a controllable way. Granted, concepts like economic duress and illegitimate pressure lack sharp boundaries, and this is brought home especially in those controversial or borderline cases that tend to be litigated, but the absence of bright-line borders in this area of the private law should be of little or no concern when the relevant determinations are themselves capable of being rendered within a framework of understanding and analysis that is *conceptually* tractable, which, it is submitted, the two-pronged, normative-baseline approach to contractual duress is. A problem with the *Karam*

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183 See especially *Johnson v Buttress* (1936) 56 CLR 113 (HCA).

184 Ibid 135 (Dixon J).

185 Consider, for example, fiduciary rules and proximity or duty of care in the law of negligence.

186 I have adapted this point from Ernest J Weinrib, 'The Case for a Duty to Rescue' (1980) 90 *Yale Law Journal* 247, 275.

decision is that there was simply no attempt by the Court of Appeal to understand and buttress the concepts of economic duress and illegitimate pressure within the framework of that stable and defensible approach before recommending abandonment of concepts and criteria that are integral to the law's two-pronged theory of duress. On my reading of the decision, the Court started from no stable conceptual account of legal coercion at all.

In sum, set within the framework of the two-pronged theory of duress that emerges from Lord Scarman's speech in *The Universe Sentinel*, the concepts of 'economic duress' and 'illegitimate pressure', while of course unavoidably difficult to apply in some cases, are not so unmanageably vague as to require their abandonment and resort to equitable alternatives. 'The difficulty of being precise cannot by itself justify abandonment of whatever precision is possible.'[187]

B *If Vagueness is a Problem, Are the Equitable (or Statutory) Alternatives Preferred by the Court in* Karam *any Less Vague than the Category being Abandoned?*

Even set within the framework of the two-pronged, normative-baseline approach to contractual duress outlined in this article, the concepts of economic duress and illegitimate pressure are bound to suffer vagueness or indeterminacy and to be perceived by judges as sometimes (often?) difficult to apply. That is unavoidable given the nature of those concepts and the judicial task at hand. Yet this is an observation that obtains regardless of what doctrinal vehicle is enlisted to resolve a lawful-act pressure claim. The capacity of the courts to impose controls on threats of lawful action is identical whatever doctrine is being employed for the purpose. Although the Court of Appeal in *Karam* must have of course believed in the superiority of the equitable successors to the duress doctrine in cases of lawful-act coercion (unconscionable dealing and undue influence especially), that belief was essentially one of faith alone, founded on two obiter passages in Kirby P's judgment in *Equiticorp Finance Ltd (In Liq) v Bank of New Zealand*[188] quoted earlier in this article.[189] It cannot be said that there was any complete and robust *analysis* of those (still-developing) equitable alternatives so as to *demonstrate* their superiority to the common law's duress doctrine, or even to show an improvement by way of a reduction in vagueness. It seems to me that a court will be required to address the selfsame difficult questions about the limits of transaction-inducing lawful pressure applied to another's economic interests under, say, the unconscionable dealing inquiry as under the two-pronged theory of duress. For example, in order to decide whether D had taken 'unfair or unconscientious' advantage of P's 'special disadvantage' for the purpose of establishing alleged unconscionable dealing on the part of D, the court will still be destined to tackle such matters as whether what D was demanding, in combination with the lawful pressure applied in support of the demand, was 'reasonably necessary for the protection of his legitimate interests', which is the same sort of propriety-of-means-to-end issue that a court would have to address when determining the illegitimacy (or otherwise) of such pressure inside a lawful-act duress claim. And as for the question of what might count as a 'special disadvantage' when P's relative situational disability relates to poor volition or

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[187] John E Coons, 'Compromise as Precise Justice' (1980) 68 *California Law Review* 250, 261, quoted by H Mather, *Contract Law and Morality* (1999) 72.

[188] (1993) 32 NSWLR 50.

[189] See text accompanying n 132 and 133 above.

absence of choice on her part, as opposed to deficient judgment or limited cognitive skills, the Court in *Karam* throws no light on that subject except to confirm the unsurprising proposition from *Berbatis* that P's merely facing economic pressure and/or being in an unequal bargaining position vis-à-vis D does not necessarily qualify to set the stage for unconscionable dealing under the general law. Beyond that there is no signal as to when serious financial need (for example) might qualify as a special disadvantage for the purpose of triggering equitable supervision under the jurisdiction. To my knowledge, Anglo-Australian law has not yet articulated an explicit theory of 'need' in this context,[190] so as to distinguish objective *need* from mere subjective *preference* (say).[191] That may be no easy task,[192] and certainly no simpler or any less vague than determining, under the 'compulsion of the will' arm of the common law's two-pronged duress inquiry, whether P, having already received a threat or illegitimate proposal from D, was left with 'no reasonable alternative' than submission to D's demand.[193] Judging by American jurisprudence on the subject at least, '[w]hether the victim has a reasonable alternative is a mixed question of law and fact, to be answered in clear cases by the court'.[194] Moreover, while on the subject of the 'compulsion of the will' arm of the duress inquiry, although there exists considerable academic and judicial discussion of the nature, quality, and role of causation in the duress complaint,[195] the same cannot yet be said for the equivalent requirement, if any, under the unconscionable dealing inquiry.[196]

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[190] Certainly, the unconscionable dealing cases where transactions have been set aside on the basis that unfair advantage had been taken of the claimant's serious 'financial need' do not supply such a theory, or even robust analysis of 'need' and its relationship to the concept of 'special disadvantage'. See, eg, *Sturge v Sturge* (1849) 12 Beav 229; 50 ER 1049; *Mulholland v Bartsch* [1939] 1 WWR 100; *Familiar Pty Ltd v Samarkos* (1994) 115 FLR 443; *Asia Pacific International Pty Ltd v Dalrymple* [2000] 2 Qd R 229. This is not to say, however, that Anglo-Australian private law is incapable of developing such a theory, by drawing on, for example, the current law relating maritime salvage agreements (especially the concept of 'danger') and the necessity defence in tort law.

[191] Clearly, on the facts of *Karam*, the Karams could not be said to have suffered from a 'special disadvantage' because they were not truly 'needy' vis-à-vis the Bank. They had a strong 'preference' for saving their business, but even desiring something intensely does not necessarily convert it into a need.

[192] See, eg, R E Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (1985) 198–200; Bigwood, above n 33, 225–7.

[193] See, generally, Bigwood, above n 47, 344–62.

[194] *Restatement (Second) of Contracts*, §175, Comment (b).

[195] See, eg, Bigwood, above n 47, 347–51, and the references cited therein.

[196] Discussion of causation rarely features in unconscionable dealing cases. See, however, the opinion of the majority of the High Court of Australia in *Bridgewater v Leahy* (1998) 194 CLR 457, 485, [99]–[100]. One of the factual elements that signified unconscionable conduct on the part of D in that case was that D had not recommended to P that P should take independent advice before transacting with D. The trial judge had accepted this failing on D's part but discounted its effect on P's decision to enter into the transaction. The judge was 'satisfied that had [P] been independently advised by another lawyer, the end result would have been the same'. (Compare also *European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192, 201 (Rogers J).) The majority of the High Court of Australia accepted that this approach might well be correct in undue influence cases, since the focus there is on the quality of the disponor's consent to the transaction. In unconscionable dealing cases, however, the majority opined that the emphasis is on the quality of the disponee's conduct, so it was appropriate in this context to focus exclusively on the denial, by D, of the opportunity for P to have the assistance of disinterested advice, rather than to speculate as to what might have followed had such advice been pursued. Care ought to be taken with this analysis,

In sum, important questions remain outstanding in relation to the alternative doctrines to which the Court of Appeal in *Karam* would have lawful-act coercion claims reassigned. Such doctrines remain equally in a state of development as the common law's duress doctrine, and perhaps even more so.[197] There is certainly no reason to assert that the equitable (or statutory) alternatives preferred by the Court are any less vague, and the vagueness any more avoidable, than what one would expect to encounter in a lawful-act coercion claim inside the common law's two-pronged theory of duress.

C *Vagueness Aside, Does a 'Principled Approach' to Lawful-Act Coercion Nevertheless Require the Doctrinal Reassignment Recommended in Karam?*

To my mind, the Court of Appeal's reasoning in *Karam* essentially begs the question as to what is meant by a 'principled approach' in this area, and as to why, exactly, any particular approach to the resolution of lawful-act pressure claims is any more or any less 'principled' than some notional alternative approach. No convincing supporting reasons are offered in the judgment; again, the Court was simply influenced by Kirby P's earlier obiter remarks to similar effect in the *Equiticorp* case. However, as the analysis in this article has attempted to show, although a 'principled' (ie, rights-based) approach to contractual duress, 'economic' or otherwise, would permit the Court's doctrinal reassignment recommendation in *Karam*, in no way does it require the abandonment of lawful-act duress as a serviceable category within the law of contract. The two-pronged, normative-baseline theory of duress that emerges from Lord Scarman's speech in *The Universe Sentinel* can in principle accommodate lawful-pressure cases comfortably with its structure and analysis, and according to what juristically motivates it. Unfortunately, in *Karam*, the Court started with no stable conceptual account of legal coercion/duress at all, perhaps overlooking the fact that one exists.

D *Ignoring the Court's Explicit Reasons for Judgment, Does the Law of Parsimony Nevertheless Support the Doctrinal Reassignment Recommendation in Karam?*

If the recommended doctrinal move in *Karam* can be justified at all, it is not for the reasons expressly extended for it in the case. With respect, the Court of Appeal's reasons for doctrinal reassignment of lawful-act duress to (mostly) equitable

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however. From the standpoint of corrective justice, there must be a causal connection between D's unconscientious conduct (acts or omissions) and the effect on P's decision-making, otherwise P's claim against D is not correlative in the way demanded by that form of justice. The majority's focus on D's unconscionability may, however, support a 'NESS'-type approach to causation in this area, rather than a strict 'but-for' approach. This would ensure that the courts' general approach to causation in relation to unconscionable dealing matches that taken to the causation requirement in Class 2 undue influence law, despite the majority's opinion in *Bridgewater* that counterfactual speculation is permissible in undue influence cases. The majority's opinion in that regard was based on the false distinction between undue influence, as resting on P's impaired consent, and unconscionable dealing, as resting on D's improper conduct, whereas in truth both rest to some extent on an 'improper conduct' rationale — a fact recognized in *Karam* itself: (2005) 64 NSWLR 149, [46].

[197] Consider, for instance, the House of Lords' treatment of undue influence in *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773.

exculpatory categories are not cogent and compelling ones. Still, a case might be made, on conceptual or doctrinal redundancy grounds, for decanting all lawful-act coercion claims into equitable alternatives such as unconscionable dealing and Class 1 undue influence. After all, all successful lawful-act duress cases would seem to satisfy the doctrinal criteria of either (or both) of those equitable doctrines, so that they are in a practical way coterminous.

Again, though, while practical redundancy would support abandonment of lawful-act duress claims to appropriate equitable or statutory alternatives, it does not require it. On the contrary, continuing to channel such claims through the common law's developed duress doctrine might be thought to better direct judges' attention to the peculiar features of a legal *coercion* claim, as opposed to a simple 'exploitation' complaint. It might force them to ask the right questions in that particular name, rather than through (say) the unconscionable dealing doctrine, which so far seems to lack an authoritative theory of market exploitation in relation to volitional disabilities such as 'pressing need', financial or otherwise. However, the superiority of the duress inquiry in this connection presupposes that judges first understand the distinctive structural features and criteria of a legal coercion claim, at least according to the rights-based, normative-baseline approach to contractual duress, but *Karam* is perhaps a sign that they do not.

The two-pronged, normative-baseline approach to contractual duress additionally allows courts to determine which cases of possible exploitation (or unconscionable dealing) are *not* also cases of coercion or duress. Cases like *Karam* and *Berbatis* involve conduct, on the part of a dominant contracting party, that might simply be labeled a 'mere failure to rescue' the other contracting party who is in a known relative position of (serious) financial need or vulnerability. In the absence of a common law duty to bestow gratuitous benefits upon others, however, a credible conditional proposal not to alleviate another's need or distress in return for a price — any price — cannot possibly amount to *duress*, and so such conduct must, if there is to be a successful exculpatory claim, be regulated under some alternative doctrinal vehicle such as unconscionable dealing. This does not mean, however, that all lawful-pressure situations should therefore be resolved through other doctrines than duress, as not all applications of lawful pressure in support of specific demands involve a threatened refusal to assist P unless some price is paid. Most successful lawful-act duress claims have involved 'blackmail'-type pressure, and blackmail does not involve a mere failure to rescue at all. The victim of blackmail has no need for rescue in the absence of the very choice conditions that have been imposed upon her by D, the blackmailer. It is difficult to get past the fact that, when taken to its logical conclusion, the recommendation in *Karam* would have us deny that even blackmail, where successful, is not capable of being treated as an instance of improper coercion, amenable to being resolved, in a principled way, via the modern, nuanced, two-pronged theory of duress. There is no reason to think that Class 1 undue influence, for instance, is a superior vehicle for resolving such cases, as the analysis there must *ex hypothesi* be identical to the common law's now fully developed test for duress. In effect, the old equitable 'undue pressure' cases have been supplanted by developments at common law, and the Court of Appeal's judgment in *Karam* contains no cogent and convincing reasons why we should now reverse that progress.[198]

[198] Certainly, the argument that equity is somehow better equipped than the common law to deal with more subtle and insidious forms of coercive behaviour belies modern advancements in the common law's conception of duress. It also ignores the fact that the same judges are effectively applying equivalent rules regardless of the jurisdictional

In the end analysis, there is little if anything to be gained by defining duress, 'economic' or otherwise, so as to exclude coercion by way of threatened lawful action. There is certainly no harm in allowing lawful-act pressure cases to be administered under the common law's modern duress doctrine, just as there is probably little harm in endorsing the doctrinal reassignment recommendation in *Karam*. But where there is no harm, there is no discernible improvement either. At best, the Court of Appeal's recommendation is neutral in the sense that all the difficult questions have merely been thrust sideways, and neutrality is equally a case for retention of the status quo ante as for the suggested reform.

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stream being mined. It is also to allow a mere incident of history to prevail over sound uniting principle.