

The Doctrine of Duress in the Law of Contract and Unjustified Enrichment in South Africa

A thesis submitted in fulfilment of the
requirements for the degree of

DOCTOR OF PHILOSOPHY

of

RHODES UNIVERSITY

by

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October 2003

Abstract

This thesis analyses the doctrine of duress and its application in the law of contract and unjustified enrichment in South Africa. Following an initial examination of the historical development of the doctrine from its roots in Roman and Roman-Dutch law, the study focuses on the current legal position in the two areas of law under review, identifies the substantive and formal deficiencies in the current approach, and suggests, using comparative authorities, how the law might be developed. As far as the law of contract is concerned, after exposing the difficulties inherent in the current approach, and placing the doctrine in its proper context in the South African law of contract generally, it is argued that the duress doctrine finds its juridical basis in the principle of good faith. A more modern and coherent test for duress is then proposed: one that concentrates on the question whether an illegitimate threat was made, which induced a contract in that it left the other person no reasonable choice but to succumb to the proposal. Additionally, the need for South African contract law to recognise and deal with cases of economic duress is emphasised. The study then shifts to an examination of the position in situations where non-contractual performances have occurred under duress: cases that are decided in terms of the principles of the law of unjustified enrichment. The current position is reviewed, and it is shown that the approach to duress cases is substantially different to the approach that applies in contract. An attempt is made to reconcile this problem. From a structural perspective, the nature and application of the relevant enrichment action where a non-contractual performance is made under duress (the *condictio indebiti*) is also investigated, in the light of approaches to enrichment adopted in both Germany and England, in an attempt to make better sense of this enrichment action in the South African context. The study closes with an analysis of the various contractual, delictual and enrichment remedies that are available once a case of duress has been proved.

“It would seem to be that coercion, like the poor,
is always with us.... Coercion appears to be
the phoenix of the human condition.”

J Rowland Pennock and John W Chapman
Coercion: Nomos XIV viii-ix

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Abbreviations

A	Atlantic Reporter (USA); or Appellate Division (SA)	BW	Burgerlijk Wetboek (Netherlands)
AAJA	Acting Additional Judge of Appeal	C	Cape of Good Hope Provincial Division (SA)
AC	Appeal Cases (UK)	C	Codex of Justinian
AD	Appellate Division (SA)	CA	Court of Appeal (UK)
Ad & El	Adolphus and Ellis' King's Bench Reports (UK)	Cass.civ.3e	Cour de Cassation, 3 rd Chambre civil (France)
Adv	Advocate	CC	Close Corporation (SA); or Constitutional Court (SA)
AG	Aktiengesellschaft (German joint stock company)	CCMA	Commission for Conciliation, Mediation and Arbitration (SA)
AJ	Acting Judge	Cf	Compare
AJA	Acting Judge of Appeal	Ch	Chancery Division Reports (UK); or chapter
aka	also known as	<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
All ER	All England Reports	CIR	Commissioner for Inland Revenue
All SA	All South African Law Reports	CJ	Chief Justice
ALR	American Law Reports; or Australian Law Reports	CkSC	Ciskei Supreme Court Reports (SA)
art	article	CLR	Commonwealth Law Reports (Australia)
B	Baron	Co	Company
BALR	Butterworths Arbitration Law Reports (SA)	Contra	for an opposing view, see
BCLR	Butterworths Constitutional Law Reports (SA)	Cowp	Cowper's King's Bench Reports (UK)
BGB	Bürgerliches Gesetzbuch (German Civil Code)	CP	Common Pleas
BGH	Bundesgerichtshof (German Federal Supreme Court)	CPD	Cape of Good Hope Provincial Division Law Reports (SA)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decision of the German Supreme Court in civil matters)	CRR	Canadian Rights Reporter
Bing	Bingham's Common Pleas Reports (UK)	CTR	Cape Times Law Reports (SA)
BK	Close Corporation (SA)	CWIU	Chemical Workers Industrial Union
Bligh	Bligh's House of Lords Reports (UK)	D	Durban & Coast Local Division (SA)
BLLR	Butterworths Labour Law Reports (SA)	D	Digest of Justinian
Bpk	Public Company (SA)	DLR	Dominion Law Reports (Canada)
Buch	Buchanan Reports (SA)	DP	Deputy President
Buch AC	Buchanan Appeal Court Reports (SA)	E	Eastern Cape Provincial Division (SA)
Build LR	Building Law Reports (UK)	ed	edition; or editor
Bull Civ	Bulletin Civile (France)	EDC	Eastern Districts Court Reports (SA)
Burr	Burrows King's Bench Reports (UK)		

EDL or	Eastern Districts Local	M&G	Manning & Granger's
EDLD	Division Reports (SA)		Common Pleas Reports (UK)
(Edms) Bpk	Private Limited Company (SA)	M&W	Meeson & Welsby (UK)
eg	for example	<i>MLR</i>	<i>Modern Law Review</i>
Eq	Equity Court (UK)	Mo	Missouri Supreme Court
ER	English Reports (Reprint)		Reports (USA)
<i>et al</i>	and others	N	Natal Provincial Division
Ex	Exchequer Cases (UK)	n	footnote
F	Federal Reports (USA)	NAC	Native Appeal Court Cases
FC	Federal Court of Rhodesia		(SA)
	and Nyasaland	NBW	Nieuwe Burgerlijk Wetboek
FCA	Federal Code Annotated		(Netherlands)
	(USA)	NC	Northern Cape Provincial
ff	and following		Division (SA)
fn	footnote	NE	North Eastern Reporter
F Supp	Federal Supplement (USA)		(USA)
GmbH	Gesellschaft mit beschränkter	NJ	Nederlandse Jurisprudentie
	Haftung (German limited	NJW	Neue Juristische
	liability company)		Wochenschrift
GW	Griqualand West Local	NLR	Natal Law Repts (SA)
	Division (SA)	<i>NO</i>	<i>Nomine officii</i>
HC	High Court	NPD	Natal Provincial Division
HL	House of Lords (UK)		Reports
HR	Hoge Raad (Netherlands)	NR	Nambian Reports
IC	Industrial Court (SA)	NSWLR	New South Wales Law
ICR	Industrial Cases Reports (UK)		Reports (Australia)
ie	that is	NUM	National Union of
<i>ILJ</i>	<i>Industrial Law Journal</i>		Mineworkers
ILR	International Law Reports	NUMSA	National Union of
<i>in fin</i>	at the end of the page		Metalworkers of South Africa
ITWF	International Transport	NW	North Western Reporter
	Workers Federation		(USA)
J	Judge; or Justice	NY	New York Court of Appeals
<i>J</i>	<i>Journal</i>		Reports (USA)
JA	Judge of Appeal	NZLR	New Zealand Law Reports
<i>JBL</i>	<i>Journal of Business Law</i> (UK)	O	Orange Free State Provincial
JDR	Juta's Daily Reports (SA)		Division (SA)
KB	King's Bench Division	<i>OJLS</i>	<i>Oxford Journal of Legal</i>
	Reports (UK)		<i>Studies</i>
LAC	Labour Appeal Court (SA)	OPD	Orange Free State Provincial
<i>LAWSA</i>	<i>The Law of South Africa</i>		Division Reports
LC	Labour Court (SA)	ORC	Orange River Colony Reports
<i>LJ</i>	<i>Law Journal</i>		(SA)
LJ	Lord Justice	P	Pacific Reporter (USA); or
LJ Ch	Law Journal Chancery (UK)		Probate Division Reports
llc	Limited Liability Company		(UK); or President
Lloyd's Rep	Lloyd's Reports (UK)	p	page
<i>LQR</i>	<i>Law Quarterly Review</i>	para	paragraph
<i>LR</i>	<i>Law Review</i>	PC	Privy Council
LT	Law Times Reports (UK)		(Commonwealth)
Ltd	Public Company (SA)	PCC	Privy Council Cases
Madd	Maddocks' Chancery Reports	PH	Prentice Hall Reports (SA)
	(UK)	(Pty) Ltd	Private Limited Company

(Pvt) Ltd	(SA) Private Limited Company (Zimbabwe)	VC	Vice Chancellor
QB	Queen's Bench Division Reports (UK)	viz	that is
R	High Court of Rhodesia, or Rex/Regina	Vol	Volume
RA or RAD	Rhodesian Appellate Division	VR	Victoria Reports (Australia)
Rep	Reports	W	Witwatersrand Local Division (SA)
S	State	WAR	West Australian Reports (Australia)
s	section	WLD	Witwatersrand Local Division Reports (SA)
SA	South African Law Reports	WLR	Weekly Law Reports (UK)
<i>SALJ</i>	<i>South African Law Journal</i>	WWR	Western Weekly Law Reports (Canada)
SALLR	South African Labour Law Reports	ZHC	Zimbabwe High Court
SAR	Reports of the High Court of the South African Republic	ZSC	Zimbabwe Supreme Court
SC	Cape Supreme Court Reports (SA); or Senior Counsel	ZSS	<i>Zeitschrift der Zavigny- Stiftung für Rechtsgeschichte</i>
SCA	Supreme Court of Appeal (SA)	&	and
SCC	Supreme Court of Canada	§	paragraph; or section
SE or SEC	South Eastern Cape Local Division (SA)	2d	Second series
Searle	Searle Law Reports (SA)	3d	Third series
SR	Southern Rhodesia Law Reports	4 th	Fourth series
SR (NSW)	New South Wales State Reports (Australia)		
ss	sections		
Str	Strange's King's Bench Reports (UK)		
sv	<i>sub verbo</i>		
SW	South Western Reporter (USA)		
SWA	South West Africa Reports		
T	Transvaal Provincial Division (SA)		
t/a	trading as		
TH	Transvaal High Court Reports (SA)		
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>		
TLR	Times Law Reports		
TPD	Transvaal Provincial Division Reports (SA)		
TS	Transvaal Supreme Court Reports (SA)		
<i>TSAR</i>	<i>Tydskrif vir Suid-Afrikaanse Reg</i>		
UCC	Uniform Commercial Code (USA)		
US	United States Reports		

Note on the names of courts:

The names of the various divisions of the High Courts in South Africa have undergone changes over the years. For example, the name of the Appellate Division was changed to the Supreme Court of Appeal in terms of the Final Constitution, Act 108 of 1996. In this study, the name of the particular court at the time that the judgment was handed down has been used.

Acknowledgements

I would like to begin by extending a vote of thanks for the support I received from my colleagues and the students in the Faculty of Law at Rhodes University. A special word of appreciation must go to Professor Brigitte Clark for all her encouragement. I would also like to thank the Law Faculty Librarian, Mrs Ria Greaves, and the University's Inter-Library Loans Assistant, Mrs Anne Stockwell, for all they did to assist me in undertaking my research.

In 2000 I was the beneficiary of funding from the Attorney's Fidelity Fund and the Dean of Research, Rhodes University, which allowed me to spend a period of time researching in the United Kingdom, and to present some early ideas at the conference of the Society of Public Teachers of Law, held at the University College, London. I thank both those organisations for providing me with the funding to undertake that visit. While I was overseas I was privileged to spend a week as a visitor at the University of Leicester. My thanks go to my hosts, Professor Tony Bradney and Ms Fiona Cownie, who showed this doctrinal lawyer so much kindness.

A core of friends and family have provided extraordinary support to me throughout the period that I have been doing my thesis, for which they deserve my gratitude. I shall start with my friends: Diana Gardner, who was an ear to listen, and a tonic for the soul; Melanie Field, for her belief in my ability; Margaux Beard, for her support in the last stretch; Tammy Smith, for understanding, and becoming the big sister I had never previously had. In particular I must thank the "gentlemen of College House": Mark Robertson, Murray Gardner, Grant Surtees and Lawrence Schäfer, for their incredible support, humour and motivation. A finer group of friends one could not hope to have. Then, most importantly, there is my family. First, I must thank my father, Brian Glover, for his unflinching support and companionship from day one. Had he not made some of the difficult choices and sacrifices he did make, I would never have had the opportunities I ultimately did have. Secondly, I must thank my sister Jayne, my best friend. It is impossible to explain in words how much she means to me: but she will understand.

Finally, I must thank two colleagues who have had a special impact on this work. First, there is Professor Emeritus Alastair Kerr SC, for his rigorous intellectual input, his unflagging encouragement, and his belief that what I had to say was important. And secondly, I owe a great debt to Professor Rob Midgley, my supervisor, for being prepared to take on this project, for the time and effort he put into the various drafts of my work, his patient responses to my occasional hysteria, and for his assistance in making this thesis what it is. The usual caveats apply with regard to any imperfections that remain.

This thesis is dedicated to my late mother, Corlette Glover. Gratitude is the heart's memory, both painful and blessed.

Chapter One

Introduction

1.1 The general purpose of the study

The principal object of this study is to examine the doctrine of duress in the law of contract and the law of unjustified enrichment in South Africa.

One of the ways in which people can avoid responsibility for their actions is to show that they were coerced into acting in the way that they did act. Colloquially, they might say that they acted under compulsion, or were forced into acting, or that they acted under duress. All these terms have pejorative connotations in law, and in society generally. It is commonly understood that a person who can show that he or she acted under compulsion should be excused the normal consequences of his or her act. From a legal perspective, the mechanism that exists to handle this problem is the doctrine of duress.

It is easy to conclude that a person who acted under duress is not legally responsible for the ordinary consequences of his or her conduct. The difficulty comes in determining whether or not a person's act was in fact induced by duress; or, to put it in the context of this study, whether the aggrieved party who claims to have made a contractual promise, or to have handed over money or property under pressure, has actually been coerced in the eyes of the law. During the course of this thesis, the legal doctrine of duress, and its relevance and application in the two fields under discussion, will be analysed and evaluated. Although doctrinal guidelines do exist, generally speaking the approach to duress cases is rather rudimentary. The cause of action applies mainly to situations where coercion is directed at the aggrieved party's person, and (in certain circumstances) a person's property. There is no general recognition of the principle of economic duress, especially in the law of contract. Furthermore, with regard to the resolution of duress cases, most courts and lawyers in South Africa tend to take a pragmatic approach to the problem: the impression one gets is that they are confident that they will be able to recognise a case of duress when they come across it. From an analytical perspective, there have been few attempts to explore and describe the doctrine systematically in this country. This is a common feature of many legal doctrines in all legal systems. In Hart's words:¹

¹ Hart "Analytic Jurisprudence in the Mid-Twentieth Century: A Reply to Professor Bodenheimer" (1957) 105 *University of Pennsylvania LR* 953 at 964, cited by Westen "'Freedom' and 'Coercion' — Virtue Words and Vice Words" 1985 *Duke LJ* 541.

“[I]t is characteristic not only of the use of legal concepts, but also of many concepts in other disciplines and in ordinary life, that we may have adequate mastery of them for the purpose of their day-to-day use; and yet they may still require elucidation; for we are puzzled when we try to understand our own conceptual apparatus. We may know how to *use* these concepts, but we cannot *say* how or *describe* how we do this in ways which are intelligible to others and indeed to ourselves. We know, and yet do not fully understand ... much in the way perhaps that a man may know his way about a familiar town by rote without being able to draw a map of it or explain to others how he finds his way about the town.”

The rather underdeveloped nature of the duress doctrine in South African law, both from a point of view of principle and breadth of application, had its parallel in other jurisdictions, which once adopted a similarly limited approach to duress. For example, in the early 1900s in the United States, a plaintiff was castigated for attempting to rely on what the judge described churlishly as “the womanish plea of duress”.² This extraordinary comment indicates not only that the judge was, from a sociological perspective, a product of a different era, but also makes it plain that the defence of duress in private law was historically viewed as the last resort of a desperate advocate. However, during the course of the 20th century, most leading jurisdictions came to modernise their approach to duress cases, and came to recognise that the doctrine has a more valuable role to play in the legal system than lawyers had previously imagined. The emergence of a more modern approach to the doctrine manifested itself in two ways. The doctrine, which had for so long been peripheral, was dusted off, placed in a proper jurisprudential context, and a coherent, logical, general test for duress was developed, which was flexible enough to cover all forms of illegitimate compulsion. Secondly, it was recognised that obligations induced by threats to economic interests needed to be incorporated into the doctrine, in recognition of the fact that in the modern world, threats to economic interests can be just as devastating as the more traditional forms of duress.

In the light of these developments, the purpose of this study will be to propose that the approach to the doctrine of duress in South Africa needs to be reviewed and placed on a firm and coherent jurisprudential foundation that is not only consistent from the perspective of principle, but is also capable of handling modern realities, from a practical perspective.

1.2 Sources and approach

Since the basic principles that underpin the doctrine of duress in South African law derive their origins from Roman and Roman-Dutch law, the initial part of the thesis involves an historical analysis of how the doctrine of duress developed through the centuries from its Roman roots. This section of the thesis

² *Wood v Kansas City Home Telephone Co* 223 Mo 537 (1909).

is important to establish the foundations for the analysis of the doctrine in modern South African law, and the parameters within which that analysis must occur. Due to the fact that the aim of the thesis is neither solely nor primarily historical, this section of the thesis will not comprise an exhaustive historical analysis of each and every period in the development of the *ius commune*,³ but will focus only on the two most important periods in the historical development of the Roman-Dutch law that was received into South Africa — the position in Roman law up to the codification of Justinian, and the legal position in the Netherlands in the 16th, 17th and 18th centuries before codification.

The remainder of the thesis will be dedicated to an analysis of the legal position as it currently stands in South Africa, a discussion of the problems associated with the current position, and a trenchant re-evaluation of the current legal position, where proposals for reform will be made. Obviously it will be necessary to remain true to the basic principles of the South African common law in conducting this exercise, or the proposed reforms will make no sense in the context of the legal system under discussion. But inasmuch as the South African doctrine of duress is rather unstructured and underdeveloped, the approach from this point onwards will mainly be comparative, and developments regarding the doctrine of duress in other legal systems will be referred to for guidance. The South African legal system is a mixed or hybrid legal system,⁴ and as a result we are in the fortunate position of having links with both the civilian and the common law systems, and are able to extract suitable authority from both systems of law without straining principle. Aspects of this mixed character are evident across the breadth of the South African law of obligations,⁵ including the current approach to the doctrine of duress.

As far as specific sources are concerned, the study relies for its inspiration mainly on the relatively homogeneous approach to the substantive doctrine of duress developed over the last century in Anglo-American law, which, it is submitted, constitutes the most advanced theoretical and structural approach to the doctrine. To be more precise, the law in England, the United States, Canada and Australia will be discussed. This is not to say that South Africa's civilian connections will be ignored. Although the doctrine of duress may not be as thoroughly considered in the codes of the main civilian-based systems of Europe, many of the fundamental principles of the modern doctrine of duress are encapsulated in the civil codes of Germany, the Netherlands and France, and will also be discussed from a comparative

³ For the approach that is usually followed in studies dedicated exclusively to a legal-historical methodological analysis of an area of law in the South African context, see Van Zyl "Die regshistoriese metode" (1972) 35 *THRHR* 19; Venter *et al Regsnavorsing* 161ff.

⁴ For a full discussion of mixed legal systems around the world, see the fascinating recent publication edited by Palmer *Mixed Legal Jurisdictions Worldwide: The Third Legal Family*.

⁵ For a general discussion of this matter in the South African context, see Zimmermann and Visser *Southern Cross*, and the chapters by Farlam and Zimmermann, and Van der Merwe, Du Plessis and De Waal in Palmer (ed) *Mixed Legal Jurisdictions Worldwide: The Third Legal Family* 83ff.

perspective. The impact of civilian thinking is especially significant with regard to the South African law of unjustified enrichment, and is helpful in classifying the various remedies for duress in a contractual and non-contractual context.

1.3 Structure of the thesis

The first matter that must be clarified is where the roots of the doctrine of duress in South African law lie. In common with a great deal of the South African law of obligations, the roots lie in Roman law and the Roman-Dutch law applied in the Netherlands in the 16th, 17th and 18th centuries. The thesis commences in Chapter Two with an examination of the origins of the doctrine of duress (*metus*) in Roman private law, and the Roman actions and remedies in cases of duress. Chapter Three examines how the Roman law on duress was received into and applied in the Roman-Dutch law of the 16th, 17th and 18th centuries. Neither the Romans nor the bulk of the Roman-Dutch authorities recognised unjustified enrichment as a distinct branch of the law of obligations — this step only occurred in the 20th century in South Africa. As a result, the Romans and the Roman-Dutch authorities treated contracts entered into, and payments or transfers made under duress, without discriminating clearly between different branches of the law in a schematic sense, even though different forms of action were available to aggrieved parties, depending upon the circumstances of the case. Neither the Romans nor the Roman-Dutch authorities developed a systematised and coherent approach for dealing with duress cases — the authorities treated the problem in a rather unstructured and casuistic fashion. General principles have to be identified from a careful consideration of the sources, rather than being explicit. In addition, the definition of duress was unsophisticated, and was limited almost exclusively to threats of harm to the person.

Having analysed the historical civilian origins of the duress doctrine, the nature and scope of the duress doctrine in the South African legal context will be discussed in the remainder of the thesis. First, the spotlight will be placed on that area of law where the doctrine of duress is most developed, and has its most common application in South African law: the law of contract. In Chapter Four, the current South African legal position with regard to the doctrine of duress as it applies specifically to the law of contract today will be explained, and the problems with the current position will be identified. As far as the current position is concerned, the approach to duress cases remains very restricted, and has not developed much beyond its Roman and Roman-Dutch roots. The one significant attempt by Wessels⁶ to systematise this area of law, and to establish a list of elements that must be satisfied to make out duress as a cause of action, has been embraced by the courts, virtually without question. But closer

⁶ Wessels *Contract* §1167. See 4.3 below.

investigation reveals that this approach to the doctrine of duress is fraught with contradictions and inconsistencies, both on a theoretical and a substantive level, and also perpetuates the limited scope of the doctrine.

In the light of the criticisms of the current position, a review of the duress doctrine in contract will be undertaken, and a more coherent conceptual framework for dealing with duress cases in contract will be proposed. Chapter Five is designed to put the review in its proper contractual context. The doctrine of duress cannot be considered in isolation. It must be determined why the doctrine exists in the law of contract, what purpose it serves, and upon what principled theoretical basis the doctrine is based. After a consideration of ideological developments in the South African law of contract generally, as well as the unique impact of the South African Constitution and Bill of Rights on private law, it will be proposed that the doctrine of duress finds its theoretical basis in the principle of good faith, as a mechanism designed to combat abuses of bargaining power. At the end of the chapter, once these important background issues have been discussed, a proposed alternative framework for dealing with duress cases will be introduced. It will be argued that the test for duress in contract can be articulated in simple terms. A case of duress will be made out if the aggrieved party can show that the other party made an illegitimate threat that induced him or her to enter into a contract, since he or she had no reasonable or acceptable alternative but to succumb to the threat. This alternative approach will be explained and discussed in detail in Chapters Six and Seven. In Chapter Six, the focus will be on the illegitimate conduct of the party making the threat. In Chapter Seven, the focus will be on the response of the aggrieved party, and whether that person was justified in succumbing to the threat.

The thesis will then shift to analysing the legal position that applies in situations where a person is coerced into transferring money or property under duress, but where the performance does not occur in terms of a contractual obligation. This issue falls squarely under the auspices of the law of unjustified enrichment in South Africa. Chapter Eight will consist of an analysis of how cases of this nature are currently resolved in South Africa. This chapter will show how the legal position in that area of law differs from that which currently applies in contract, as well as how it differs from the proposed alternative framework for the doctrine discussed in the contract section. In Chapter Nine, the current approach to duress cases in this field of law will be revisited, in an attempt to place the law on a more coherent and principled footing. In the absence of the existence of a general enrichment action in South African law, much of the focus of this chapter will be on analysing the scope and application of the relevant traditional enrichment action — the *condictio indebiti*. As far as the concept of duress is concerned, it will be suggested that the conceptual framework for dealing with duress cases in contract proposed in Chapters Five, Six and Seven can simply and easily be adapted, *mutatis mutandis*, to cases that fall strictly under the law of unjustified enrichment, so allowing for the application of a generalised and coherent doctrine of duress across both these two branches of the law of obligations. As far as our

understanding of the relevance of a duress claim to the *condictio indebiti* is concerned, although the South African law of unjustified enrichment is of civilian heritage, it will be shown that certain aspects of the English law of unjust enrichment appear to have encroached into our understanding of the *condictio indebiti*, in that things like error, duress and protest have come to be seen as “unjust factors” that support a finding that a performance was an *indebitum*. After analysing the potential problems, especially of delimitation, with this view, it will be argued that an alternative understanding of the *condictio indebiti* can and should be adopted, which is based simply on the idea that the *condictio* can be claimed where no *causa retinendi* for the performance exists, subject to a defence that the performance occurred in the knowledge that it was undue. Payments made under duress or protest in reservation of rights would constitute principle and policy-based exceptions to this defence.

From what has been said above, it will be evident that much of the study will focus on the nature and scope of duress as a cause of action, or as an aspect of a pleaded case. In addition, another very important issue that requires analysis is the nature and scope of the remedies that are available to an aggrieved party who has been able to establish duress as a cause of action. In Chapter Ten, the final chapter of the thesis, the various forms of remedy (contractual, restitutionary and delictual) available to an aggrieved party where he or she can make out a case of duress, either in a contractual or a non-contractual context, will be identified, and the relationship between these forms of remedy will be discussed.

The thesis closes with an appendix that considers certain proposals that have made by the South African Law Commission concerning the possible future legislative regulation of unreasonableness and unfairness in the law of contract. In the appendix, the potential effects of these recommendations on the question of good faith in the bargaining process in general, and the doctrine of duress in particular, are considered.

This thesis reflects the law as stated in the sources available to me as at 1 November 2002.

Chapter Two

The Roman Law

“The question arises ... whether agreements and promises must always be kept when, in the language of the praetor’s edicts, they have been secured through force.”

Cicero *de Officiis* 3.24.92.

2.1 Outline

The aim of this chapter will be to explain how the Romans treated cases of duress in the law of obligations. This exercise has more than mere historical relevance, since many of the Roman rules and principles find a place in the modern South African law of obligations. It is thus important to give some attention to the origins and characteristics of the law of duress in Roman times, in order to provide a better understanding of the role the law of duress plays in South Africa today. First, the law concerning contracts will be discussed, since this was the area of law where the Romans paid the most attention to the problem. The origins of the law will be examined, and the law placed in its historical context. The various actions and remedies available to a victim of duress will also be explained. The essential substantive elements of a duress claim will then be reviewed. Finally, the relevance of the *condictio* (which later evolved into the enrichment *condictiones*) to this area of law will be discussed.

2.2 *Metus* and the Roman law of obligations

In Roman law an obligation amounted to a legal bond that required one party (a debtor) to perform some act for the benefit of another (the creditor), and for which the creditor could bring an *actio in personam* for enforcement.¹ Gaius was responsible for the first significant classification of obligations: his *summa divisio* classified obligations into those arising out of either contract or delict.² Gaius did

¹ See Justinian *Institutes* 3.13.pr; Zimmermann *The Law of Obligations* 1.

² Gaius *Institutes* 3.88.

refer vaguely to a third category of obligations *ex variis causarum figuris*,³ but by the time of Justinian this classification had been enlarged to a settled concrete list of four forms of obligation: those arising out of contract, delict, quasi-contract, and quasi-delict.⁴ Contractual obligations arose mainly out of various forms of agreement; delictual obligations concerned unlawful conduct giving rise to civil liability; quasi-contracts referred to acts which gave rise to obligations, but where there was no agreement — for example actions arising out of *negotiorum gestio*, *tutela*, *communio*, and obligations arising out of unjustified benefits. Quasi-delictual obligations concerned unlawful acts arising from mere *culpa* outside the bounds of the *lex Aquilia*.⁵ The Romans did not recognise a distinct category of obligations arising from unjustified enrichment, as we do in South Africa today. As far as the categories of quasi-contract and quasi-delict are concerned, their impact on the Roman law of obligations was rather modest, and obligations arising out of contract or delict were by far the most common and important forms of obligation.

An entire title of Book Four of Justinian's *Digest*⁶ is devoted to explaining the doctrine of *metus* (the Latin term for duress⁷) as it was understood at the time of the codification of the Roman law. That title begins with the following statement: "The praetor says: 'I will not hold valid what has been done under duress.'"⁸ This unequivocal statement of legal principle illustrates, in very general terms, that by the time the *Corpus Iuris Civilis* was compiled, the Romans disapproved of persons using threats to inspire the creation of legal obligations, and that it was possible to avoid the legal consequences of an obligation because it was induced by *metus*. The *Corpus Iuris Civilis* remains our most valuable source of authority with regard to how duress cases were treated in Roman times. But the relevant textual sources pose some fundamental difficulties. Far from containing a coherent, structured analysis of the

³ D 44.7.1.pr.

⁴ Justinian *Institutes* 3.13.2.

⁵ For a discussion of these categories, see Kaser *Römisches Privatrecht* 162ff; Zimmermann *The Law of Obligations* 10-18.

⁶ D 4.2. The Emperor Justinian was the ruler of the Eastern Roman Empire from 527 to 565 AD. It was at his insistence that a codification of Roman law was undertaken (a task principally driven by Tribonian, at the time head of the imperial public service). The codification (comprising the *Digesta*, the *Codex*, the *Institutiones* and the *Novellae*; collectively known as the *Corpus Iuris Civilis*) was designed to provide a coherent and uniform source of law for the Roman Empire. The *Corpus Iuris Civilis* is the final great "statement" or articulation of Roman law, and the compilation formed the basis for the reception of the Roman law in Europe in the Middle Ages.

⁷ South African law has adopted the English (or Norman-French) word "duress" to describe the situation where an agreement or transaction is induced by threats which invoke fear in the mind of the victim. See Christie *Contract* 337. The traditional Latin term for duress was: *mētus mētus* (m), meaning fear, oppression or dread. See Lewis and Short *A Latin Dictionary sv mētus* 1141.

⁸ D 4.2.1 (Watson's edition).

law, the relevant passages in fact amount to a jigsaw-puzzle of unco-ordinated, haphazard, and occasionally contradictory legal propositions. As Schultz states: “The compilers ... drastically modified the classical law by ruthlessly shortening and interpolating the classical texts; for that reason the short *Digest* title 4.2 presents unusual difficulties.”⁹ Much of the *Corpus Iuris Civilis* is beset by this problem to some degree, since it constitutes a small, selected compilation of almost 1000 years worth of legal source material;¹⁰ but *D* 4.2 is an extreme case. The sources thus require very careful analysis and interpretation before any vaguely coherent structural pattern of legal principles can be discerned: the Romans never got to the point of listing the substantive elements of a claim based on *metus* explicitly, and the nature and scope of the remedies available to an aggrieved party remain a matter of some conjecture.

One point must be made quite clear from the outset. The Romans discussed *metus* in the context of obligations generally. They did not set out to discriminate between cases of *metus* in contract or quasi-contract, for example. The rules, principles and remedies discussed in *D* 4.2 covered both coerced contracts and coerced acts of payment or transfer of property that strictly speaking fell outside the bounds of contract. But from a practical perspective, *metus* was most significant, and is generally discussed by the Romans, in the context of the law of contract. As a result, in my discussion below I shall focus on the position in contract. But the general nature and application of the rules, principles and remedies should be borne in mind throughout.

2.2.1 The nature and classification of contracts in Roman law

An understanding of the nature of the Roman law of contracts is essential in order to understand how cases concerning *metus* were treated in Roman law, and why certain matters about this area of Roman law remain controversial to this day. The Romans never reached the stage where they developed a general theory of contract, based upon the essential element of mutual agreement.¹¹ Rather, the Romans had a law of contracts — a particular type of contract was identified principally by the nature of the act that had to be performed, and each type of contract had its own special rules and requirements. The existence of an agreement was not of singular importance; it was the form of the arrangement that was significant. The Romans classified their contracts in an assortment of ways. First, they categorised them

⁹ Schulz *Classical Roman Law* 604.

¹⁰ The compilers of the *Digest* read about 2000 sources (totalling about 3 million lines of text) in the course of their research, but utilised only about a twentieth of this material in the *Digest*. See the *Constitutio Tanta* 17 and Thomas *Textbook of Roman Law* 57.

¹¹ See the analysis of this matter by De Villiers AJA in *Conradie v Rossouw* 1919 AD 279 at 306, and Christie *Contract* 3-7.

in terms of the manner in which the various contracts were concluded. In this sense the Romans recognised four categories of contracts: contracts *re* (or real contracts); contracts *verbis* (or verbal contracts); contracts *litteris* (written contracts) and contracts *consensu* (or consensual contracts).¹² Secondly, contracts could be classified in terms of whether they were bilateral or unilateral. And thirdly, they could be classified procedurally in terms of whether they were contracts *stricti iuris* or contracts *bonae fidei*. It is this third classification that is important for the investigation into the Roman doctrine of *metus*.

Stricti iuris contracts were normally unilateral in nature, and were regulated by strict rules and procedures set down in the *ius civile*. The validity of such contracts was dependant upon the parties reciting specific questions and answers laid down by the *ius civile*. For the contract to be valid, the formal words that constituted the promise or undertaking had to be complied with to the letter; any deviation from the formalities rendered the agreement void. Secondly, the content of the arrangement was to be interpreted and enforced strictly; issues of equity were not relevant in situations where a dispute concerning a contract *stricti iuris* arose. The main examples of contracts *stricti iuris* were the *dotis dictio*, the *iusiurandum liberti* and the *stipulatio*.¹³ The *stipulatio* was easily the most important of the three, since it was an extremely popular and common method of entering into a transaction in Roman law.¹⁴ Its attraction lay in the fact that it was an highly versatile type of contract: almost any sort of legal undertaking could be the subject of a legally enforceable *stipulatio*, provided the appropriate formalities were uttered.

On the other hand there were the contracts *bonae fidei*. Contracts *bonae fidei*, or contracts of good faith, were governed by equitable principles rather than the strict and formal rules of the *ius civile*. The informing basis of such contracts was that the parties, in the negotiation and performance of the arrangement, should act at all times in good faith towards one another. In situations where a dispute concerning a contract *bonae fidei* arose, the *iudex* was at liberty to decide the case on equitable grounds, and was not confined merely to interpreting and enforcing the contract, regardless of the consequences. Originally the most common types of contract *bonae fidei* were the more complex and theoretically advanced consensual contracts — the sale contract (*emptio venditio*), the contract of hire (*locatio*

¹² This form of classification may be found in Gaius *Institutes* 3.89 and Justinian *Institutes* 3.13.2. For a discussion of the types of contracts that fell under these four categories see Thomas *Textbook of Roman Law* 259-309 and Van Zyl *History and Principles of Roman Private Law* 277-312.

¹³ See Gaius *Institutes* 3.92. The *dotis dictio* amounted to a formal endowment of a dowry upon a husband by his wife or father. See Buckland *A Text-book of Roman Law* 456. The *iusiurandum liberti* amounted to a promise by a freedman to render services to his *patronus*. See Buckland *A Text-book of Roman Law* 457.

¹⁴ For a discussion of the importance of the *stipulatio*, and the formalities that were required for the creation of a *stipulatio*, see Borkowski *Textbook on Roman Law* 256, 296; Thomas *Textbook of Roman Law* 259; Van Zyl *History and Principles of Roman Private Law* 283; Kaser *Römisches Privatrecht* 171.

conductio), the contract of partnership (*societas*) and the contract of mandate (*mandatum*). But by the late Republican period the real contract of deposit (*depositum*) had also been classified as a contract *bonae fidei*.¹⁵

Determining whether a particular contract was *stricti iuris* or *bonae fidei* was highly significant for cases involving *metus*, since the nature of the contract determined the nature of the action that the aggrieved party could claim for relief, if the party had any action at all, that is. First of all, the nature of the actions available in situations where a contract *stricti iuris* was induced by *metus* will be discussed. Secondly, the position with regard to contracts *bonae fidei* will be examined.

2.2.2 *Metus* and contracts *stricti iuris*

2.2.2.1 The traditional approach

Up until the first century BC, if a contract *stricti iuris* was concluded in accordance with the formalities laid down in the *ius civile*, the contract was valid and enforceable, and a complaint that one party had forced the other by threats to conclude the transaction had no effect upon the transaction at all.

“Suppose, for instance that, being coerced by duress ... you promise, in response to Titius’s demand what you had no need to promise, obviously you are bound at civil law and the action which claims that you ‘ought to give’ is operative.”¹⁶

So, during the formative and pre-classical period of Roman law, the fact that a contract *stricti iuris* was concluded as a result of *metus* was irrelevant both to the question whether the contract was valid and the question whether the contract should be enforced. The same rule applied to contracts *stricti iuris* entered into by fraud or mistake — no escape was possible.

However, as Roman society developed, and that society’s legal system became more sophisticated, the Romans of the late Republican era began to question the idea that a contract *stricti iuris* (particularly the very common *stipulatio*) could be completely valid and enforceable despite the agreement having been coerced by threats. It was in the first century BC that the idea that one should be entitled to

¹⁵ Kaser *Römisches Privatrecht* 142. He states further that there is controversy as to whether the real contract of loan (*commodatum*) was classified as a *bona fide* contract in the classical period. Van Zyl *History and Principles of Roman Private Law* 279 alleges it was, citing Justinian *Institutes* 4.6.28 as authority.

¹⁶ Justinian *Institutes* 4.13.1 (Thomas’s translation). See too Zimmermann *The Law of Obligations* 653; Thomas *Textbook of Roman Law* 228; Van Warmelo *An Introduction to the Principles of Roman Civil Law* 261; Van Oven “Opmerkingen over de Zoogenaamde Wilsgebreken in het Romeinsche Recht” (1938) 2 *THRHR* 14 at 19.

institute legal proceedings to nullify obligations *stricti iuris* induced by force or fear, or to raise *metus* as a defence to an action for performance, took seed and began to germinate. Legal innovations are often inspired by socio-political circumstances, and the developments in this particular area of the law were no different.

2.2.2.2 The socio-political situation in the latter part of the Republican period

The first century BC was a time of constant social and political upheaval in Rome. Violence, it appears, became a way of life: historical accounts of the time chronicle gangs being employed to patrol the streets and intimidate political opponents, high ranking officials being lynched, legal trials and elections constantly being marred by acts of brutality, and the ordinary citizens, both in Rome and the provinces being exploited by the ruling elite. For example, Cicero illustrates in graphic detail how Verres and his henchman Apronius forced the farmers of Sicily to hand over their corn crop by threats of criminal prosecution and flogging.¹⁷ Zimmermann¹⁸ lists several startling examples of the anarchy that came to grip the Republic after the reforms of the Gracchi; examples drawn mainly from Lintott's book *Violence in Republican Rome*, which provides detailed evidence of how the turbulent nature of social and political life was a leading factor in the downfall of the Roman Republic. Having reviewed these historical events, Lintott states:¹⁹

“The Romans of the Republic seem genuinely to have considered it an essential constituent of *libertas* that a man should be allowed to use force in his personal interest to secure what he believed to be his due.”

In particular, the period between 90 and 80 BC was a time of fierce civil war in Italy: a period dominated by L. Cornelius Sulla Felix (more commonly known as Sulla) — renowned army general, eventual winner of the civil war, and self-proclaimed dictator of the Roman Republic. Perhaps the event for which Sulla was most notorious was his proscriptions, whereby supporters of the opposing Marian faction were listed upon public noticeboards as “outlaws”, and prices were put on their heads. Thousands of people were killed in this Stalinesque purge.²⁰ Sulla also took the step of emancipating

¹⁷ *In Verrem Oratio* 2.2.30.71. Gaius Verres had been propraetor in Sicily from 73 to 71 BC, and during his period of office had plundered the province mercilessly for his own gain. Cicero was appointed by the Sicilians to lead the case for the prosecution of Verres on charges of extortion. See Cary and Scullard *A History of Rome* 243; Jashemski *The Origins and History of the Proconsular and Propraetorian Imperium to 27BC* 117.

¹⁸ *The Law of Obligations* 651-2.

¹⁹ *Violence in Republican Rome* 204.

²⁰ See Cary and Scullard *A History of Rome* 234.

about 10 000 of the proscribed men's slaves and recruiting them as his private army, known as the *Cornelii*. Many of these men, freed from the shackles of slavery, and intoxicated by their new powers, went rampaging across the countryside, forcing innocent people to give up their land and robbing these people of their possessions.²¹

Once Sulla's dictatorship ended,²² it appears that the new leaders of Rome took a policy decision to treat any lawless and extortionate behaviour in a very serious light, particularly in the context of the anarchy and depredations of the civil war period and its aftermath. In the four years after Sulla's departure, some important legal developments were implemented to arrest the anarchy that had become a way of life in Rome. In the criminal context, there were two important innovations. First, there was the *lex Cornelia repetundarum*, which could be used to prosecute provincial governors allegedly guilty of extortion.²³ Secondly, the *actio vi bonorum raptorum* was introduced in 76 BC, which was designed to punish robbery, or theft with violence.²⁴ Thirdly, there was the *lex Julia de vi privata*, which was designed to punish people taking the law into their own hands and forcing debts out of debtors by criminal means.²⁵ But how did the Romans come to deal with intimidation in the private law context?

2.2.2.3 The *formula Octaviana*

It would come as no surprise, considering the socio-political background outlined above, that individuals were frequently forced to part with property or money, or to enter into agreements, as a result of intimidation. We have already seen that the *ius civile* provided no relief for the victims of such intimidatory tactics, particularly in the context of obligations *stricti iuris*. But because the use of such tactics had become so prevalent, and had created something of a social dilemma, it was left to the great Roman legal innovators, the praetors, to address the problem and to provide some form of relief for those who had been compelled to enter into legal transactions.²⁶ It was just after the Sullan dictatorship came to an end that a *formula Octaviana* was introduced — named after the praetor who was responsible for the innovation. The *formula Octaviana* allowed a person coerced into concluding a

²¹ Kelly *Roman Litigation* 16.

²² Sulla resigned from all public office in 79BC, and died a year later. See Cary and Scullard *A History of Rome* 237.

²³ Poste *Gai Institutiones Iuris Civilis* 416-7.

²⁴ Justinian *Institutes* 4.2; Thomas *A Textbook of Roman Law* 360; Hartkamp *Zwang* 251, 307.

²⁵ See *D* 48.7.8 and Hartkamp *Zwang* 43. Cf the *decretum divi Marci* *D* 4.2.13.

²⁶ For an analysis of the reforming role of the praetor in Roman law, and particularly their role in developing the formulary process, see Jolowicz and Nicholas *Historical Introduction to the Study of Roman Law* 199ff; Cecil Turner *Introduction to the Study of Roman Private Law* 34ff.

contract *stricti iuris* by threats to have an action against his oppressor. The *formula Octaviana* provided the foundations²⁷ for the classical Roman remedies for *metus* that will be discussed below.

The earliest reference to the *formula Octaviana* may be found in Cicero's *In Verrem Oratio*.²⁸

"Apronius was brought before him; his accuser was a man of the highest consideration, Gaius Gallus, a senator. He demanded of Metellus to give him a right of action according to the terms of his edict against Apronius, 'for having taken away property by force or by fear', which formula of Octavius Metellus had both adopted at Rome, and now imported into the province."

There are several other passages in the works of Cicero that make reference to the *formula Octaviana*.²⁹

There is some debate about the Octavius whom Cicero identifies as having introduced the *formula* into the edict.³⁰ It is likely that the *formula Octaviana* was introduced somewhere around 80 BC,³¹ since two members of the *gens Octavia* held public office around that time. First, there was Gnaeus Octavius, who was consul in 76 BC, and who (in terms of a *lex Cornelia* concerning time periods for promotion up the *cursus honorum*) would have been praetor in 79 BC.³² Secondly, there was Lucius Octavius, who was consul in 75 BC, proconsul in 74 BC, and praetor in 78 BC.³³ Most authorities

²⁷ Hartkamp *Zwang* 4-5.

²⁸ 2.3.65.152 (Younge's translation). The speech was delivered in 70BC. See too 2.3.61.143.

²⁹ In *de Officiis* 1.10.32, Cicero said: "[W]ho fails to see that those promises are not binding which are extorted by intimidation or which we make when misled by false pretences. Such obligations are annulled in most cases by the praetor's edict in equity, and in some cases by the laws." See too *de Officiis* 3.24.92; 3.28.103; 3.30.110; *pro Flacco* 21.49; *ad Quintum Fratrem* 1.1.21; *pro Roscio Amerino* 145. For a philosophical discussion of the question of *metus*, see *Tusculanarum Disputationum* 4.6.11; 4.30.64.

³⁰ Jolowicz and Nicholas *Historical Introduction to the Study of Roman Law* 278n6 state that it is "uncertain" which Octavius introduced the *formula*. The main problem is that the *gens Octavia* supplied over twenty men who were magistrates of one sort or another from the 3rd century BC to the end of the Republic, and there is no mention in the Verrine Orations of this particular Octavius's *praenomen*, which would help isolate the relevant individual. It is certain that the Metellus referred to was in fact L Caecilius Metellus, praetor in 71 BC, and propraeor in Sicily in 70 BC as successor to the infamous Verres. See Broughton *The Magistrates of the Roman Republic* 122, 128. I would like to thank Mr John Jackson of the Classics Department at Rhodes University for his assistance in bringing this source to light.

³¹ See Olivier "Onregmatige Vreesaanjaging" (1965) 28 *THRHR* 187; Schulz *Classical Roman Law* 600; Jolowicz and Nicholas *Historical Introduction to the Study of Roman Law* 278; Zimmermann *The Law of Obligations* 653.

³² Broughton *The Magistrates of the Roman Republic* 83.

³³ Broughton *The Magistrates of the Roman Republic* 86; Jashemski *The Origins and History of the Proconsular and Propraeorian Imperium* 147.

argue that the introduction of the *formula Octaviana* should be attributed to Gnaeus Octavius.³⁴

The introduction of the *formula Octaviana* marked the point at which the Roman legal system came to recognise, as a matter of principle, that a contract *stricti iuris* induced by coercion could be impeached. The *formula* took its place in the praetorian edict, and by the time of the creation of the Perpetual Edict in Hadrian's time, had become a permanent feature of that edict.³⁵ Like all special *formulae*, an aggrieved party who wanted to raise the question of *metus* in a dispute concerning a contract *stricti iuris* would have to petition the praetor to have the matter specifically inserted into the formulation of the case that went before the *iudex*. In the absence of an express direction to this end, the *iudex* would have been bound to decide the case under the strict rules of the *ius civile*.

According to Roman procedure, the *formula* constituted the written exposition of the claim (or cause of action) that was drafted according to specific guidelines by the *praetor in iure*, and which crystallised the issues to be investigated and pronounced upon by the *iudex* during the hearing *apud iudicem*. The cause of action which supported an argument for the inclusion of the relevant *formula* was known as an *actio*. In circumstances where a litigant sought to bring an action on the grounds that a contract *stricti iuris* had been coerced by *metus*, the relevant action was known as the *actio quod metus causa*. It was classified as an *actio in factum*, since it derived its origin from the praetorian edict.³⁶

2.2.2.4 The *actio quod metus causa*

³⁴ Both Broughton *The Magistrates of the Roman Republic* 86 and the commentary in the Loeb Classical Library translation of the speeches against Verres suggest that Lucius Octavius was the person responsible for introducing the *formula*. Yet Sallust describes Lucius Octavius as “a tired man, not wanting to be bothered” — not a description one would associate with a vibrant legal innovator. On the other hand, Kelly *Roman Litigation* 15n3 suggests that Gnaeus Octavius is more likely to have been the creator of the *formula*. He was a friend of Cicero, and was described as “an excellent and amiable man”. See Cicero *De Finibus* 2.28.93. Sallust *Hist* 2.26 described him as “mitis”, meaning “gentle”. Kelly also points out that Gnaeus Octavius suffered from acute arthritis, and suggests tentatively that enduring this debilitating physical condition may have provided the inspiration for Gnaeus Octavius to use his powers to provide a method of relief for those people who had been the victims of intimidation. Hartkamp *Zwang* 247 also submits that Gnaeus Octavius was most likely the author of the *formula*, and cites an eminent array of continental jurists who have reached the same conclusion. This is significant. Van Zyl “Der Zwang im Römischen Privatrecht” (1972) 35 *THRHR* 311 at 313 describes the work as “the authoritative work on duress and related topics in the Roman law”. This is my translation of the original Afrikaans “die gesaghebbende werk oor dwang en aanverwante onderwerpe in die Romeinse reg”. Poste *Gai Institutiones Iuris Civilis* 417 suggests that Cicero was actually referring to the Octavius who was the father of the first emperor of Rome: Augustus. With respect, this is impossible. It is quite clear that the *formula* had been introduced before 70 BC — the year in which Cicero delivered his speeches against Verres. Augustus's father (Gaius Octavius) was only elected to the praetorship in 61 BC, nine years later. See Shuckburgh *Augustus: The Life and Times of the Founder of the Roman Empire* 1,2. From a purely chronological point of view, Cicero could not have been referring to Gaius Octavius.

³⁵ Schulz *Classical Roman Law* 601.

³⁶ Thomas *Textbook of Roman Law* 83.

2.2.2.4.1 The name of the action

The precise name of this action is a matter of modern debate. Schulz³⁷ suggests that the classical Roman lawyers probably stuck closely to the *formula*, and called it the *actio de eo quod vi metusve causa factum est*. He then goes on to say that by the time of the Byzantine era and the reign of Justinian, it had become known as the *actio metus causa*, although he provides no authority for this. Lee³⁸ and Borkowski³⁹ both refer to the *actio metus* with Lee stating (again without giving any reasons or authority) that the action is “commonly, but incorrectly called the *actio quod metus causa*”. Yet the overwhelming number of expert Roman law writers tacitly disagree with these two schools of thought, preferring to call the action the *actio quod metus causa*.⁴⁰ In this work the action will be called the *actio quod metus causa* for consistency’s sake.

2.2.2.4.2 The characteristics of the *actio quod metus causa*

The *actio quod metus causa* could be brought by a plaintiff who had been coerced into a contract *stricti iuris* by *metus*, and who had been forced to perform in some way in terms of the contract. The *actio quod metus causa* had seven important characteristics, a number of which are apparent from the *formula* reconstructed by Lenel.⁴¹

First, a successful action would entail the rescission of the contract by the *iudex*. Although this was a natural consequence of a successful action, the Romans did not consider this to be a significant legal issue, but rather a matter of common sense.⁴² The impeachment of the contract was merely a preliminary step to the more important legal remedies that were identified specifically in the *formula*.

Secondly, and far more significantly, the *formula* also made provision for an extra punitive measure, or penal element to be made against the defendant, and which was to be bestowed upon the

³⁷ *Classical Roman Law* 601.

³⁸ *The Elements of Roman Law* 344.

³⁹ *A Textbook on Roman Law* 354.

⁴⁰ See Zimmermann *The Law of Obligations* 654; Hartkamp *Zwang* 2; Van Huyssteen *Onbehoorlike Beïnvloeding* 13; Kaser *Römisches Privatrecht* 59; Leage *Roman Private Law* 380; Van Warmelo *An Introduction to the Principles of Roman Civil Law* 226; Buckland *A Text-book of Roman Law* 593 and *Manual of Roman Private Law* 329; Kelly *Roman Litigation* 15; Watson *The Law of Obligations in the Later Roman Republic* 257.

⁴¹ Lenel *Das Edictum Perpetuum* 112 provides a Latin reconstruction of how this *formula* would probably have been composed: “Si paret metus causa Aulum Agerium fundum illum Numerio Negidio mancipio dedisse neque ea res arbitrio tuo restituatur neque plus quam annus est cum experiundi potestas fuit, quanti ea res erit, tantae pecuniae quadruplum iudex Numerium Negidium Aulo Agerio condemnatio: Si non paret absolvito.”

⁴² See on this point O’Brien *Restitutio in Integrum* 16.

plaintiff. If the action was brought within a year, the *formula* enjoined the *iudex* to order that a sum amounting to four times the value that had originally been handed over be paid by the defendant.⁴³ This in effect amounted to restitution of the original amount handed over, plus an additional penalty of three times that amount.⁴⁴ But there was a time limit to this sort of penalty: if the action was brought after a year had passed since the contract had been concluded, liability was limited only to the restoration of the performance that had originally been made, and this remedy could be claimed only if the plaintiff had good cause to bring the action after such a long time: for example, if the plaintiff had no other remedy at his or her disposal.⁴⁵

But the third interesting characteristic of the action was that although the action could involve a penal element, in practice this penalty was never automatic, nor was it very commonly awarded. In fact, the action was also *arbitraria*, meaning that the judge would always order simple restitution first, and the defendant would be able to escape the payment of the penalty simply by restoring the money or property which had been acquired as a result of *metus*. Only if the defendant failed to comply with this preliminary order would the defendant be brought back before the *iudex* and condemned to pay the penal damages.⁴⁶ This penal character has led to some characterising the *actio quod metus causa* as a praetorian delictual action,⁴⁷ although this is probably not strictly accurate.⁴⁸ Although the effect of the *actio quod metus causa* could be to penalise the defendant financially for his or her conduct, in practice the true aim of the action was restitutionary.⁴⁹

⁴³ See D 4.2.14.1; 4.2.14.9; 4.2.14.14; Zimmermann *The Law of Obligations* 655; Borkowski *Textbook on Roman Law* 354.

⁴⁴ See D 4.2.14.10; Zimmermann *The Law of Obligations* 655n34; Hartkamp *Zwang* 285. The plaintiff would have to have shown that he or she had rendered some performance in terms of the contract, whether it had been in the payment of money or the transfer of property. See D 4.2.12.2; 4.2.14.pr, and particularly 4.2.14.14 (Watson's edition), which states: "Julian says that only the extent of a person's interest is quadrupled, and therefore, where someone who owed forty under a *fideicommissum* was forced to promise three hundred and paid this amount, he will recover four times two hundred sixty; for it was this amount that the force to which he was subjected took effect."

⁴⁵ See D 4.2.14.1; Zimmermann *The Law of Obligations* 355n34; Borkowski *Textbook on Roman Law* 354; Poste *Gai Institutiones Iuris Civilis* 576.

⁴⁶ D 4.2.14.1; 4.2.14.3-4; Justinian *Institutes* 4.6.31; Zimmermann *The Law of Obligations* 655; Buckland *A Text-book of Roman Law* 593; Thomas *Textbook of Roman Law* 374; Leage *Roman Private Law* 380.

⁴⁷ See Thomas *Textbook of Roman Law* 373; Borkowski *Textbook on Roman Law* 353; Van Zyl *History and Principles of Roman Private Law* 348.

⁴⁸ Cf Du Plessis "Fraud, duress and unjustified enrichment: a civil law perspective" in Johnston and Zimmerman (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 196 at 221.

⁴⁹ O'Brien *Restitutio in Integrum* 16; Zimmermann *The Law of Obligations* 656.

The fourth characteristic of the action (certainly by the time of Justinian)⁵⁰ was that it was an *actio in rem scripta*; that is, it was general or impersonal, and could be invoked not only against the intimidator, but also against anyone (even a *bona fide* third party) who had benefited from the transaction which had been inspired by *metus*.

“In this action, no inquiry is made as to whether it was the defendant who used duress or someone else. For it suffices that the plaintiff shows that duress or force was brought to bear on him and that the person sued on account of the affair has made a gain although he has committed no offence.”⁵¹

The fifth important characteristic of the action was that it was not infaming.⁵² *Infamia* involved an order reducing a person’s status from that person’s accustomed class to a lower social class, accompanied by the attendant legal disabilities. In this respect, the *actio quod metus causa* was different to the *actio doli*, which was infaming.⁵³ Kelly submits convincingly that the reason why the action was not infaming was due to the historical context out of which the action developed, it being aimed principally at reversing the depredations of Sulla’s cohorts.⁵⁴

“No doubt Octavius did not think of attaching *infamia* to condemnation because he was dealing with a class of defendant belonging to the lowest order of freedom, who had no civic honour to lose.”

Sixthly, the action could be instituted by the heirs of the plaintiff, but could not be instituted against the heirs of the defendant, unless they had been enriched in some way.⁵⁵ Finally, if a number of persons

⁵⁰ There is some polemic about whether this was indeed the position in classical times. Some believe that this only became the position at the time of Justinian, and that in classical times, the action was a personal action which enured against the intimidator alone. See on this point Schulz *Classical Roman Law* 601; Buckland *A Text-book of Roman Law* 593n9.

⁵¹ *D* 4.2.14.3 (Watson’s edition). See too *D* 4.2.9.1; 4.2.9.8; 4.2.14.5; Hartkamp *Zwang* 201. It is interesting to note what the Elder Seneca had to say in *Controversiae* 9.3.9: “The law is not angry with the man applying the force; it merely comes to the aid of one who has suffered by it.... It makes no odds, I repeat, who caused him to be forced; for what is annulled is made unfair by the fortunes of the man who suffered, not the person of the agent.”

⁵² Zimmermann *The Law of Obligations* 655; Hartkamp *Zwang* 245, 274; Buckland *A Text-book of Roman Law* 593; Schulz *Classical Roman Law* 602. For a detailed examination of the concept of *infamia* in Roman Law, see Greenidge *Infamia in Roman Law*.

⁵³ See *D* 4.3.1.4; 4.3.11.1.

⁵⁴ Kelly *Roman Litigation* 16.

⁵⁵ *D* 4.2.19; Leage *Roman Private Law* 380; Thomas *Textbook of Roman Law* 374.

were responsible for the act of intimidation, they were jointly and severally liable under the action.⁵⁶

These characteristics present “a puzzling mixture of mildness and rigidity”,⁵⁷ suggests Zimmermann. One could not agree more. On one hand, a defendant could suffer the most severe penalty of four times the value of the performance that had been received; on the other hand, by giving restitution, the defendant could quite literally get off scot free, without further penalty or lowering of status. This may have been so because policy dictated that such behaviour was unacceptable — a message to this effect needed to be articulated, and backed up with a heavy sanction; but a lesser sanction needed to be available to protect those *bona fide* third parties who might face an action based on *metus*. Those guilty of blatant intimidation were fortunate to have the opportunity to benefit from the resultant compromise.

2.2.2.5 The *exceptio metus*

An aggrieved party who had been induced into an agreement by *metus* did not have to seek an action as a plaintiff in Roman law. The aggrieved party could also wait until the other party attempted to enforce the agreement, and raise a defence that the contract had been coerced. This defence was known as the *exceptio metus*,⁵⁸ and if successful, allowed the defendant to avoid performance of the obligation. Just like the *actio quod metus causa*, if the agreement induced by *metus* was *stricti iuris* in form, the defendant would have to seek an *exceptio metus* expressly from the praetor *in iure*, otherwise the defendant would have had no defence under the *ius civile*. It is not known exactly when the *exceptio metus* was introduced into the law,⁵⁹ but it was probably of late Republican origin, since it is referred to in the writings of Cicero.⁶⁰ Like the *actio quod metus causa*, the *exceptio* was *in rem scripta*. In other words, the defence could be raised against any plaintiff, whether or not the plaintiff was the person who had made the threats, or some *bona fide* third party who was to benefit from the transaction.⁶¹

2.2.2.6 An order of *restitutio in integrum*?

⁵⁶ See *D* 4.2.14.15.

⁵⁷ Zimmermann *The Law of Obligations* 655.

⁵⁸ See Justinian *Institutes* 4.13.1; *D* 44.4.4.33; Gaius *Institutes* 4.11.7 and 4.12.1; *C* 8.36.9.

⁵⁹ On the controversy surrounding this point see Hartkamp *Zwang* 270; Watson *The Law of Obligations in the Later Roman Republic* 257-8.

⁶⁰ *ad Quintum Fratrem* 1.10.32. The *exceptio* is also referred to in the work of Pliny *Epistulae* 3.9.

⁶¹ *D* 44.4.4.33; Zimmermann *The Law of Obligations* 657-8; Schulz *Classical Roman Law* 603; Van Warmelo *An Introduction to the Principles of Roman Civil Law* 261.

The nature and function of *restitutio in integrum* in Roman law remains a matter of some mystery, and therefore, debate. *Restitutio in integrum* is traditionally viewed as an order that entitled the aggrieved party, on good cause shown, be restored to the original position he or she would have been in had the contract never been entered into. The agreement was declared void, and any performance which had been made had to be returned by both parties.⁶² The *restitutio in integrum* was, according to this view, an extraordinary remedy in that it was granted by the praetor by that official exercising his *imperium*, rather than by him exercising his ordinary judicial *iurisdictio*. This was necessary because the order involved the nullification of rights under the *ius civile*, rather than the simple enforcement of rights and duties. A *restitutio in integrum* could only be claimed where the transaction was one *stricti iuris* — the power to grant a similar type of order was inherent in *iudiciae bonae fidei*.

The relationship between the order of *restitutio in integrum* and the *actio quod metus causa* has been a matter of extensive scholarly debate.⁶³ In the light of the orthodox view of the *restitutio in integrum* described above, it has commonly been thought that an order of *restitutio in integrum* was the second distinct type of remedy available to a victim of *metus* where the contract was one *stricti iuris*.⁶⁴ Those who support this view rely in particular on a statement by Ulpian that “if anyone, compelled by force, does something, he may obtain *restitutio* through this edict”,⁶⁵ as well as the way in which book four of the *Digest* is compiled: there are separate sections for topics such as *metus* and *dolus* following a general title on *restitutio in integrum*. According to this approach, the *actio quod metus causa* was a purely penal delictual action, and the *restitutio in integrum* was the restitutionary action — the two served different purposes.

If one were to accept the view that the *restitutio in integrum* may have existed in early Roman law, this view presents some difficulties. It seems unlikely that the self-standing *restitutio in integrum* would have remained in existence by the time of Justinian’s codification. This is so for two reasons. First, as time passed, contracts *bonae fidei* became far more popular and prevalent, and in turn contracts *stricti iuris* naturally became less popular. As a result, the practical scope for the implementation of an order of *restitutio in integrum* would have receded, since the order could only be implemented in cases where the contract was *stricti iuris*. Secondly, as I have already mentioned, according to the traditional view the order could only be granted by the praetor exercising his *imperium*. As time passed, and the edict

⁶² See in general *D* 4.1; O’Brien *Restitutio in Integrum* 8-9; Lambiris *Restitutio in Integrum* 183ff; Thomas *Textbook of Roman Law* 113-4.

⁶³ See O’Brien *Restitutio in Integrum* 11n37 for a full list of those scholars who have participated in the debate.

⁶⁴ See Van Zyl *History and Principles of Roman Private Law* 349; Thomas *Textbook of Roman Law* 113 and 373; Schulz *Classical Roman Law* 600; Lenel *Das Edictum Perpetuum* 110; Hartkamp *Zwang* 189ff.

⁶⁵ *D* 4.2.3.pr (Watson’s edition). See too *D* 4.1.1.

became concretised, the praetors became less and less involved in the day-to-day administration of justice, leaving this task to the *iudex*. The *iudex* only had powers of *iurisdictio* and not *imperium*, and so would not have been entitled to grant an order of *restitutio in integrum*.⁶⁶ By as early as the third century AD the formulary procedure was no longer in use, and the proceedings *in iure* before the praetor no longer occurred.⁶⁷ Since the *restitutio in integrum* as a self-standing order would have been intimately connected with the praetor, its continued existence must be questionable. This view is supported by the Dutch Pandectist Goudsmit, who states:⁶⁸

“And as a result of the changes in procedure and the role of judges, the difference between the ordinary legal actions and the *in integrum restitutio* must have progressively disappeared, and indeed before the time of Justinian there was no longer a reason for the existence of the *in integrum restitutio*.”

In recent times certain eminent jurists have challenged the orthodox view, and have argued convincingly that the order of *restitutio in integrum*, viewed as a self-standing remedy, may not have existed at all, or at the very least was not relevant in cases of *metus*. This view was first proposed by Kupisch,⁶⁹ and has been adopted by Kaser,⁷⁰ Zimmermann,⁷¹ Du Plessis⁷² and O’Brien.⁷³ According to this view, the *actio quod metus causa* and order of *restitutio in integrum* were not two distinct remedies at all. Rather, in cases where a contract *stricti iuris* was coerced by *metus* there was only one relevant action — the *actio quod metus causa*. Although the *actio quod metus causa* did contain a penalising element, it has already been shown that in practice this penalty was seldom imposed, and was not the main rationale

⁶⁶ Kaser “Zur *in integrum restitutio*, besonder wegen *metus* und *dolus*” 1977 ZSS 101 at 107; O’Brien *Restitutio in Integrum* 12.

⁶⁷ Van Zyl *History and Principles of Roman Private Law* 384 states that the formulary procedure had ceased to be used by the time of Diocletian (284-305AD), and was officially abolished and replaced by the *cognitio* procedure in the 4th century. Disputes were decided at one formal hearing, usually by a trained jurist.

⁶⁸ Goudsmit *Pandecten-Systeem* §109. This is my translation of the original Dutch: “En ten gevolge van der veranderde procesorde en die gewijzigde taak des rechters, moest de verschil tussen de gewone rechtsmiddelen en de i.r.r. meer en meer verdwynen, en had zij inderdaad voor het Justinianeische recht geen reden van bestaan meer.”

⁶⁹ Berthold Kupisch *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen recht* 123ff. The original source was unavailable to me.

⁷⁰ “Zur *in integrum restitutio*, besonder wegen *metus* und *dolus*” 1977 ZSS 101. At 110 Kaser describes Kupisch’s conceptual breakthrough as revolutionary.

⁷¹ *The Law of Obligations* 656-7.

⁷² *Compulsion and Restitution* 15.

⁷³ *Restitutio in Integrum* 13-17.

of the action. Rather, restitution was its main priority, which is why the *iudex* would always order restitution first, and only impose a penalty as a last resort if the defendant did not comply with that order. In this sense, the *actio quod metus causa* was the legal mechanism implemented to obtain (in a terminological sense) *restitutio in integrum*. This being the case, it would be unnecessary and inappropriate for a plaintiff, to seek an extraordinary order of *restitutio in integrum* in cases where *metus* was relevant. These views are convincing, and it is my view that *restitutio in integrum* did not exist as a remedy in such cases.

2.2.3 *Metus* and contracts *bonae fidei*

2.2.3.1 An action on account of *metus*

In situations where a contract *bonae fidei* had been entered into because of *metus*, an aggrieved party who had performed in terms of that contract was entitled to seek an action against the aggressor. This had been the position since the Romans began to recognise the class of contracts *bonae fidei*. In such cases there was no need for the praetorian reform that was necessary with regard to contracts *stricti iuris*. In fact, it is likely that the availability of an action for *metus* where the contract was one of good faith may have provided the legal inspiration for the introduction of the *actio quod metus causa* in the late Republican period, to alleviate the problem faced by those coerced into a *stricti iuris* contract in the pre-classical period.

The nature of an action on account of *metus* where a contract *bonae fidei* was concerned was different to that where the contract was *stricti iuris*. In such cases the *actio quod metus causa* was not the appropriate action, since that was a special action that had to be sought from the praetor where the contract was *stricti iuris*, and where the question of *metus* would otherwise have been irrelevant. Since such contracts were predicated upon the existence of good faith, rather than formality, matters like fraud, duress and mistake could automatically be taken into account when adjudicating the case, and a remedy granted to an aggrieved party: there was no need for the issue expressly to be raised or inserted in the *formula*, since the generic *formula* allowed such issues to be adjudicated upon as a matter of course.⁷⁴ *Metus* (like *dolus*) was undoubtedly a violation of the good faith that was supposed to exist between contracting parties, and provided grounds for an action.⁷⁵ Where a plaintiff sought restitution by way of action, the plaintiff would usually institute the generic action relevant to the particular *bonae*

⁷⁴ See D 24.3.21; Zimmermann *The Law of Obligations* 663; O'Brien *Restitutio in Integrum* 10.

⁷⁵ Thomas *Textbook of Roman Law* 228 states: “[T]he consensual and later real contracts were enforced by *bonae fidei* actions and the expression *ex fide bona* in the *intentio* of the relevant contractual action would enable the aggrieved party to seek redress for, or, as a defendant, to establish the fraud or duress to which he had been subjected.” See too Kaser *Römisches Privatrecht* 142-3.

fidei contract he or she had concluded.⁷⁶ For example, where a contract of purchase and sale had been concluded due to *metus*, the plaintiff would institute an *actio empti*.⁷⁷

2.2.3.2 A defence of *metus*

In situations where the person coerced into a contract *bonae fidei* by *metus* was sued for performance, the *bona fide* nature of the contract meant that *metus* could automatically be raised as a defence. It was not necessary for the defendant to seek a specific *exceptio* from the praetor that would have to be inserted in the *formula*. The *iudex* had the inherent power to refuse to entertain the plaintiff's case on the ground of *metus*, since this sort of behaviour violated the precepts of good faith.⁷⁸

2.2.4 The likely elements of a cause of action

Up to this point I have focussed my enquiry mainly on the nature and classification of the contract affected by *metus*, and the consequences this had for the nature of the procedural action and the ultimate remedy available to the aggrieved party. I have done so because the Romans were far more concerned with the classification of actions, and the remedies that were attached umbilically to those actions, than we are in South Africa today. Today, the legal system is geared more towards trying to understand and articulate the substantive principles that determine the rights and duties of individuals than to the rigid classification of actions. Therefore, perhaps the most important question that needs to be asked of the Roman sources is: what substantive elements would have to be proved in order for a person to claim that he or she was entitled to an action on account of *metus*? For it is in this regard that the principles developed in Roman law are so important to the law of duress as it applies in South Africa today. It is necessary to turn to the passages on *metus* contained in the *Corpus Iuris Civilis* for guidance on this point. As stated earlier, this question is not easy to answer, since the relevant texts are not neatly systematised, and the Romans never explicitly articulated a list of elements which, if established by evidence, would amount to *metus*, and would constitute grounds for instituting an action or raising a defence. Furthermore, the construction of the *formula Octaviana* tells us little or nothing about the

⁷⁶ O'Brien *Restitutio in Integrum* 10; "Restitutio in integrum by onbehoorlik verkreeë wilsooreenstemming" 1999 TSAR 646 at 647.

⁷⁷ At D 19.1.1.1 (Watson's edition) Ulpian states that "anything done contrary to good faith comes under the action on purchase".

⁷⁸ D 24.3.21; Kaser *Römisches Privatrecht* 143; Zimmermann *The Law of Obligations* 658; Van Zyl *History and Principles of Roman Private Law* 351n401.

substantive requirements that would have to be proved before an action based upon *metus* would succeed. But it does appear that there were certain important general elements which would have had to be satisfied before a transaction could successfully be reversed on grounds of *metus* — even if these have to be extracted from the sources by a process of careful interpretation, rather than merely quoted from a succinct list. These elements would in all likelihood have been common to any action based on *metus*, whether it was an *actio quod metus causa* instituted on the basis of a contract *stricti iuris*, or an action in good faith where the contract was one *bonae fidei*.

2.2.4.1 Fear caused by a threat of harm

It is evident from the words of Cicero that the *formula Octaviana* originally gave a remedy *quae per vim aut metum abstulerant*. Literally, this would refer to what had been taken away by physical application of force (*vis*) or fear (*metus*). Yet the reference to *vis* came to be dropped in time:⁷⁹

“At one time the words of the edict were: ‘what has been done through force or under duress’. For mention was made of force because of the compulsion brought to oppress the will, whereas duress expressed the alarm of a mind brought about through present or future danger. But the mention of force was later omitted.”

The main reason for this was probably that the remedies for *metus* were designed only for cases of what the Romans called *vis compulsiva* — where someone had inspired fear in the mind of his victim by means of threats, and not for cases of physical violence (*vis absoluta*).⁸⁰ Cases concerning the application of physical force (*vis absoluta*) fell to be decided in terms of the *actio vi bonorum raptorum*.⁸¹ But the original term *vim metumque* does provide some important clues about a key element of an action based on *metus*. Both Schulz⁸² and Van Huyssteen⁸³ suggest that the words *vim metumque* should not be understood to have had exclusive and independent meanings, but should rather be construed as a hendiadys, expressing the idea of “fear caused by a threat”.⁸⁴ Merely acting due to a

⁷⁹ D 4.2.1 (Watson’s edition).

⁸⁰ Hartkamp *Zwang* 6-11, 296.

⁸¹ Schulz *Classical Roman Law* 601; Hartkamp *Zwang* 11.

⁸² *Classical Roman Law* 600ff.

⁸³ *Onbehoorlike Beïnvloeding* 10-11.

⁸⁴ A hendiadys is defined to be the grammatical technique of expressing one idea by using two words connected with “and”. The debate concerning the congruence or otherwise of the terms *vis* and *metus* is reviewed in Du Plessis *Compulsion and Restitution* 7-9.

personally perceived fear of possible consequences was not enough; the fear had to have been induced by a threat which had been made by the other party: a causal connection between the threat and the resultant fear was critical.⁸⁵

2.2.4.1.1 *Metus reverentialis*

Metus reverentialis may be defined as fear arising from the respect or awe persons may feel for someone who occupies a position of authority over them.⁸⁶ It is evident from the bulk of authority that *metus reverentialis* was not a good ground for avoiding a contract in Roman law.⁸⁷ This makes sense when one remembers the general rule that mere fear without the presence of a threat of some kind did not constitute actionable *metus*. The few isolated texts which could provide evidence that *metus reverentialis* was a good ground for avoiding an agreement have been shown to be vague and inconclusive, and do not derogate from the general Roman legal position.⁸⁸

2.2.4.2 The threat must be *contra bonos mores*

⁸⁵ See *D* 4.2.9.pr (Watson's edition): "For he [Pomponius] says that fear is to be understood as having been inspired, that is, where dread has been inspired by someone." In *D* 4.2.9.1 (Watson's edition), it is stated: "[I]f, the more readily to protect or free you from the force of the enemy or robbers or a mob, I have accepted something from you or placed you under an obligation, I ought not to be liable under this edict, unless I myself subjected you to this force. But if I have nothing to do with the force, I ought not to be liable since I am rather held to have accepted a reward for my services." See too *D* 4.2.21.pr; *D* 4.2.23.pr; *C* 2.19(20).6.

⁸⁶ For example, a son's fear for a father; a wife's fear for a husband. For an exhaustive analysis of the concept of *metus reverentialis*, see Scholtens "Undue Influence" 1960 *Acta Juridica* 276, and Van Huyssteen *Onbehoorlike Beïnvloeding* 11-12.

⁸⁷ In *C* 2.19(20).6, it is stated that one could not escape the terms of a contract merely by demonstrating that the other party had senatorial rank. In *D* 2.9.6.3 and *C* 6.34.3 a husband who induces his wife to leave her property to him in her will (provided he does not do so by using force in the narrow sense of the term *metus*) does not act wrongly. See too Scholtens "Undue Influence" 1960 *Acta Juridica* 276 at 277; Van Huyssteen *Onbehoorlike Beïnvloeding* 11-12.

⁸⁸ In *C* 2.19(20).11 the Emperor Constantine decreed that a sale induced by the "influence" of a minor public official would be subject to restitution. The word "influence" (*impressio*) is vague, and could conceivably have involved some form of threat. It has been suggested that this passage is indicative of a relaxation of the requirement of a causal connection between threat and fear in post-classical Roman law (Hartkamp *Zwang* 72; Van Huyssteen *Onbehoorlike Beïnvloeding* 12), but the learned authors suggest that this would only have applied to contracts between officials and citizens, and not generally. Furthermore, the classical requirement of a causal connection between the threat and the fear was revived by Justinian, which would effectively have overturned this relaxation. *D* 44.5.1.5 and 6 do suggest that it may be possible where a freed slave enters into an agreement with his patron "through excessive reverence" the agreement may be unacceptable, but the passage does say "the position is doubtful", and is thus slightly contradictory. Other texts occasionally cited in this regard, like *D* 23.2.22; *D* 29.2.6.7 and *D* 18.1.46 do not provide authority for the proposition that *metus reverentialis* was actionable *metus* at all.

There has been some debate about what the Romans considered to be the true theoretical basis for an action based on *metus*. Was it because of the unlawful or illegitimate nature of the threat which had inspired the conclusion of the agreement? Or, was it because the act of duress suppressed the essential contractual element of consensus, rendering the purported agreement involuntary? Evidence of the uncertainty as to which of these two competing theories formed the true juridical basis of the law may be found in a single passage in the *Digest*, which is attributed to Ulpian, and which refers to both possibilities: “Nothing is so opposed to consent, which is the basis of cases of good faith, as force and fear; and to approve anything of this kind is contrary to good morals.”⁸⁹

There are a few passages in the *Corpus Iuris Civilis* which suggest that contracts concluded because of *metus* were void for lack of consent.⁹⁰ However, the majority of the Roman authorities saw the illegitimate nature of the threat which induced the agreement as the key ingredient in a case of *metus*, and did not see the act of duress as vitiating the consent of the aggrieved party. The jurist Paul penned the famous phrase “*Si metu coactus... tamen coactus volui*”, or “If I entered [into an agreement] under duress, nevertheless when compelled, I had the intention to enter”.⁹¹ Support for this thinking may be found in the *Institutes*:⁹²

“Suppose, for instance, that, being coerced by duress ... you promise, in response to Titius’s demand what you had no need to promise, obviously you are bound at civil law, and the action which claims that you ‘ought to give’ is operative: but it is inequitable that judgment should be given against you, and so you are given the defence of duress, or a defence is devised for you to resist the action.”

In other words, although the jurists recognised that the victims of duress formed their will to contract under coercion, this consent was legally valid, since these persons had exercised a choice — to agree to the terms of the contract, rather than suffer harm. However, it was because the unscrupulous and predatory act of intimidation had unjustly induced the contract that the praetor would grant an action. The cardinal principle appears to have been that the threat should have been *contra bonos mores*:⁹³

⁸⁹ *D* 50.17.116 (Watson’s edition).

⁹⁰ Over and above *D* 50.17.116 see *C* 4.44.1, where an edict of the Emperor Alexander states that a sale in good faith of a house would be void if the seller had been compelled by fear to agree to the transaction; and *D* 4.2.23.1, where Paul states that where a dowry is promised under duress, the promise is void *ab initio*.

⁹¹ *D* 4.2.21.5 (Watson’s edition). See too *D* 23.2.22.

⁹² Justinian *Institutes* 4.13.1 (Thomas’s translation).

⁹³ *D* 4.2.3.1 (Watson’s edition). See too (i) *D* 4.2.7.1; and (ii) *D* 4.2.8.pr. In the latter passage there is a reference to an act of duress having to be “morally wrong” (*malo more*) before an action or defence will lie against the perpetrator.

“But we understand force to be severe and such as is used contrary to sound morals, but not that which a magistrate properly brings to bear, of course, if that is done lawfully and in accordance with the legal powers of his position. Yet should a magistrate of the Roman people commit a wrongful act, Pompeius states that the edict is applicable.”

As a result, a contract induced by *metus* was considered to be *prima facie* valid (since the aggrieved party had consented to the contract), but voidable because the agreement had been unlawfully induced.⁹⁴ The above passage provides evidence that the Romans would ascertain the illegitimacy or otherwise of a threat by utilising a fairly broad test, which examined not only the nature of the threat itself, but also the goal which the threat was designed to achieve.⁹⁵ First, a threat that was unlawful in nature, (for example, a threat to murder a person if he did not sign a contract of indebtedness) was considered to be *contra bonos mores*. But additionally, a *prima facie* valid threat that was designed to achieve a manifestly unjust purpose was also considered to be *contra bonos mores*. Three examples of this broader form of unlawfulness may be found in the texts: a magistrate who threatens to use his legal powers of enslavement to extort a payment of a sum of money from a victim would act unlawfully, since his powers were being used illegitimately for financial gain.⁹⁶ Secondly, where a person apprehended another committing adultery, it would be unlawful to threaten to have that person prosecuted to induce (or blackmail) the adulterer into agreeing to pay an amount of money in return for silence.⁹⁷ And thirdly, if someone made a threat which induced his debtor to pay a greater sum of money than the debtor in fact owed, this would be unlawful conduct.⁹⁸

2.2.4.3 Serious evil

The third main element of a claim for *metus* in Roman times was that the threat should be one of serious evil (*maioris malitatis*). “Labeo says that duress is to be understood not as any alarm whatever but as

⁹⁴ Van Warmelo *An Introduction to the Principles of Roman Civil Law* 262; Joubert *Contract* 104; Van Huyssteen *Onbehoorlike Beïnvloeding* 12.

⁹⁵ For an analysis of this issue, see Olivier “Onregmatige Vreesaanjaging” (1965) 28 *THRHR* 187 at 189-90.

⁹⁶ These examples are drawn from *D* 4.2.3.1 as read with *D* 4.2.4.

⁹⁷ *D* 4.2.7.1 and 4.2.8.pr.

⁹⁸ “If anyone has been forcibly compelled, through the intervention of the governor’s attendants without an inquiry by a judge, to pay one claiming by assignment from his adversary what he did not owe the latter, the judge orders *restitutio* of what had been wrongfully extorted to be made by the one who caused him loss. But if he has paid what is owed on a mere demand, where no judicial inquiry has been held, although the demand should not have been made out of turn but in accordance with the law, nevertheless, it is contrary to legal principle to revoke what has enabled payment of the amounts owed by him.” (My emphasis) *D* 4.2.23.3 (Watson’s edition).

fear of a serious evil.”⁹⁹ Gaius provided a more detailed explanation of this requirement:¹⁰⁰ “Moreover, we say that the duress relevant to this edict is not that experienced by a weak-minded man but that which reasonably has an effect upon a man of the most resolute character.” The question of serious evil was therefore inextricably linked with the question of character. Perhaps as a result of the influence of Stoic philosophy, the Romans extolled the virtues of the *homo constantissimus*, or “the [person] of the most steadfast character”. The Romans took a very restrictive view of the sorts of threat which would amount to legally actionable *metus*. A Roman was expected to take responsibility for his actions, and it was considered poor form for a Roman to attempt to avoid the consequences of what he had done, unless there was a very good reason for doing so.¹⁰¹ The test was thus objective in nature. First of all, the threat had to be an imminent one, and not merely a contingent threat.¹⁰² Secondly, the types of threat which would ground an action for *metus* in Roman times were extremely limited. The threat could only be directed against the victim himself or his children,¹⁰³ and had to constitute a threat of physical harm: either of death, enslavement, imprisonment (particularly private imprisonment by an individual), an attack upon the person’s chastity, or the accusation of a capital charge.¹⁰⁴

2.2.4.4 Other types of threat

There are three other types of threat which are of interest: threats directed against property; threats of criminal prosecution; and threats of litigation or civil action. The attitude of the Romans to such threats warrants some discussion.

2.2.4.4.1 Threats to property

The Roman sources provide no explicit guidance at all about whether a threat directed against a person’s property could amount to *metus*. It would appear that such threats were not considered actionable, and the threat had to be one of physical harm to the person. There is one passage in the

⁹⁹ *D* 4.2.5 (Watson’s edition). See too *D* 50.17.184.

¹⁰⁰ *D* 4.2.6 (Watson’s edition). See too *D* 4.2.7.pr.

¹⁰¹ For comment on this issue, see Zimmermann *The Law of Obligations* 653.

¹⁰² *D* 4.2.9.pr.

¹⁰³ *D* 4.2.8.3.

¹⁰⁴ Death: *D* 4.2.3.1; enslavement: *D* 4.2.8.1; imprisonment: *D* 4.2.7.1, *D* 4.2.22, *D* 4.2.23.1 and *D* 4.2.23.2; *stuprum*: *D* 4.2.8.2; a capital charge: *D* 4.2.8.3. See Leage *Roman Private Law* 380; Thomas *Textbook of Roman Law* 227; Zimmermann *The Law of Obligations* 653-4.

Digest which could be interpreted to mean that such a threat could provide grounds for an action. Paul states:¹⁰⁵

“If someone who is ready to destroy documents relating to my status unless I give [something to him] receives money [from me], there is no doubt that he has exercised compulsion through the most extreme fear, at least if an action to have me declared a slave has already been brought against me and I cannot be declared free if those documents are lost.”

The passage is inconclusive since it is not clear whether the fear concerned the possibility of the documents themselves being destroyed (which would have been a threat directed against a corporeal thing), or whether it was the threat of losing status and freedom which was considered to be *contra bonos mores*. It is possible, though, that this strict position regarding threats to property was in fact ameliorated in post-classical law by means of an extended application of the *condictiones*. This matter will be discussed below.

2.2.4.4.2 Threats of criminal prosecution

It is not at all clear whether threats of criminal prosecution did constitute *metus* in Roman law. The relevant passages are rather inconclusive, and refer only obliquely to this particular sort of threat. A rescript of the Emperors Diocletian and Maximian reads:¹⁰⁶

“You ask that an alienation or a promise which has been made through fear of prosecution which has been begun against you, or which may be brought hereafter, shall be rescinded, and this is an improper request.”

This passage seems to indicate that a threat of criminal prosecution did not constitute an actionable threat. However, it is not entirely clear whether this passage in fact refers to a threat of criminal prosecution in its strict sense at all. The word translated as “of prosecution” by Scott is the genitive form of the noun *accusatio*, which can mean a complaint or an accusation which falls outside the realms of criminal law, and which is made in civil proceedings.¹⁰⁷ Little can really be gleaned from the rescript, due to its vagueness.

¹⁰⁵ *D* 4.2.8.1 (Watson’s edition).

¹⁰⁶ *C* 2.19(20).10 (Scott’s translation).

¹⁰⁷ Lewis and Short *A Latin Dictionary sv accusatio*.

On the other hand, Ulpian states:¹⁰⁸

“Likewise, if a person caught in the act of theft or adultery or in some other disgraceful conduct made a present of something or incurred an obligation, Pomponius, in his twenty-eighth book rightly writes that he can invoke this edict, for he feared either death or prison. Although it is not always lawful to kill an adulterer or thief, unless he defends himself with a weapon, he could still be killed unlawfully, and therefore fear was justified. Again, it is held that relief under this edict should be given to someone who has transferred property so that he might not be given up by the person who has caught him, since, if he had been given up, he could have suffered the penalties which we have stated.”

Paul continues as follows:¹⁰⁹

“Those [who have made the discovery] indeed are liable under the *lex Julia* because they have accepted something on account of proved adultery. Yet the praetor ought also to intervene and compel them to make *restitutio*. For what has been done is morally wrong, and the praetor does not consider whether the person who made the gift is an adulterer but only what the recipient has obtained by inspiring the former with the fear of death.”

Read superficially, these passages might suggest that a threat of criminal prosecution was *contra bonos mores* in Roman law. But these passages are not explicit, and do raise some questions. First, the passages do not define what a threat of “death” entails, and how this might differ from a threat which could result in the person being “given up” and ending up in prison. Do threats of death refer to a direct threat by the aggressor (which would constitute a physical threat, not a threat of prosecution), or do the jurists refer to the spectre of being reported to the authorities, prosecuted, and sentenced to death for committing the crimes? For it was possible, in terms of the *lex Julia de adulteriis*, for one found guilty of adultery by the courts to face a penalty of death.¹¹⁰ Secondly, the nature of the crimes which are referred to are serious, and involved serious consequences for perpetrators (either death or imprisonment). There is no clarity as to what the position might have been with regard to less serious crimes. Thirdly, the words “made a present of something or incurred an obligation” (*aliquid ... se obligavit*) do not explain clearly the purpose of the impeachable transaction. Did it have to concern an entirely unjustified payment of money or property blackmailed from the other person (the reference to adultery would support this), or was an agreement to pay back merely what was owed by a threat of

¹⁰⁸ D 4.2.7.1 (Watson’s edition).

¹⁰⁹ D 4.2.8.pr (Watson’s edition).

¹¹⁰ See D 48.5.21, 22 and 25.

criminal prosecution (eg in the case of theft) also a voidable transaction? On this point the texts cited above are inconclusive,¹¹¹ and do not make it clear whether the general test of unlawfulness will apply in this particular context. The word “*aliquid*” (something) is particularly ambiguous, and gives no indication as to whether there is a necessary link between the obligation and the crime.¹¹²

2.2.4.4.3 Threats of civil action or litigation

Although there is almost no authority on the point, it appears unlikely that a threat of civil action was considered *contra bonos mores* by the Romans. Interestingly, most authorities cite the rescript of Diocletian and Maximian (referred to above) as authority for this point,¹¹³ which lends some credence to the suggestion that Scott’s translation of the passage as referring to threats of criminal proceedings is inaccurate, and that the passage in fact ought to be interpreted as a reference to threats to sue.

2.3 *Metus* and the *condictiones*

Up to this point this chapter has focussed on the way in which agreements concluded as a result of *metus* were treated in Roman law, both from a point of view of the actions and remedies available, as well as the substantive requirements that had to be proved. The next question that needs to be considered is whether there were any other forms of action available for cases of coercion in the Roman law of obligations. More specifically, what was the legal position where payments were made or property transferred improperly under compulsion outside the traditional territory of the *metus* doctrine?

2.3.1 Unjustified enrichment in the Roman law of obligations

As stated earlier, the Romans did not recognise a discreet “system” of enrichment law as a distinct branch of the law of obligations. However, the general principle that unjustified enrichment ought not

¹¹¹ Certainly some form of actual loss was necessary for a penal delictual action. See the section on the *actio quod metus causa* below, and *D* 4.2.14.14. This issue has caused some debate in contemporary South African law. See 4.3.4.1.1 below, and (in connection with the Roman Law texts) Wessels *Contract* §1188; Bloch “Duress — Threats of Civil and Criminal Prosecution” 1974 *Responsa Meridiana* 42 at 43; D’Oliveira “Caught Redhanded: Metus and Compounding” (1974) 91 *SALJ* 284.

¹¹² See on this point D’Oliveira “Caught Redhanded: Metus and Compounding” (1974) 91 *SALJ* 284 at 287.

¹¹³ *C* 2.19(20).10. This view is endorsed by Zimmermann *The Law of Obligations* 654 and Van Huyssteen *Onbehoorlike Beïnvloeding* 13n95. Another text which could serve as authority for the view is *D* 4.2.23.3.

to be countenanced was recognised at least as a matter of principle in Roman law,¹¹⁴ even if this sort of obligation was classified by the Romans as being quasi-contractual. The leading articulation of the principle against unjustified enrichment in Roman law is the statement of the jurist Pomponius, who said in the *Digest*: “[f]or it is by nature fair that nobody should enrich themselves at the expense of another”,¹¹⁵ and “[b]y the law of nature it is fair that no one become richer by the loss ... of another”.¹¹⁶ On the basis of this principle of equity, it was possible for an aggrieved party in Roman times to seek relief in cases where that party had been unjustifiably impoverished in some way. But since the Romans did not go as far as viewing unjustified enrichment as a distinct source of obligations, cases of unjustified enrichment were treated in a rather *ad hoc* fashion. The Romans did not develop one all-embracing enrichment action. Rather, in circumstances where unjustified enrichment occurred, it was ultimately possible to seek relief in terms of certain specific enrichment actions, each with their own particular characteristics, and each designed to deal with a particular practical problem. The most famous of these were the *condictiones*, although there were other forms of enrichment action, like the action of the *negotiorum gestor*, for example.¹¹⁷

At this point it is important briefly to trace the history of the *condictiones* in Roman law.¹¹⁸ Under the earliest form of Roman civil procedure (the *legis actiones* procedure) the *legis actio per conditionem* was one of the five ways in which a citizen could bring an action, according to prescribed words and formalities, before a magistrate *in iure*.¹¹⁹ A *legis actio per conditionem* could be instituted initially to enforce a claim for a sum of money (*certa pecunia*) in terms of the *lex Silia* of the third century BC, and later (in the second century BC) to enforce a claim for a particular thing (*certa res*) in terms of the *lex Calpurnia*. The Romans eventually replaced the stilted procedural system of *legis actiones* with the more flexible and dynamic formulary procedure, which had been developed by the

¹¹⁴ For the fact that the Romans merely recognised an enrichment principle in a vague sense, see *Pucjłowski v Johnston's Executors* 1946 WLD 1 at 3-4; *Le Roux v Van Biljon and another* 1956 (2) SA 17 (T) at 20 *in fin.* LAWSA Vol 9 §75; De Vos *Verrykingsaanspreeklikheid* 5; Eiselen and Pienaar 3.

¹¹⁵ *D* 12.6.14 (Watson's edition).

¹¹⁶ *D* 50.17.206 (Watson's edition). There are a number of other passages where the principle against unjustified enrichment is referred to in Roman law. See *D* 5.3.38; 12.1.23; 12.7.1.3; 20.5.12.1; 25.2.25.

¹¹⁷ For an analysis of the action of the *negotiorum gestor*, which falls outside the scope of this thesis, see LAWSA Vol 9 §90ff; Van Zyl *Negotiorum Gestio in South African Law*.

¹¹⁸ The information contained in this brief analysis of the legal development of the *condictiones* in Roman law was derived from the more lengthy exposés contained in Kaser *Römisches Privatrecht* 200-205; Zimmermann *The Law of Obligations* 834ff; De Vos *Verrykingsaanspreeklikheid* 7-10; Thomas *Textbook of Roman Law* 77; Du Plessis *Compulsion and Restitution* 17ff.

¹¹⁹ For a discussion of the *legis actio* procedure, see Thomas *Textbook of Roman Law* 73ff; Kaser *Römisches Privatrecht* 335ff.

praetor peregrinus, and which eventually became a part of the *ius civile* by virtue of the *lex Aebutia*.¹²⁰ The original *legis actio per condictioem* procedures developed with the law into a *stricti iuris* personal action to enforce a financial or proprietary claim, which was instituted by means of a *formula*.¹²¹ The actions were known as the *actio certae (credita) pecuniae* and the *actio certae rei*, and the remedy where a party was successful in making out a case under the relevant formula was either a *condictio certae pecuniae* or a *condictio certae rei*. The formula was drafted in the abstract, meaning that in classical Roman law, the source and nature of the obligation in terms of which the aggrieved party had a claim did not have to be identified. As a result, these *actiones* originally had a wide scope, and could sustain an action under the classical contracts *verbis* (invariably the *stipulatio*), contracts *litteris*, and the contracts *re* (eg *mutuum*), as well as a claim for theft. Technically, therefore, there could have been an overlap between the traditional *stricti iuris* actions for *metus* and these *condictiones*. But furthermore, as time went on it was also recognised that these *actiones* could be instituted, and a *condictio* could be claimed, to recover some money or property that had been handed over *sine causa*, or without legal cause: the conventional province of enrichment claims. Two elements were required here to justify recovery of what had been given: some act of transfer or conferment, and evidence that the purpose for which the *datio* had been made had failed.

This was the classical position. By the time of the post-classical period, however, the formulary procedure had outlived its usefulness, the Roman law had shaken itself out in a more doctrinal fashion, and the nature, meaning and scope of the *condictio* had undergone a wholesale change. By the time the *Corpus Iuris Civilis* was compiled, a *condictio* had become a generic term of substantive law¹²² that identified certain types of civil claim that were not based on an existing contract or a delictual act that had occurred, but which had crystallised over the years as common forms of action in the law. The theoretical basis for instituting a *condictio* was the equitable one identified in *D* 12.6.14 and *D* 50.17.206: that no person should be enriched at the expense of another. The compilers of the *Digest* identified a number of *condictiones*, each of which had its own independent requirements, and which constituted independent causes of action. These were the *condictio causa data causa non secuta*; the *condictio ob turpem vel iniustam causam*; the *condictio indebiti*; the *condictio furtiva*; and the *condictio sine causa*. The *condictio causa data causa non secuta* was to be instituted in a situation where money or property had been handed over where a counter-performance was expected but did not materialise,

¹²⁰ For more on this development, see Jolowicz and Nicholas *Historical Introduction to the Study of Roman Law* 218.

¹²¹ Examples of the wording of the two formulae may be found in Kaser *Römisches Privatrecht* 348.

¹²² Zimmermann *The Law of Obligations* 839; Kaser *Römisches Privatrecht* 204.

or where the performance occurred for a particular purpose that did not result.¹²³ This *condictio* was important in the context of the Roman law of the time, since the Romans only recognised ten specific forms of contracts. As a result, performance in terms of any innominate contractual transaction could not be enforced or reversed in terms of a contractual action. But it would obviously be inequitable for one party to the transaction to perform, and to be without remedy if the other party did not reciprocate. In such circumstances this *condictio* could be instituted to reverse the transaction, and reclaim any money or property handed over for a purpose that never resulted. The *condictio ob turpem vel iniustam causam* could be instituted to reclaim that which had been handed over or paid for an illegal (*turpis*) or immoral (*iniusta*) purpose.¹²⁴ Very often this applied to situations where a contract had been declared void for illegality. The *condictio indebiti* was probably the most common of all the actions, and could be instituted to reclaim money or property handed over by mistake in situations where an obligation to do so had not in fact existed.¹²⁵ The *condictio furtiva* was an action whereby an owner of property could claim, from a person who had stolen the property, the return of the property or the value of the thing.¹²⁶ Finally, there was the *condictio sine causa*,¹²⁷ which has been interpreted to have come in two distinct forms.¹²⁸ First there was the *condictio sine causa generalis*, which was a generic name for an action based on the same facts and circumstances as any of either the *condictio causa data causa non secuta*, the *condictio indebiti*, or the *condictio ob turpem vel iniustam causam*. Secondly there was the *condictio sine causa specialis*, which was the “catch-all” *condictio* that could be instituted in circumstances where a case of unjustified enrichment was made out on the facts, but the case did not meet the substantive requirements of the classical *condictiones* discussed above.

2.3.2 The position with regard to cases of *metus*

Under classical Roman law, the traditional actions for *metus* discussed above were, of course, framed widely enough that although they are commonly discussed in the context of agreements and promises, they could be implemented to allow an aggrieved party to recover payments and transfers of property outside the bounds of contract law. The relatively fluid nature of the law of the Roman approach to

¹²³ See *D* 12.4; *C* 4.6; De Vos *Verrykingsaanspreeklikheid* 10-20; Zimmermann *The Law of Obligations* 843.

¹²⁴ See *D* 12.5; *C* 4.7; De Vos *Verrykingsaanspreeklikheid* 20-23; Zimmermann *The Law of Obligations* 844.

¹²⁵ See *D* 12.6; *C* 4.5; De Vos *Verrykingsaanspreeklikheid* 23-29; Zimmermann *The Law of Obligations* 848.

¹²⁶ See *D* 13.1; *C* 4.8; De Vos *Verrykingsaanspreeklikheid* 36-39; Zimmermann *The Law of Obligations* 839.

¹²⁷ See *D* 12.7; *C* 4.9; De Vos *Verrykingsaanspreeklikheid* 29-36; Zimmermann *The Law of Obligations* 856.

¹²⁸ The compilers of the *Corpus Iuris Civilis* did not draw the distinction between these two forms of *condictio sine causa*. The distinction was drawn by later jurists. See on this point De Vos *Verrykingsaanspreeklikheid* 29.

metus would explain this — but what would have been important is whether a case for restitution based on *metus* had been made out. Of course, the traditional approach to claims based on *metus* was very strict, and limited recovery to cases involving a threat of serious evil to the person. So, the question that needs to be asked is whether the Roman *condictio* had any relevance to transfers of money or property made as a result of *metus* outside traditional (mainly contractual) bounds, or to situations where the strict requirements for *metus* were not met? In classical law, the formula for the *condictio* was framed in the abstract, allowed for the recovery of any *datio* that was undue, and applied to a wide variety of transactions. As such, one could make out a *prima facie* case for saying that a person who had transferred money or property under threat would have been entitled to seek a *condictio* by way of action for recovery, over and above the traditional *stricti iuris* actions for *metus* discussed earlier. But, as Du Plessis points out,¹²⁹ on closer analysis of the nature and scope of the action for a *condictio* in classical law it is unlikely that this would have been possible. The aggrieved party would have to have shown that the transfer was undue in the eyes of the law, which was problematic: in the formative period of Roman law, the Romans did recognise that a coerced agreement or conferment was voluntarily made, and therefore the performance was technically due, despite the threat. Only once the praetors recognised that *metus* was inappropriate in the late Republic could an aggrieved party speak of the transaction being undue. Secondly, a classical *condictio* was usually sought where the transfer had occurred to satisfy a debt or legal obligation that the party did not know was not due. Since a payment or transfer under threat was made with the knowledge (*scientia*) that it was not due, and there was as a result usually no intention to satisfy some legal obligation that the party thought was owed, it seems unlikely that an action for a *condictio* could have availed a victim of *metus*. The traditional remedies for *metus* would have had to suffice.

In post-classical law, the position was different, since the *condictiones* had evolved into a variety of enrichment remedies. Since it was recognised by this stage that a payment or transfer under threat was undue (*indebitum*), it would seem that the *condictio indebiti* would have been a competent mechanism to institute to seek recovery of the money or property. But the *condictio indebiti* would not in fact have been available, since the compilers of the *Digest* required that before a *condictio indebiti* could be successful, the undue payment had to have been made by mistake (*in error*).¹³⁰ An intentional payment or transfer under coercion cannot be said to have been made erroneously.

In the light of the fact that *metus* was considered to be an unlawful act in Roman law, the *condictio* that was relevant to cases of coercion was the *condictio ob turpem vel iniustam causam*. The relevant

¹²⁹ Du Plessis *Compulsion and Restitution* 21. He relies on Schwartz *Die Grundlage der Condictio im klassischen römischen Recht*, a source unavailable to me.

¹³⁰ See *D* 12.6.1.

title of the *Digest*¹³¹ identifies a number of situations where a payment or transfer made under compulsion could be recovered in terms of this *condictio*. As far as *metus* in particular is concerned, the most explicit passage is *D* 12.5.7, which reads: “It is agreed that money exacted under a stipulation itself extorted by force is recoverable.” This passage suggests that, at least as far as the *stipulatio* was concerned, the *condictio ob turpem vel iniustam causam* could have been instituted as well as the traditional *stricti iuris* actions for *metus*.

But there are other relevant passages too. First, Paul intimates that where one makes a payment to ensure one’s property is returned, such a payment was *turpis*, and could be recovered for being undue in terms of the *condictio ob turpem vel iniustam causam*.¹³² In similar vein, an undue payment made in order to obtain money or property legitimately owed to a person in terms of a will or *stipulatio* was also recoverable in this way.¹³³ This suggests that it would have allowed transactions induced by compulsion to be reversed without the strict requirements for *metus* (a threat of serious evil to the person) having to be proved. Both examples refer to more subtle forms of threat, and concern proprietary or patrimonial interests. This indicates something of an extension to the traditional bounds of the doctrine of *metus*. Finally, this *condictio* could be instituted to recover something given in order to prevent the commission of some form of crime.¹³⁴ From these passages it can be inferred that the *condictio ob turpem vel iniustam causam* did provide an aggrieved party with a remedy for recovery that not only paralleled the more traditional actions for *metus* in post-classical Roman law (notably the contractual restitutionary action that had evolved by that time), but may also have extended the bounds of actionable compulsion to a small degree.¹³⁵

2.4 Conclusion

The aim of this chapter has been to outline and explain how the Romans treated cases of duress (*metus*) in the private law sphere. Many of the Roman law rules and principles described above were absorbed into Roman-Dutch law, as will be demonstrated in Chapter 3 below. From there many of these principles were absorbed into South African law, where they retain a place up to this day. This

¹³¹ *D* 12.5. See too Dawson “Economic Duress and the Fair Exchange in French and German Law” (1937) 11 *Tulane LR* 343 at 348.

¹³² *D* 12.5.2.1 (Watson’s edition).

¹³³ *D* 12.5.9.1 (Watson’s edition) reads: “[I]f I give you money to get from you something owed by you under a will or stipulation, only the *condictio* will lie to recover the payment.”

¹³⁴ See *D* 12.5.2.1.

¹³⁵ Cf the views of Du Plessis *Compulsion and Restitution* 22-26, esp at 26.

continuity of principle and approach will be reviewed in Chapter 4.

Chapter Three

The Roman-Dutch Law

“Fear and liberty are consistent; as when a man throweth his goods into the sea
for fear that the ship should sink, he doth it nevertheless very willingly,
and may refuse to do it if he will.”

Thomas Hobbes *Leviathan* 137

3.1 Outline

The institutional writers and practitioners of 16th, 17th and 18th century Roman-Dutch law looked to the Roman law of obligations to form the foundation upon which they erected their structure of private law. As far as the doctrine of duress is concerned, this Roman influence was significant: the principles espoused by the Roman-Dutch authorities bear a strikingly close resemblance to the principles discussed in Chapter Two above. It is important to pay some attention to the characteristics of the Roman-Dutch law of duress as it was articulated in the 16th, 17th and 18th centuries, since this is the law that was brought to the Cape and practised by the Dutch, and forms the basis of the current South African doctrine of duress. In this chapter the various elements of a valid duress claim in Roman-Dutch law will be outlined and discussed. After that, the remedies available to a victim of duress in Roman-Dutch law will be examined.

3.2 Background

After a lengthy period in the legal wilderness, the study of Roman law underwent a revival from the end of the 11th century onwards.¹ This was chiefly due to the work of the Glossators and the Commentators. It was the Roman law, as glossed by the Glossators and commented upon by the Commentators, that was received into the law of Western Europe, and which came to play such a vital part in shaping the civil law tradition. The provinces of the Netherlands in particular underwent an

¹ The role of the Glossators and the Commentators in reviving the study of Roman law falls beyond the scope of this work. For a detailed examination of this topic, see Wessels *History* 112ff; Van Zyl *Geskiiedenis* 81ff. For an exhaustive analysis of the concept of *metus* as it was interpreted by the Glossators and Commentators, see Van Huyssteen *Onbehoorlike Beïnvloeding* 25ff.

extensive period of such reception between the 12th and 15th centuries.² The effect of this reception was to graft Roman law onto the indigenous law to form a hybrid system that has come to be known as Roman-Dutch law³ — a phrase commonly attributed to Simon van Leeuwen.⁴

In theory, the Roman law was supposed to be applied only where the indigenous law did not cater for a legal problem. Van Leeuwen stated: “In practice a rule has been introduced that whenever indigenous customs or statutes are silent there shall be had immediate recourse to the Roman law”.⁵ But in practice, Roman law came to play a far more comprehensive and dynamic role than this quote suggests. In the end, it in fact became the dominant facet of the system, particularly in areas like the law of obligations, where the Roman law was far more advanced than anything the indigenous customary law could offer.⁶ Their main source of authority was the law articulated in Justinian’s time — to use a religious allusion, the *Corpus Iuris Civilis* was their Bible, and the *Digest* their Gospel. The

² The subject of the reception of the Roman law in the Netherlands is addressed fully in Hahlo and Kahn *The South African Legal System* 514ff; Wessels *History* 123ff; Van Zyl *Geskiedenis* 303ff; De Vos *Regsgeskiedenis* 147ff.

³ From a strict technical perspective, Roman-Dutch law refers to the legal system spawned from the union of Roman law and the indigenous law of the province of Holland. There are those who take the view that since the law that was imported into South Africa was the law of the province of Holland, only the institutional legal works produced in that province of the Netherlands are authoritative sources in South African law (see *Tjollo Ateljees (Edms Bpk) v Small* 1949 (1) SA 856 (A) 865; *Bank of Lisbon and South Africa Ltd v De Ornelas and another* 1988 (3) SA 580 (A) at 604F-G; *Du Plessis v Strauss* 1988 (2) SA 105 (A) at 133; 149). On the other hand, there are those who consider this approach to be restrictive, positivistic, and that it “wrenches Roman-Dutch law from its European moorings” (Visser and Hutchison “Legislation from the Elysian Fields: The Roman-Dutch authorities settle an old dispute” (1988) 105 *SALJ* 619 at 630. See too Van Zyl *Geskiedenis* 491-2; Zimmermann “Synthesis in South African Private Law: Civil Law, Common Law and the *Usus Hodiernus Pandectarum*” (1986) 103 *SALJ* 259 at 268-71; Zimmermann and Visser *Southern Cross* 45; Zimmermann “Roman-Dutch jurisprudence and its contribution to European Private Law” (1992) 66 *Tulane LR* 1685; De Vos *Regsgeskiedenis* 271-2). These authors prefer to treat the concept “Roman-Dutch law” more flexibly, and view it rather as being part of a broader European *ius commune*, from which we in South Africa can seek guidance. It is submitted that the latter view is the better one. The law of Holland did not develop in isolation, and was subject to legal influences from all over the continent. One obvious example is the work of the Frenchman Robert Joseph Pothier, which was highly influential in shaping the views of some writers in Holland, particularly Johannes Van der Linden (See Kerr “Impairment of profitability of premises let; implied contractual provisions; standing of Pothier” (1987) 104 *SALJ* 550). Furthermore, the South African courts have (the authorities referred to above notwithstanding) generally taken a broad approach to consulting civil law authorities, and have included references to German, French, Italian and Spanish writers, as well as writers who inhabited provinces other than Holland (see, for example, *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A); *Trust Bank van Afrika Bpk v President Versekeringsmaatskappy Bpk en ’n ander* 1988 (1) SA 546 (W) and Zimmermann and Visser *Southern Cross* 43-5). Interestingly enough, Van Zyl has coined the term “Roman-European law”, which he prefers to “Roman-Dutch law” (see Van Zyl “The General Enrichment Action is Alive and Well” 1992 *Acta Juridica* 115 at 121). But this term is very seldom used. In adopting the broader approach, sources other than those limited to the province of Holland alone will be referred to in the course of this study.

⁴ See Hahlo and Kahn *The South African Legal System* 514n82; Van Zyl *Geskiedenis* 303.

⁵ Van Leeuwen *CF* 1.1.1.2. See too Grotius *Inleiding* 1.2.22; Voet 1.1.2; Van Leeuwen *RHR* 1.1.11 and 12.

⁶ See further De Vos *Regsgeskiedenis* 159-60; Hahlo and Kahn *The South African Legal System* 516; Wessels *History* 566.

concept of duress was given various names in the 16th, 17th and 18th centuries. Those who wrote in Latin continued to refer to the Roman term *metus*, whereas those who wrote in Dutch refer to “*vaere*” or “*vrees*”. For the sake of consistency, I shall use the English term “duress” in this chapter.

3.3 Duress and the law of obligations

Like the Romans, the Roman-Dutch authorities never drew a distinction between duress cases in the law of contract and what we now know to be the law of unjustified enrichment. For example, Voet refers to the principles underpinning the doctrine of duress as applying, in a wider sense, to all acts, whether it be acts pursuant to a contract, or any other form of payment or transfer.⁷ The rules, principles, actions and remedies discussed below therefore apply to both contracts and payments or transfers made outside the bounds of contract, in terms of what we would today call the law of unjustified enrichment. It should be made clear from the outset, though, that most of the Roman-Dutch authorities did not recognise unjustified enrichment as a distinct branch of the law of obligations, with its own unique character and elements. The approach of the Roman-Dutch authorities to the principle of unjustified enrichment was Romanist, being heavily influenced by the relevant texts in the *Digest*. Justinian’s fourfold classification of obligations into contract, delict, quasi-contract and quasi-delict continued to be embraced by the majority of the leading Roman-Dutch writers,⁸ and cases of enrichment were usually treated as being quasi-contractual. The one exception appears to be Grotius, who in his *Inleiding* wrote a chapter on “*verbintenisse uit baet-trecking*” or obligations deriving from enrichment, all based on the principle that “equity does not permit that one man should be enriched at another man’s expense”.⁹ But his views do not seem to have had much impact, in a systematic sense, on the classical Roman-Dutch law of the 17th century. And, like the Romans, the categories of contract and delict were far more significant than the marginal categories of quasi-contract or quasi-delict. By far the majority of the discussion about duress in the law of obligations occurs in the context of the law of contract. I shall follow this pattern in my discussion, although it must be understood that the rules, principles and remedies described below did apply beyond the bounds of contractual agreements, in a general sense.

In line with the general background illustrated above, the institutional writers of Roman-Dutch law relied almost exclusively upon the principles espoused by the Romans when describing the Roman-

⁷ See Voet 4.2 and *White Brothers v Treasurer General* (1883) 2 SC 322 at 350.

⁸ See Voet 12.6.1 and 44.7.4; Van der Linden *Institutes* 1.14.5.

⁹ Grotius *Inleiding* 3.30.1-2.

Dutch law of duress in the contractual milieu.¹⁰ The only major conceptual change that ought to be noted is that the old Roman distinction between contracts *bonae fidei* and contracts *stricti iuris* had disappeared. The Roman-Dutch authorities recognised one general theory of contract, in which all contracts were predicated upon good faith, and where all agreements seriously and deliberately entered into constituted a contract.¹¹ As far as the doctrine of duress was concerned, many of the precepts described by the Roman-Dutch authorities will be very familiar from the previous chapter.

3.3.1 The general characteristics of legal protection on account of duress

Because the Roman-Dutch authorities were so reliant upon the Roman law set out in the *Corpus Iuris Civilis*, their general approach to the problem of duress was very similar to that of the Romans. The Roman-Dutch authorities also never got round to expounding a single theoretical framework for duress cases, or listing basic essential elements which would have to be proved before a duress claim would be successful. The authorities discuss the law in a rather disjointed and piecemeal fashion that is reminiscent of the casuistic Roman texts. Indeed, many writers openly model their work on parts of the *Corpus Iuris Civilis*, and simply provide an updated commentary on the law, matching the Roman source passage for passage. Accordingly, the primary texts have to be analysed and interpreted carefully in order to establish what sort of things a person claiming duress would have had to prove in order to be successful. Unsurprisingly, the matters which most Roman-Dutch writers seem to have considered fundamentally important to proving a duress claim mirror those discernable from the writings of the Roman jurists. The topics below will consequently be familiar from the previous chapter.

3.3.1.1 Fear caused by a threat of harm

The Roman-Dutch authorities recognised the distinction between physical force (*vis absoluta*) and conditional fear (*vis compulsiva*). A transaction induced by the direct application of physical force was considered to lack the essential element of consent. Any purported agreement of this nature was thus

¹⁰ Van Huyssteen *Onbehoorlike Beïnvloeding* 66 shows that because the main Roman-Dutch writers took a Humanist approach to their work, much of the work and proposals of the Glossators and Commentators (which he describes in chapters III-VI) appear to have been ignored in favour of the principles articulated in the original Roman texts.

¹¹ Wessels *History* 579 states: “From the twelfth century onwards the German nations strove to get rid of all unnecessary ceremonies in making contracts, and regarded the consensus of the parties as the essential element of every agreement.” As such, the old Roman classification of contracts *reales et verbales; nominati et innominati; bonae fidei et stricti iuris* fell away. Decker (commenting in Van Leeuwen *RHR* 4.2.1) said the following: “Further, we may conveniently dispose with the division of contracts into *stricti iuris* and *bonae fidei*, for according to our customs all contracts are considered to be *bonae fidei*.” See too Voet 12.1.3; Pothier *Obligations* §9; *Estate Schickerling v Schickerling* 1936 CPD 269 at 275.

void *ab initio*, and anything which had been handed over could be recovered by means of a *rei vindicatio*. Restitutionary remedies were not relevant to this sort of situation.¹² The doctrine of duress was designed for instances of *vis compulsiva* — situations where an agreement was concluded or payment made on the basis of a fear of some horrible consequence. But the concept of “fear” requires some explanation. A person could not escape the consequences of his actions on the basis of simple fear which was abstractly perceived. The Roman-Dutch authorities required that the fear had to have been inspired by a threat of some kind which had been made by another person who was in some way party to the negotiation of the agreement: a causal connection between such a threat and the resultant fear was an essential feature of any duress claim.¹³

For this reason a remedy for duress was not available in circumstances where an agreement had been entered into in an emergency situation. By this I mean a situation where the fear was caused by some environmental circumstance, rather than by a threat that had been articulated by a party to the negotiations, and which was designed to induce fear in the victim. Voet gives the following example to draw the distinction between the two scenarios:¹⁴

“The case of those who have received something from another or put another under obligation to themselves in order to protect him when undergoing force is quite different. Reason tells us that such persons are not held liable if they have not themselves applied such force. They seem rather to have taken pay for their services than to have enjoyed a gain from another’s fear. On that basis the position can be defended that a betrothal too would be valid in the case where a girl, scared by justifiable fear of shipwreck or foes or robbers, has promised marriage to a young man who stands free from fraud, if she has escaped to freedom by his help and assistance.”

3.3.1.1.1 *Metus reverentialis*

During the Middle Ages some leading jurists began to propose that *metus reverentialis*, or fear arising from the respect or awe one has for people in authority, could constitute legally recognisable duress in certain circumstances. This was particularly true of the Glossator Accursius, who suggested that *metus reverentialis* could be a ground for avoiding an agreement where a particular hierarchical relationship

¹² Voet 4.2.1.

¹³ Voet 4.2.1; Van Leeuwen *CF* 1.4.41.9; Huber *HR* 4.38.1; Van Huyssteen *Onbehoorlike Beïnvloeding* 67.

¹⁴ Voet 4.2.6. Pothier *Obligations* §24 says the same. The inspiration for this is *D* 4.2.9.1. See too Pauw *Obs Tum Nov* 1.242. The only dissenting voice is Van Leeuwen *RHR* 4.42.4, who said that in a situation where a girl is in danger on the ice, and promises to marry a passenger aboard a ship if he rescues her, such a promise will not be binding upon her. But he does qualify this by saying that she will be released provided she paid an amount of money to the man in compensation for the service he had performed. This seems to indicate (albeit vaguely) that some form of obligation did come into being.

existed between the parties.¹⁵ However, the detailed research done by Van Huyssteen and Scholtens shows that this suggestion never became popular — far from it, in fact. By far the bulk of the authorities in the Middle Ages did not recognise *metus reverentialis* as a good ground for avoiding an agreement at all.¹⁶

This was endorsed by the Roman-Dutch authorities, who were uniformly of the opinion that *metus reverentialis* was not an example of legally recognisable duress. In line with the general rule, the fear had to have been inspired by a threat of some kind, and not the mere existence of some hierarchical relationship. The early legal writers of the Southern Netherlands stated that *metus reverentialis* did not entitle a person to a legal remedy unless there was evidence of threats or violence (*impressio vel violentia*).¹⁷ Pothier took the same approach: “The fear of displeasing a father or other person to whom we owe regard, is not such a fear as vitiates a contract made under the impression of it.”¹⁸ The writers of the Netherlands who mention *metus reverentialis* (Voet, Van Leeuwen and Huber) are all firmly of the opinion that it was, in itself, no justification for a legal remedy.¹⁹

3.3.1.2 The threat must be *contra bonos mores*

The Roman-Dutch writers, like the Romans, allowed themselves the liberty of a little philosophical reflection on the question whether the true juridical basis for the existence of remedies for duress was because of a lack of consent, or because the obligation had been unlawfully induced by the illegitimate nature of the threats that had been uttered. The authorities endorsed the old adage “*coacta voluntas voluntas est*” (a coerced will is nevertheless a will), and were thus of the opinion that an act of duress did not vitiate consensus: the aggrieved party could not argue that he had never intended to enter into the contract, nor that he had not consented to its terms. For example, Voet states:²⁰

¹⁵ Relevant relationships included those between freedmen and patrons, wives and husbands, and priests and bishops. For more on the Accursian gloss, see Van Huyssteen *Onbehoorlike Beïnvloeding* 29.

¹⁶ For a full analysis of the concept of *metus reverentialis* in the Middle Ages, which falls beyond the scope of this work, see Van Huyssteen *Onbehoorlike Beïnvloeding* Chapters III-IV, and Scholtens “Undue Influence” 1960 *Acta Juridica* 276.

¹⁷ Van Huyssteen *Onbehoorlike Beïnvloeding* 58 and Scholtens “Undue Influence” 1960 *Acta Juridica* 276 at 284 quote Zoezius *Commentarius ad Digestorum*, Wesembecius *Commentarii in Pandectas*, Perezius *Praelectiones in Duodecim Libris Codicis* and Christenaeus *Quaestiones et Decisiones* in this regard. These original sources were not available to me.

¹⁸ Pothier *Obligations* §27.

¹⁹ Voet 4.2.11; Van Leeuwen *CF* 1.13.8; Huber *HR* 4.38.5.

²⁰ Voet 4.2.2. Others who take the same view are Grotius *Inleiding* 3.48.6; Van der Keessel *Praelectiones ad Gr* 3.48.6; Huber *HR* 4.38.3; Decker’s note to Van Leeuwen *RHR* 4.1.6; Van der Linden *Institutes* 1.14.2; Pothier *Obligations* §21; Goudsmit *Pandecten-Systeem* §51. See also Lee *Introduction to Roman-Dutch Law* 229-

“Sound reason moreover shows that he who has done something by fear consents. He chooses in fact the least of two evils. He prefers to deliver property and lose goods to suffering wounds or other serious mischief.”

Having rejected the consent (or overborne will) theory, the Roman-Dutch authorities instead preferred the view that the true jurisprudential basis for the existence of remedies for duress was that the agreement had been induced by an illegitimate threat. It was the unlawful conduct of the aggressor that was legally objectionable: the cardinal rule was that the threat which had been made had to be *contra bonos mores*.²¹ The Roman-Dutch lawyers also recognised the Roman principle that a threat is not only unlawful for the purposes of the doctrine of duress if the threat (if carried out) would constitute a criminal or delictual act; a *prima facie* valid threat which was made for an unlawful or extortionate purpose was also *contra bonos mores*. Thus, a threat to kill or incarcerate someone to induce an agreement was obviously *contra bonos mores*. But if what appears to be a perfectly valid threat (eg to report someone to the police for theft) is used for an entirely illegitimate purpose (eg to extort a totally arbitrary and fictitious payment from the thief) then that threat too will be considered *contra bonos mores*.²²

In Roman-Dutch law, agreements entered into under duress were therefore voidable, and not void *ab initio*. Voet went on to say:²³

“Since then consent is present in those acts that are performed in fear, it follows that as a rule they are not ipso iure void, but they hold good until they are set aside and restored to their proper fairness by the magistracy.”

Since agreements entered into under duress were voidable, if the element of fear was removed, and the person who made the promise subsequently performed his obligations without any objection, the agreement was considered to have been ratified, and the person’s remedies fell away.²⁴

30.

²¹ Voet 4.2.10; Van Leeuwen *CF* 1.4.41.1; Grotius *De Iure Belli ac Pacis* 2.11.7; Pothier *Obligations* §26.

²² See Voet 4.2.3, 4.2.10 and 4.2.17; Huber *HR* 4.38.8. For a full examination of this issue, see Olivier “Onregmatige Vreesaanjaging” (1965) 28 *THRHR* 187 at 190-1 and 3.3.1.4.2 below.

²³ Voet 4.2.2. See too Huber *HR* 4.38.2; Pothier *Obligations* §21; Groenewegen *De leg abr ad D* 4.2.22; Zimmermann *The Law of Obligations* 660; Nathan *The Common Law* 573.

²⁴ Van Leeuwen *CF* 1.4.41.6 says: “For if a person has done anything; for instance he has made a promise when under the influence of fear, and then, when the fear has been removed, has paid, no restitution will be made, because, before he paid, he could have avoided paying, and by paying spontaneously he is considered to have given fresh consent and to have confirmed the obligation *de novo*.” See too Voet 4.2.16; Pothier *Obligations* §21.

3.3.1.3 Serious evil

The third critical element of a valid duress claim in Roman-Dutch law was that the threat had to be of a serious and compelling nature. “Fear is said to be an agitation of the mind because of immediate or future danger; or again a dread of some serious mischief.”²⁵ As in Roman law, the threat had to be directed against the person of the victim. Grotius sculpts his definition of what constituted serious evil as follows: “By fear is to be understood a great terror as of death, dishonour, great pain, unlawful imprisonment of oneself or of those belonging to one.”²⁶ Van Leeuwen’s definition is to similar effect: “[T]he fear [must be] of some greater evil, for example of death, exile, violation, slavery, imprisonment, bonds, torture, force, treachery....”²⁷ Threats of infamy or mere annoyance were not actionable.²⁸

It was not necessary that the victim had to suffer the intimidation directly — threats directed against one’s spouse or children also sufficed.²⁹ Although the Roman-Dutch authorities still required the threat to be one which would make an impression upon a courageous person, the Roman-Dutch lawyers eased the strict objective test of the Roman *homo constantissimus* by introducing a welcome subjective element to the determination of the gravity of the fear: in assessing the impact of the threat upon the victim, the person was entitled to be judged according to the type of person he or she was.

“[I]n determining [the seriousness of the fear] the judge must take into consideration the circumstances both of the persons and of the things: eg, that fear which cannot be deemed sufficient to disturb the mind of a person of mature age or a soldier may be quite sufficient in the case of a woman or old man.”³⁰

3.3.1.4 Other types of threat

The Roman-Dutch attitude to threats directed against property, threats of criminal prosecution, and

²⁵ Voet 4.2.1. See too Voet 4.2.13; Van Leeuwen *CF* 1.4.41.1; Huber *HR* 4.38.7; Pothier *Obligations* §25; Lee *Introduction to Roman-Dutch Law* 230.

²⁶ Grotius *Inleiding* 3.48.6.

²⁷ Van Leeuwen *CF* 1.4.41.1.

²⁸ Voet 4.2.12 and 13; Huber *HR* 4.38.6; Van Leeuwen *CF* 1.4.41.2.

²⁹ Voet 4.2.11.

³⁰ Van der Linden *Institutes* 1.14.2.2. See too Voet 4.2.11; Pothier *Obligations* §25. Huber *HR* 4.38.4 says: “The laws demand that the fear must be such as could influence a very steadfast person; nevertheless this must be understood in a humane sense, and with a distinction of persons, so that more must be required of a man than of a woman, according to the varying circumstances.”

threats of civil action warrants some consideration.

3.3.1.4.1 Threats to property

The vast majority of authorities say nothing at all about whether a threat directed against property constituted duress. The Glossators, in their efforts to make some sense of the rather haphazard array of texts in the *Corpus Iuris Civilis*, concluded that remedies for duress could be granted even if the nature of the threat fell outside the strict limits of the praetor's edict. Judges were granted an inherent discretion to set aside acts done under compulsion in a wider sense. This was defined as a remedy *per officio iudicis*.³¹ It was under the guise of this wider discretion *per officio iudicis* that one of the Ultramontani, Jacobus Revigny,³² argued that it was possible to grant a person a remedy for duress where he had contracted under a threat to have his house destroyed. However, Van Huyssteen demonstrates quite correctly that the passages in the *Digest* upon which Revigny relied in fact refer to threats to the person, and provide no support whatsoever for his submission.³³ The Commentators appear not to have recognised a threat against property as an example of duress at all.³⁴

As far as the law in the Netherlands was concerned, a few early writers in the southern provinces suggested that a threat directed against property could provide the aggrieved party with a remedy. Christenaeus³⁵ refers to a fear of loss of goods ("*amissio bonorum vel partis*") as constituting duress, as does Zoezius.³⁶ Perezius suggests that loss occasioned to one's fortune (in the sense of assets) would

³¹ The Glossators divided relief for *metus* into four categories on the basis of their understanding of the relevant texts in the *Corpus Iuris Civilis*: (a) relief *ex sententia et verbis* the edict (threats of death or torture); (b) relief *ex sententia vel per interpretationem* the edict (threats of *stuprum*, slavery or where the attack is directed against one's children); (c) relief *per Constitutionem* (situations where relief was granted by the emperors in the post-classical period — see *D* 18.1.46; *C* 2.19(20).11); and (d) relief *per officio iudicis* (threats of physical incarceration and physical damage — see *D* 4.2.23.1 and 2; 44.5.1.5 and 50.13.3). For a full discussion of the work of the Glossators in this regard, see Van Huyssteen *Onbehoorlike Beïnvloeding* 27.

³² Revigny (or Jacobus de Ravanis) *Lectura super Codice* ad 2.4.13, as cited by Van Huyssteen *Onbehoorlike Beïnvloeding* 34. Revigny was one of the leading jurists of the Middle Ages, and was a member of the School of Orleans. See Van Zyl *Geskiedenis* 115-7.

³³ Van Huyssteen *Onbehoorlike Beïnvloeding* 34. He relies on *D* 4.2.23.1 and 2, 44.5.1.5 and 50.13.3, which all concern threats of physical incarceration or physical harm, and have nothing whatsoever to do with threats to property.

³⁴ For a full analysis of the thinking of the Commentators see Van Huyssteen *Onbehoorlike Beïnvloeding* 37.

³⁵ Christenaeus *Decisiones Belgicae* vol 2 dec 114, as cited by Wessels AAJA in *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 451.

³⁶ Zoezius *Commentarius ad Pandectas* 4.2n15, as cited in *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 451-2 and Wessels *Contract* §1175.

amount to duress.³⁷ But the leading authorities of the province of Holland are almost entirely silent on the question of threats to property. They continued to define duress by sticking rigidly to the traditional examples of threats to the person. Van Leeuwen alone submits that threats to property constitutes duress, but he merely mentions the possibility, without discussing the matter at all.³⁸ The weight of evidence would suggest that threats to property were not generally considered to be relevant to the Roman-Dutch doctrine of duress, interpreted in its strict sense.

3.3.1.4.2 Threats of criminal prosecution

There is not a great deal of authority on the status of threats of criminal prosecution in Roman-Dutch law, and what little there is, is rather vague.³⁹ Pothier seems to indicate that such threats would not be considered *contra bonos mores*:⁴⁰

“The violence which leads to the rescission of a contract, should be an unjust violence, *adversus bonos mores*; and the exercise of a legal right can never be allowed as a violence of this description; therefore a debtor can have no redress against a contract which he enters into with his creditor, upon the mere pretext that he was intimidated by the threats of being arrested, or even of his being actually under arrest, when he made the contract, provided the creditor has a right to arrest him.”

The first problem with this passage is that it is uncertain whether it refers to a threat of arrest for the purposes of criminal prosecution, or a threat of civil proceedings and civil imprisonment for debt, which was a common occurrence at the time. The references to “creditor” and “debtor” could indicate that the latter is more likely.⁴¹ Secondly, Pothier appears to take quite a restrictive approach to

³⁷ Perezius *Commentarius ad Codicem* 2.20n6, as cited by Wessels *Contract* § 1175. Both Zoezius and Perezius were eminent Professors of Law at the University of Louvain in the early seventeenth century, and Christenaeus was a leading advocate at the Groote Raad van Mechelen. See Van Zyl *Geskiedenis* 339-341.

³⁸ Van Leeuwen *CF* 1.1.13.7.

³⁹ This view accords with the perceptions of most commentators on the Roman-Dutch law on this point. See the remarks of Corbett J in *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 307-8; Trengove J in *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 33-4; Bloch “Duress — Threats of Civil and Criminal Prosecution” 1974 *Responsa Meridiana* 42 at 44; D’Oliveira “Caught Redhanded: Metus and Compounding” (1974) 91 *SALJ* 284 at 288; Harker “The Effect of a Threat of Criminal Prosecution on Contract” (1977) 40 *THRHR* 139 at 141.

⁴⁰ Pothier *Obligations* §26. Trengove J in *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 34F incorrectly cites the passage as §56.

⁴¹ Both Corbett J in *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 308C, and Bloch “Duress — Threats of Civil and Criminal Prosecution” 1974 *Responsa Meridiana* 42 at 43 suggest that this passage refers to civil imprisonment for debt, and not to threats of criminal prosecution.

determining whether a threat is *contra bonos mores*, in that a threat to exercise a legal right will not be *contra bonos mores*. This test conflicts with the wider test of unlawfulness promoted by other Roman-Dutch authorities, who looked both to the nature of the threat as well as the purpose for which it was made to ascertain whether the threat was *contra bonos mores*.

On the other hand, Voet has been cited as authority for the view that threats to prosecute are indeed *contra bonos mores*.⁴² He stated:⁴³

“On these lines even if a person caught in debauchery, adultery or some other shameful act gave or promised something in order to avoid the wounds, fettering or death which he feared at the hands of those who caught him, the praetor applied this action [based on fear] to him.”

Again, however, this passage is not explicit. It does not refer directly to threats of prosecution, and can easily be interpreted to refer only to threats of physical harm made by those who apprehended the criminal. Secondly (in the light of the fact that Voet relies on *D* 4.2.7.1 and 4.2.8.pr for his authority), the passage suffers from the same problem as those passages in the *Digest* — what is meant by “promised something”? What would be the position where a thief were apprehended, and agreed, under threat of prosecution, merely to pay back that which he had stolen? This issue is not addressed by Voet at all.

The only authority who deals directly with the question whether a threat of criminal prosecution is actionable is Huber. He is firmly of the opinion that such threats are *contra bonos mores*:⁴⁴

“Though a person suffered duress in the course of an unlawful action, he could still obtain restitution; as if a thief, adulterer or other criminal were caught in the act, and money extorted from him; he would be able to get it back if he had the courage to make a clean breast of it, or had already suffered the punishment of the law; for private persons are not allowed to extort money from criminals, but they must inform against them, and have them arraigned in the proper place.”

But Huber’s comments do not take into account that in the Netherlands, individuals were fully entitled

⁴² See in particular *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 307G-H.

⁴³ Voet 4.2.3.

⁴⁴ Huber *HR* 4.38.8. The emphasis in the passage is my own. Those who indicate that this passage may provide authority that threats of criminal prosecution are improper are Corbett J in *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 307, and Bloch “Duress — Threats of Civil and Criminal Prosecution” 1974 *Responsa Meridiana* 42 at 44.

by private law means to compromise or settle claims for loss arising out of the commission of a crime.⁴⁵ As such, the injured party and the wrongdoer could settle their dispute by way of agreement, rather than by having recourse to the criminal courts. This would seem to indicate (contrary to Huber's opinion) that a threat to prosecute in order to induce a valid compromise or payment of what had been lost might not automatically have been considered *contra bonos mores*. However, the authorities do make it clear that the law stated above was not designed to allow an accuser to make such arrangements vexatiously, and to extort an unfair or undue profit out of the accused person.⁴⁶ These passages suggest (rather than such threats being considered (a) lawful; or (b) unlawful, in a binary fashion) that the general rule about assessing the illegitimacy of a threat may have applied in cases of where threats of criminal prosecution were at issue: a *prima facie* valid threat would be illegitimate only if the purpose for which it was made was illegitimate. In this context, making a threat to prosecute in order to get back what one owed may have been acceptable, but if the threat were made to induce a private payment of an entirely fictitious amount, bearing no resemblance to the loss occasioned by the crime (eg theft), that would be construed as *contra bonos mores*.⁴⁷

In sum, one can see that as far as the question of threats of criminal prosecution are concerned, the Roman-Dutch authorities are vague and contradictory.

3.3.1.4.3 Threats of civil action or litigation

Although there is very little authority on the point, the Roman-Dutch authorities that address the issue of threats of civil action are of the opinion that such threats do not constitute actionable duress, and that a person is fully entitled to threaten legal proceedings against another.⁴⁸ The position was thus the same as that which applied in Roman law.

3.4 Actions and remedies

3.4.1 General comments

⁴⁵ Voet 2.15.17-20; Grotius *Inleiding* 3.4.5; Van der Keessel *Theses Selectae* 520; Wessels *Contract* §500-505; Harker "The Effect of a Threat of Criminal Prosecution on Contract" (1977) 40 *THRHR* 139 at 141.

⁴⁶ See in particular Voet 2.15.19.

⁴⁷ This is the view of the authorities supported by Trengove J in *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 34G-H.

⁴⁸ Voet 4.2.10; Huber *HR* 4.38.6.

The Roman-Dutch authorities do not provide a clear and systematic analysis of the actions and remedies available for duress. In the previous chapter I pointed out that the nature of the remedies available for duress in Roman law has been the subject of an ongoing debate. That problem has been attributed mainly to the haphazard and truncated nature of the title on *metus* in the *Digest*, which presents peculiar difficulties for any interpreter. Since the Roman-Dutch authorities relied so heavily on the *Digest* to craft their law of duress, their rather unsystematic approach to remedies for duress can probably be attributed to the same constraints.

But it appears from an analysis of the sources that the Roman-Dutch lawyers traditionally recognised three sorts of remedy in cases of duress: first, a delictual remedy; secondly, a remedy of *restitutio in integrum*, and thirdly, a defence of duress in situations where an aggrieved party had been sued for performance of an obligation. Since the rigid Roman distinction between contracts *stricti iuris* and contracts *bonae fidei* had fallen away, the need to distinguish between different types of procedural actions had also fallen away in Roman-Dutch law. The main consequence of this is that the *actio quod metus causa* (which was a *stricti iuris* action in Roman law) appears not to have been absorbed into legal practice in the Netherlands, either as a distinct action, or even as a feature of the Roman-Dutch law from a terminological perspective. The authorities (with the singular exception of Voet)⁴⁹ do not refer to the phrase *actio quod metus causa* at all, but refer generally to remedies for duress, without giving them any special name. It appears likely that the term “*actio quod metus causa*” had no application in Roman-Dutch law,⁵⁰ even if many of the characteristics of the old action of that name continued to flourish under the guise of the various remedies available for duress in Roman-Dutch law.

3.4.2 A delictual remedy

Van Leeuwen draws a clear distinction between the existence of a delictual remedy for duress on the one hand, and the restitutionary remedy on the other hand. He states:⁵¹

“From what has been done through fear a twofold action arises, one action for the restitution of the thing...;

⁴⁹ Voet refers to the *actio quod metus causa* in his original Latin, but he does so only twice throughout his lengthy exposition on restitution for duress (4.2.3 and 4.2.18), and without any particular emphasis, or suggestion that the term was critically important.

⁵⁰ Those authors who wrote in Dutch certainly do not mention the *actio quod metus causa* by name. See Grotius *Inleiding* 3.48.6; Huber *HR* 4.38.11; Van Leeuwen *RHR* 4.42.4; Scheltinga *Dictata* 3.48. Nor do Van Leeuwen *CF* 1.4.41, Groenewegen *De leg abr ad C* 2.19(20); Groenewegen *De leg abr ad D* 4.2, Van der Keesel *Theses Selectae* §881, who wrote in Latin. O’Brien *Restitutio in Integrum* 20 and “Restitutio in integrum by onbehoorlijk verkreë wilsooreenstemming” 1999 *TSAR* 646 at 648-9 is also of the opinion that the *actio quod metus causa* had no place in Roman-Dutch law.

⁵¹ Van Leeuwen *CF* 1.4.41.4.

the other for damage done and injury, which is in the nature of a punishment for wrong-doing....”

This demonstrates that an aggrieved party who had suffered patrimonial harm as a result of an act of duress was entitled to a delictual claim for financial compensation in Roman-Dutch law. It should be emphasised that in Roman-Dutch law the fourfold penalty that could have been imposed upon the defendant in Roman law had become obsolete.⁵² Like the law of misrepresentation, a delictual claim for financial compensation would exist whether or not the aggrieved party sought to rescind the agreement induced by duress and claim restitution. Unfortunately there is almost nothing more said about the delictual action in cases of duress in the work of the leading authorities. It is possible that the Roman-Dutch lawyers would have fitted such a delictual claim under the auspices of the *lex Aquilia*, which was the general delictual remedy for patrimonial loss in Roman-Dutch law. Some support for this may be found in the delict title in Voet’s *Commentarius*, where he says that “[t]hose who cause damage by compulsion or instigation” are “[p]ersons subject to the Aquilian law”.⁵³ But that is as far as the delict passages take us, which may be due to the fact that there were very few examples of delictual claims for duress in Roman-Dutch times — a trend that is replicated in modern law.

3.4.3 An order of *restitutio in integrum*

The main remedy for duress in Roman-Dutch times was the remedy that flowed from an order of *restitutio in integrum*. Unlike in Roman law (where the *restitutio in integrum* had a very limited field of application in *iudiciae stricti iuris*, and appears to have fallen into desuetude by the time of Justinian), *restitutio in integrum* was an extremely important general remedy that could be granted by the courts in the Netherlands where an agreement had either been declared void, or cancelled. Due to the fact that the nature of the law of contract was so different in the 16th and 17th centuries, this Roman-Dutch remedy was not equivalent to the Roman *restitutio in integrum*. Rather, it became the common name for the remedy (also known as “relief” or “herstelling”) that existed in the customary law of the Middle Ages.⁵⁴ The Roman-Dutch authorities commonly described customary institutions by using Roman names, as occurred in this case. The process of “relief” entitled a person to request (initially from the government, but later from the courts), an order nullifying and reversing a legal transaction,

⁵² Voet 4.2.8; Van Leeuwen *CF* 1.4.41.8; Groenewegen *De leg abr ad D* 4.2.9 and *De leg abr ad C* 2.19(20).4; Voet *Observationes* 3.48.33.

⁵³ Voet 9.2.25. See too Olivier “Onregmatige Vreesaanjaging” (1965) 28 *THRHR* 187 at 190; Van der Merwe and Olivier *Die Onregmatige Daad* 229, who also believe the delictual action fell under the *lex Aquilia*.

⁵⁴ O’Brien “Restitutio in integrum by onbehoorlik verkree wilsooreenstemming” 1999 *TSAR* 646 at 649.

on good cause shown.⁵⁵ An act of duress was considered to be a good cause (*iusta causa*) for seeking an order of *restitutio in integrum* in Roman-Dutch law.⁵⁶ This was so because an act of duress was antithetic to the requirement of good faith that underpinned all contracts in Roman-Dutch law.⁵⁷ Since the power to grant *restitutio in integrum* (or “relief”, as it was originally called) derived its origins from powers held by the executive, the power was not inherent in the judiciary. As a result, *restitutio in integrum* is usually described as an extraordinary remedy, rather than a mere action.⁵⁸ The majority of the Roman-Dutch authorities dedicated some energy to discussing the availability of *restitutio in integrum* in cases of duress, and the characteristics of such relief. The characteristic elements of an order of *restitutio in integrum* based on duress were the following:

First, the main rationale behind the *restitutio in integrum* appears to have been restitutionary.⁵⁹ The aim of a *restitutio in integrum* was to restore both parties to the *status quo ante*. As such, the order would not only require the defendant to restore any performance to the plaintiff; it also required the plaintiff to restore anything that he or she had received to the defendant.⁶⁰ This included money or property,⁶¹ any fruits, and restitutionary damages.⁶²

Secondly, the action entitled a party to claim both rescission of the original agreement, and restitution, all in one order. Rescission and restitution were not understood as two separate and distinct remedies that had a separate conceptual existence.⁶³ Since the main rationale behind a *restitutio in integrum* was restitution, a curious feature of the Roman-Dutch remedy (from a modern viewpoint) is that rather than rescission being a preliminary step to restitution, rescission was in fact a consequence

⁵⁵ I concentrate here on the private law implications of *restitutio in integrum*. It should be noted that *restitutio in integrum* applied to a wide field of issues, including the issue of clemency in criminal law. For a discussion of this issue, which falls beyond the scope of this work, see O’Brien *Restitutio in Integrum* 23 and Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 203 at 221.

⁵⁶ See generally Voet 4.2; Grotius *Inleiding* 3.48; Van Leeuwen *RHR* 4.42; Huber *HR* 4.38. See too Lambiris *Restitutio in Integrum* 243ff; Nathan *The Common Law* 574.

⁵⁷ O’Brien *Restitutio in Integrum* 20 and 30.

⁵⁸ See Huber 4.37.1 and O’Brien *Restitutio in Integrum* 23.

⁵⁹ For a convincing discussion of this approach, see O’Brien *Restitutio in Integrum* 30-32.

⁶⁰ Voet 4.1.22; Grotius *Inleiding* 3.48.5.

⁶¹ See Voet 4.2.7; Huber *HR* 4.38.11; Van Leeuwen *CF* 1.4.41.5; Grotius *Inleiding* 3.48.5.

⁶² Voet 4.2.7 and 4.1.22; Huber *HR* 4.38.11; Grotius *Inleiding* 3.48.5; Van Leeuwen *CF* 1.4.41.7.

⁶³ Voet 4.1.21 said: “The effect of *restitutio in integrum* is that all things are put back into their original condition, and that indeed in a single judicial proceeding.... The opinion of old writers as to the proceeding being double — one of restitution, and one giving the effects of the rescission — is rejected.” (My emphasis).

of the decision to grant restitution in Roman-Dutch law.⁶⁴ In all circumstances where the main remedy of restitution was granted, the original transaction was automatically rescinded at the same time.⁶⁵

Thirdly, since an order of *restitutio in integrum* was considered to be an extraordinary remedy, a plaintiff had to approach the Supreme Court (or *Hooge Raad*) for this relief.⁶⁶ The nature of the order of *restitutio in integrum* was such that the discretion to award it could be entrusted only to a senior judicial officer.⁶⁷

Fourthly, the remedy could be sought against any person who had benefited from the transaction or was in possession of property handed over as a result of duress (whether in good faith or in bad), and not just the person who was responsible for the duress.⁶⁸ Thus, in situations where the agreement had been inspired by the duress of a third party unconnected with the two contracting parties, the agreement could be rescinded. The heirs of the person who had originally been exposed to the act of duress were also entitled to bring an action for restitution against the person responsible for the act of intimidation.⁶⁹ Interestingly, even the heirs of the original intimidator could be sued if some benefit had accrued to them as a result of the act of duress.⁷⁰ In cases where there were joint wrongdoers, full restitution by one defendant would absolve all the others.⁷¹

The suggestion by some authorities that before an action for restitution would be successful, the plaintiff must demonstrate that some loss has been suffered, is misleading, and requires the most careful interpretation. What it means is that the aggrieved party has been prejudiced by transferring some benefit (consisting in either money or property) to the defendant; that this transfer has occurred unjustly as a result of the duress; and thus the aggrieved party seeks to reclaim the benefit which was transferred. To put it in another way, the undue transfer of the benefit has unjustly enriched the

⁶⁴ Van Leeuwen *CF* 4.40.7 says “per restitutionem petitur rescissio”. See too O’Brien *Restitutio in Integrum* 25.

⁶⁵ Voet 4.1.21 discusses at length the fact that an order of *restitutio in integrum* combined both rescission and restitution, and cites both Bachovius and Vinnius in support of this view. See too Van Leeuwen *CF* 1.4.41.5.

⁶⁶ Grotius *Inleiding* 3.48.5; Scheltinga *Dictata oor De Groot* 3.48.5; Groenewegen *De leg abr ad D* 4.2.9.

⁶⁷ Voet 4.1.3; Huber *HR* 4.37.1.

⁶⁸ Voet 4.2.3 and 4; Huber *HR* 4.38.11; Van Leeuwen *CF* 1.4.41.9; Pothier *Obligations* §23.

⁶⁹ Voet 4.2.3; Van Leeuwen *CF* 1.4.41.9.

⁷⁰ Voet 4.2.5; Huber *HR* 4.38.12.

⁷¹ Voet 4.2.8. Voet’s suggestion in the same passage that the liability of joint wrongdoers under the *lex Aquilia* was different (joint wrongdoers were not jointly liable) is clearly not correct. Voet contradicts himself by stating elsewhere that wrongdoers are jointly liable under the *lex Aquilia* (9.2.12; 13.1.5), and Grotius *Inleiding* 3.32.12 and 15; 3.34.6 say the same. See on this point Van der Merwe and Olivier *Die Onregmatige Daad* 229.

defendant, and the order of restitution allows the aggrieved party to recover that benefit. A restitutionary remedy is not designed (as is a remedy in delict) for financial compensation for loss or damage suffered; rather, it is designed to allow the plaintiff to recover exactly that which was unduly handed over pursuant to an agreement, whether it consists in money or property.⁷² The term “loss” as used by the Roman-Dutch authorities must not be understood in the delictual sense. As a result, it is submitted that Voet’s comments on the question of “loss” are overstated, and do not reflect the true position in Roman-Dutch law.⁷³ Voet stated:⁷⁴

“Action fails when no loss sustained. Examples. — For the reason that no damage has been caused to the sufferer from fear by the fear inspired there is no need of restitution when a person has been compelled by the immediate inspiring of a later fear to restore what he himself had shortly before illegally acquired by an excitation of alarm as was said above on the strength of the law cited below. It is the same when one who was protected by a peremptory exception has compelled his creditor to release him; or when a creditor has inspired fear in a debtor to make him pay what is really due. Since the nature of the action because of fear demands a loss which can be repaired, and in such cases the sufferer from fear has parted with nothing, the edict is bound not to apply. Hence also the opinion was given that, if a person who owes forty has been constrained to promise and pay three hundred, he would in the event of disobedience obtain not four times three hundred but four times two hundred and sixty.”

This statement appears to blur the ordinary conceptual distinction between delictual compensation (an award of damages) for loss, and the restoration of a person to the position they were in before the transaction was concluded by a process of restitution. First of all, Voet appears to focus on the overall patrimonial consequences of at least two transactions, rather than examining the transaction which was induced by duress. His first example (where A uses duress to acquire something from B, and B uses duress to get it back from A) seems to be an example of the application of the *in pari delicto* rule, rather than a situation where restitution for duress is not suitable. His third example (a creditor using threats to compel a debtor to pay what is due) ignores completely the critical question of the nature of the threat, which, if illegitimate, would render the agreement voidable for duress regardless of what was being claimed. His second example (concerning a situation where a debtor forces a creditor to release

⁷² The terms “recovery” or “restoration” are commonly used by the authorities. See Huber *HR* 4.38.11; Grotius *Inleiding* 3.48.5. For example, Van Leeuwen *CF* 1.4.41.5 says: “By this action, that which has been given up through fear, is restored to him who has suffered the violence.... Hence, whatever has been extorted from any one by force or through fear ... is restored by means of a personal action.”, and in 1.4.41.7: “On the delivery of a thing, the Praetor orders it to be restored....”

⁷³ After a careful analysis of the authorities cited by Voet, Kerr *Contract* 323n437 comes to the same conclusion.

⁷⁴ Voet 4.2.17 (my emphasis). He repeats the requirement in 4.2.7; 4.2.10; 4.1.9 and 4.1.29.

him from a debt, in a situation where the debtor is already protected by an exemption from payment unlimited as to time) is vaguely articulated, would in all likelihood be a very rare occurrence, and could hardly be considered authority for a general requirement of damage for restitution. In fact, the example is derived from the *Digest*,⁷⁵ and a passage from the work of the jurist Ulpian that discusses the penal component of the *actio quod metus causa*. The numerical example Voet gives at the end of the passage is derived from the same fragment of the *Digest*,⁷⁶ and may also be interpreted as an example relating to the residual delictual and penal character of the Roman *actio quod metus causa*. Furthermore, the fourfold penalty Voet refers to in the example was obsolete in Roman-Dutch law, as has been demonstrated above, and this makes his example questionable authority.

In sum, it is submitted that in the ordinary course of events, evidence of economic or patrimonial damage was not a *sine qua non* of a claim for an order of *restitutio in integrum*. The order was designed to facilitate the recovery of any performance which has been unduly made, and not for financial compensation. Any use of the term “loss” by the Roman-Dutch authorities (and Voet in particular) should be understood in this sense.

3.4.4 Duress as a defence to an action

Any person sued for performance of an obligation concluded under duress was entitled to raise the act of duress as a complete defence to the action in Roman-Dutch law.⁷⁷ Provided duress could be proved, this defence or exception would constitute a bar to the plaintiff’s claim, and the defendant would be entitled to rescission of the agreement. The defence could be raised against any person who attempted to enforce the obligation, and not just the person responsible for the intimidation alone.⁷⁸ If the agreement had been executed in any form, the defendant was also entitled to claim restitution of any performance which he had made in terms of this defence.⁷⁹

3.5 Duress and the *condictiones*

3.5.1 The *condictiones* generally

⁷⁵ *D* 4.2.14.pr.

⁷⁶ See *D* 4.2.14.14.

⁷⁷ Voet 44.4.4; Huber *HR* 4.38.13; Van Leeuwen *CF* 1.4.41.5.

⁷⁸ Voet 44.4.4.

⁷⁹ Huber *HR* 4.38.11.

Up to this point the focus of this chapter has been on the position in the law of contract. But, as was stated at the beginning of this chapter, duress was not relevant exclusively to contracting. The question that arises is how the *condictiones* of Roman-Dutch law might have applied to cases of duress in Roman-Dutch law. But before this specific issue can be examined, a word needs to be said about the status of enrichment law and enrichment actions in Roman-Dutch law.

The Roman-Dutch institutional writers continued to treat instances of what we today would call unjustified enrichment on an *ad hoc* basis: relief could be obtained by instituting a *condictio*, as had been the position in Roman law. From a procedural perspective, in Roman-Dutch law a *condictio* amounted to no more than a *sui generis* form of action. Although Groenewegen stated that it was unnecessary to name the particular *condictio* upon which a litigant was relying when instituting an action before the courts,⁸⁰ all the enrichment actions or *condictiones* of Roman law — the *condictio causa data causa non secuta*; the *condictio ob turpem vel iniustam causam*; the *condictio indebiti*; the *condictio furtiva*; and the *condictio sine causa* — were received into the Netherlands and became part and parcel of the classical Roman-Dutch law of the 16th and 17th centuries. The Roman-Dutch lawyers of this time seem to have been content to classify and to use the Roman enrichment actions (especially the *condictiones*) in the same way that the Romans of Justinian's time had, and to expand upon them in small, piecemeal ways only when circumstances necessitated it.⁸¹ Whether the Roman-Dutch law of the late 18th century came to abandon the rigid structural formalism of the *condictiones*, and ultimately developed one general enrichment action based on general principles, was a matter of some debate between the courts and academic writers in South Africa. The possibility that this had occurred was initially rejected by the Appellate Division, which undertook an intensive historical analysis of the Roman-Dutch sources in *Nortje en 'n ander v Pool NO*⁸² in the 1960s. On the other hand, Professor Scholtens produced authorities from certain decisions of the Hoge Raad in the 18th century, reported by Van Bynkershoek and Pauw, that such a general enrichment action had indeed developed in the Netherlands before codification.⁸³ The majority of authors⁸⁴ have adopted Scholtens's views, which are convincing, and the Supreme Court of Appeal has finally accepted that this development had occurred

⁸⁰ Groenewegen *De leg abr ad D* 13.1.1.

⁸¹ For a comprehensive analysis of the classical Roman-Dutch approach to enrichment actions, see De Vos *Verrykingsaanspreeklikheid* 61-119; Zimmermann *The Law of Obligations* 857ff.

⁸² 1966 (3) SA 96 (A) at 135ff. His lordship relied *inter alia* on the emphatic rejection of this possibility in a number of judgments in provincial divisions in South Africa. See for example *Pucjowski v Johnston's Executors* 1946 WLD 1 at 3 (Van den Heever J) and *Le Roux v Van Biljon* 1956 (2) SA 17 (T) at 20.

⁸³ See Scholtens "The general enrichment action that was" (1966) 83 *SALJ* 391. His authority comes from Van Bynkershoek *Obs Tum* 277; 303; 2751 and 2754, as well as Pauw *Obs Tum Nov* 12; 196 and 558.

⁸⁴ See De Vos *Verrykingsaanspreeklikheid* 110ff; Eiselen and Pienaar 10; *Wille's Principles* 630.

in the late 18th century in the Netherlands in the recent case of *McCarthy Retail Ltd v Shortdistance Carriers CC*.⁸⁵

3.5.2 The position with regard to cases of duress

The impact of a general enrichment action on the Roman-Dutch practice of law in the period before codification is not discussed by any of the institutional writers, and thus the “classical” 17th century position must be analysed. The right to claim *restitutio in integrum* or relief was, of course, broadly framed, and a claim for the recovery of payments made or property transferred outside the traditional boundaries of contract could have been instituted using this extraordinary procedure. But like the Roman law, the substantive requirements to make out a case for *restitutio in integrum* required the proof of a threat of serious evil to the person. The question that needs to be examined is whether the *condictiones* of Roman-Dutch law, which existed mainly to deal with enrichment matters, could have overlapped with the more traditional remedies, or extended the bounds of the doctrine as it was traditionally understood, in a similar fashion to the Roman law.

In Roman law it was possible for a litigant to have brought a *condictio ob turpem vel iniustam causam* for the recovery of money or property handed over under duress. But this was exclusively a *stricti iuris* action (mainly designed to deal with unilateral payments or transfers made by *stipulatio* that were discovered to be illegal or immoral), and by the 17th century the Roman-Dutch legal system had of course dispensed with the distinction between obligations *stricti iuris* and obligations *bonae fidei*. So, from a technical perspective, the *condictio ob turpem vel iniustam causam* ought not to have been a competent action for duress.⁸⁶ Voet initially acknowledges this. After stating that such a *condictio* would have been available in cases where a transaction occurred for immoral or illegal purposes, he said:⁸⁷

“In *bonae fidei* transactions, however, what has been given with a view to restoration can also be reclaimed by way of action on the [transaction] itself, and thus such actions may run together with this action on a base cause, a thing which does not happen in transactions *stricti iuris*.”

Despite this, it appears that the Roman-Dutch authorities were content to ignore this particular formal issue and, finding the substance of the *condictio ob turpem vel iniustam causam* useful from a practical

⁸⁵ 2001 (3) SA 482 (SCA) at 488H. The reasons that Schutz JA gives for why this was not accepted for so long was that the sources upon which Scholtens relied (the *Observationes Tumultuariæ* containing the decisions of the *Hooge Raad*) were not available in published form for more than two centuries.

⁸⁶ Cf Du Plessis *Compulsion and Restitution* 122, and generally Zimmermann *The Law of Obligations* 862.

⁸⁷ Voet 12.5.1.

perspective, chose to ignore the straitjacket, and continued to recognise its existence in suitable cases where immorality or illegality had tainted a transaction in some way.⁸⁸ As far as cases of duress were concerned, Voet, following *Digest* 12.5.7, states that this *condictio* (more particularly the *condictio ob iniustam causam*) could be instituted to allow an aggrieved party to reclaim a stipulation that had been extorted by force.⁸⁹ But it is unclear whether Voet was merely referring to the Roman law, or whether he in fact considered this to be the position in the Roman-Dutch law. Seeing that a *stipulatio* was a form of contract, and the Roman-Dutch authorities had embraced a generalised theory of contract, it would seem that in such cases the more appropriate action would have been for *restitutio in integrum* based on duress, and allowing the *condictio* in such circumstances would simply have created an unnecessary duplication. Groenewegen in fact argues that in Roman-Dutch law an action for restitution on account of duress would have applied to a situation analogous to *D* 12.5.7, not a *condictio ob iniustam causam*.⁹⁰

Voet also refers to two other situations where the *condictio ob turpem vel iniustam causam* could potentially have been instituted where a transaction was induced by coercion. These cover situations where the relatively strict requirements that had to be proved in terms of the traditional action for restitution based on duress (the strict requirements of threats of serious evil to the person) would not have applied. The two examples Voet gives are clearly derived from the *Digest*.⁹¹ The first situation was where something had been transferred as a result of a threat of vexatious litigation, the commission of an actionable wrong, or theft. The second situation was where some illegitimate payment had been made in order to recover property or money that the other person was duty-bound to restore in any event.⁹² In both these situations the applicability of the *condictio ob turpem vel iniustam causam* would have extended the scope of the doctrine of duress beyond the traditional bounds of serious threats to person, and would have allowed a litigant to seek a restitutionary remedy in situations where the coercion was of a less blatant nature, and directed at harm to property or the unpleasant consequences of litigation — situations usually not covered by the traditional actions for duress. The rather sparse and muted discussion of this point amongst the Roman-Dutch authorities would suggest, though, that actions of this nature were probably very rare, and were considered to be peripheral, from a legal perspective.

⁸⁸ See Grotius *Inleiding* 3.30.17; Voet 12.5; Van Leeuwen *Censura Forensis* 1.4.14.8-15 and *RHR* 4.14.4-6; De Vos *Verrykingsaanspreeklikheid* 66; Du Plessis *Compulsion and Restitution* 123.

⁸⁹ Voet 12.5.4: “Such action finds place not on the ground of a future cause ... but rather on the ground of one that is past, as when something is reclaimed which has been paid on a stipulation wrung out by force.”

⁹⁰ Groenewegen *De leg abr ad D* 12.5.

⁹¹ See *D* 12.5.2.1, discussed at 2.3.2 above.

⁹² Both examples are contained in Voet 12.5.1.

What of the *condictio indebiti*? Since the Roman-Dutch authorities had come to recognise that all transactions were *bonae fidei* in nature, and had adopted the view that *ex nudo pacto oritur actio*, the *condictio indebiti* had increased significantly in importance as an action. The reason was that most payments or transfers are made on the understanding that an obligation of some kind was being performed (*solvendi causa*), and where it was discovered that the obligation did not in fact exist (either because no valid contract existed, or for some other reason), then the payment or transfer would have been *indebitum*, and the *condictio indebiti* would have been the natural action. Indeed, both Zimmermann and Du Plessis have shown that the *condictio indebiti*'s star rose under Roman-Dutch law, whereas *condictiones* like the *condictio causa data causa non secuta* and the *condictio ob turpem vel iniustam causam* depreciated in importance.⁹³ The problem as far as duress cases is concerned was that the bulk of the Roman-Dutch authorities, like their Roman counterparts, required proof that the payment or transfer had occurred in error before the *condictio indebiti* could be instituted.⁹⁴ Since a transfer of money or property under duress was usually made with knowledge that it was coerced rather than being due, it is unlikely that the Roman-Dutch authorities would have considered the *condictio indebiti* to be an appropriate alternative action in cases of duress.

3.6 Conclusion

The aim of this chapter has been to analyse how the Roman-Dutch lawyers treated cases of duress in the law of obligations. The analysis has provided evidence of the enormous influence that Roman law had on the doctrine of duress as it was articulated by the institutional Roman-Dutch authorities in the 16th, 17th and 18th centuries. In particular, the substantive law was almost identical to that articulated by the Roman jurists. The broad structural nature of the remedies available for duress did, however, undergo some changes from the Roman position.

⁹³ Zimmermann *The Law of Obligations* 866ff; Du Plessis *Compulsion and Restitution* 122 and 126-7.

⁹⁴ See Voet 12.6.7 and 44.7.5; Huber *HR* 3.35.1 and 2; De Vos *Verrykingsaanspreeklikheid* 69. Contra Grotius *Inleiding* 3.30.6, who regarded the basis of the *condictio indebiti* as unjustified enrichment rather than error. For a full discussion, see Visser *Die Rol van Dwaling by die Condictio Indebiti* 144-177.

Chapter Four

The Current South African Position: Duress Leading to a Contract

“The law hath not been dead, though it hath slept.”

William Shakespeare *Measure for Measure* II ii 90

4.1 Outline

Following a brief general introduction, the doctrine of duress in the realm of contract will be analysed in this chapter. It is in this field that the doctrine of duress is most commonly discussed and debated in South Africa. Currently, the law remains heavily Roman and Roman-Dutch in its nature, so many of the principles to be discussed below will have a familiar ring to them. But what is significant is that the law has, in the past 120 years, been influenced in certain areas by English legal precepts. These importations have altered the complexion of the law in curious ways. During the course of this chapter, the current theoretical and schematic approach to dealing with duress cases will be explained, and the deficiencies of the current approach will be highlighted. This chapter will set the scene for the re-analysis of the duress doctrine in the law of contract that will follow in Chapters 5, 6 and 7.

4.2 Duress in the South African law of obligations: an overview

Like much of the law of obligations in South Africa, the Roman-Dutch law constitutes the main source of authority for the common law¹ doctrine of duress that exists in South Africa today.² It has been

¹ In South Africa it is the convention that non-statutory rules and principles of law are referred to as the “South African common law”. These rules and principles were derived initially from Roman-Dutch law, but are now found mainly in authoritative decisions of the courts, and are applied by virtue of the doctrine of judicial precedent. This appellation “common law” excludes from its ambit the rules of African customary law. I am not using the term “common law” to mean the Anglo-American system of law, which constitutes the “common law” legal system.

² The southern part of Africa effectively came to fall under the political control of the Provinces of the United Netherlands after the Dutch East India Company (the Vereenigde Geötrooyeerde Oost-Indische Compagnie, or VOC) took the decision to establish a refreshment station at the Cape from 1652. From the late 1650s to 1795,

shown in Chapters 2 and 3 that the Roman and Roman-Dutch authorities tackled the question of duress in a rather haphazard and casuistic fashion, and discussed legal principles paragraph by paragraph, but never developed any generalised structural pattern or elemental framework for dealing with such cases. Certain core or basic requirements for valid duress claims are discernable in Roman and Roman-Dutch law, and have been discussed in the two previous chapters, but these have been elicited through careful research and comparison of the sources, and were never expressly catalogued by the old authorities.

This naturally made deciding cases involving duress difficult for the judiciary in the formative years of the South African legal system, as there was no fast and ready formula available to them. As a result, judges appear to have taken a similarly casuistic approach to duress cases: they would scan the old authorities until they came upon a principle that was relevant to the case at hand, and would then apply that principle to the facts in order to reach a decision that appeared equitable in the circumstances.³ Duress cases were, it appears, sufficiently rare not to have required or inspired a trenchant doctrinal analysis of this relatively small area of law.⁴ The courts were happy to deal with each case on its facts, in the light of the relevant submissions of the Roman and Roman-Dutch authorities available to them, and (gradually, as time passed) the findings of what local precedents there were on duress. In this way the Roman-Dutch principles of duress trickled down into South African judgments, and formed the foundation upon which the South African doctrine of duress was built.

This approach was obviously not ideal. Without a coherent formula or legal methodology available for dealing with these sort of cases, the law naturally remained rather rudimentary and unsophisticated. Subsequent attempts to rectify this situation, and to systematise the law of duress have done little, it is submitted, to change the rather disjointed and unrefined character of the law. The scope of the doctrine

Roman-Dutch law was the legal system which applied in the Cape. When the British took control of the Cape in 1795, English law dictated that the status quo should remain, and that Roman-Dutch law should continue to be the common law of the territory. The impetus for this decision would have come from the rule laid down by Lord Mansfield in the English case of *Campbell v Hall* (1774) 1 Cowp 204 at 209, 98 ER 1045 at 1047, which read: "The laws of a conquered country continue in force, until they are altered by the conqueror." See too *Calvin's case* (1608) Coke's Reports 1, 77 ER 377, and Hahlo and Kahn *The South African Legal System* 575; Zimmermann and Visser *Southern Cross* 55-6. Although the Bigge-Colebrooke Commission of 1826 recommended that Roman-Dutch law should gradually be replaced by English law, this recommendation was never implemented, and the First and Second Charters of Justice of 1827 and 1832 impliedly affirmed that Roman-Dutch law would remain the common law of the Cape. The same position was adopted in Natal, the Transvaal and the Orange Free State. As a result of this, a large portion of the South African common law of today, especially private law, continues to be based, foundationally anyway, upon Roman-Dutch law.

³ A good example is the earliest reported case on duress in South African law, *Carruthers v Van Der Venter* (1862) 4 Searle 96, where Watermeyer J at 101 applied the principle set out in Voet 4.2.16 to the effect that a contract entered into under duress may be ratified at a later stage. See too *Sievers v Bonthuys* 1915 EDLD 525 at 531, where Voet's submission at 4.2.13 that a threat must have serious implications, and not constitute a mere annoyance, formed the basis for the decision to reject a plea of duress.

⁴ From a statistical point of view, a detailed analysis of the South African law reports shows that there are only in the region of about 30 reported cases where the question of duress was raised in the context of the law of obligations before 1940.

remains limited, and has not developed much beyond its Roman tap-roots.

But a second complication was also to emerge. Since there was no uniform mechanism for dealing with duress cases, the doctrine of duress in the wider context of the law of obligations began to develop in a fragmentary fashion. The main reason for this was that Roman-Dutch law was not the only source which the South African judiciary relied upon to assist them in deciding cases. Since many of the judges of the colonial period were schooled in English law rather than Roman-Dutch law, and knew little of the old authorities, or the Dutch language, there were many situations in which judges felt more comfortable drawing upon English principles and precedents in order to reach their decisions. In particular, the approach taken to duress cases in the context of the law of contract, on one hand, and cases concerning the restitution of transfers of money or property under duress outside the bounds of contract, on the other hand, came to diverge significantly as a result of the influence of English law. In cases concerning non-contractual transfers made under duress, early colonial judges adopted an essentially English approach, claiming the English law and the Roman-Dutch law were the same in principle. This claim was not entirely accurate, but has endured, and has led to these two areas of the law of duress developing along different paths. In addition, in the last 30 years, there has been a trend towards grafting certain aspects of the law where non-contractual transfers are concerned onto the law where a contract has been induced by duress. This has occurred more by accident than on principle, and has left the doctrine of duress in an even more confused state than before.

This chapter, as well as the three that follow, will be dedicated to examining the doctrine of duress in the law of contract in South Africa. The position with regard to non-contractual transfers of money or property under duress will be discussed in Chapters 9 and 10, although at certain points in this chapter, it will be necessary briefly to discuss the position where there has been cross-pollination of precepts.

4.3 Duress leading to a contract

In South African law, an aggrieved party who has been coerced into entering a contract under duress may avoid the contract.⁵ The party alleging that the agreement has been concluded under duress will bear the onus of proving this fact, whether he or she litigates as plaintiff or defendant.⁶ In the formative

⁵ See generally Kerr *Contract* 318ff; Christie *Contract* 349ff; Van der Merwe *et al Contract* 85ff; De Wet and Van Wyk *Kontraktereg* 49ff; Joubert *Contract* 104ff; Wille's *Principles* 446ff.

⁶ This reflects the general rule of evidence with regard to the incidence of the burden of proof (*Pillay v Krishna* 1946 AD 946 at 951-2). In duress cases, the rule has been endorsed in *Kilroe v Bayer* 1915 CPD 717 at 719; *Savvides v Savvides and others* 1986 (2) SA 325 (T) at 330A-B; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC) at 439F; *Rothman v Curr Vivier Incorporated and another* 1997 (4) SA 540 (C) at 551I; *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 823C; *Scholtz v Scholtz* 1997 JDR 0556 (SE) at 3. See

period of South African law, there was, as was stated above, no certain or coherent formula for deciding cases involving duress. The first attempt to address this problem was made only in 1937, by Sir John Wessels. In his ground-breaking work *The Law of Contract in South Africa*, the erstwhile Chief Justice of South Africa conducted a careful analysis of the old authorities before identifying a set of five essential elements which, in his opinion, ought to be proven before a case of duress could be made out. These were:⁷

1. Actual violence or reasonable fear;
2. The fear must be caused by the threat of some considerable evil to the party or his family;
3. It must be a threat of imminent or inevitable evil;
4. The threat or intimidation must be *contra bonos mores*; and
5. The moral pressure used must have caused damage.

Wessels's elements were first cited with approval and applied by the South African courts in what has become, in the judicial sense, the *locus classicus* on the doctrine of duress — *Broodryk v Smuts NO*.⁸ The facts of the case were as follows: Broodryk, the plaintiff, was employed as a road-worker at the time when the Second World War commenced. He was married, with one young child. He alleged that he had been forced to enter a contract to enlist in the armed forces by two government officials, acting under the authority of the Union Government. Apparently, before the plaintiff took the oath of service, the two officials threatened that if he did not comply with their orders and enrol in the armed services, his employment would be terminated, and he would be interned in a war camp for being a traitor. On the basis of these threats, Broodryk signed the agreement. He was eventually called up for service, and due to his refusal to obey the order, and his repeated attempts to withdraw his undertaking to serve, was arrested and taken to a military camp, where he was fined £2 for disobeying orders. As a result, the plaintiff sued the Prime Minister in his capacity as Minister of Defence, claiming an order that the contract be set aside, and that he would not have to serve in North Africa. He based his claim upon the fact that the contract was invalid because he had been forced to agree to its terms under duress. The defendant took exception to the pleadings on the basis that it was both vague and embarrassing, and disclosed no cause of action.

Ramsbottom J, after quoting Wessels's list of five elements with approval, dealt with each element

too Kerr *Contract* 319.

⁷ Wessels *Contract* §1167. Wessels does in fact call this list a set of "elements", and so I have treated them as such. This treatise, although written by Wessels, was only published posthumously (under the editorship of AA Roberts) in 1937. Roberts was also responsible for producing the second edition of the work in 1951.

⁸ 1942 TPD 47.

seriatim.⁹ The learned judge held, first, that fear inspired by a threat of internment was entirely reasonable, and satisfied the first requirement. Secondly, the threat amounted to a considerable one, since the plaintiff, if interned, would lose his freedom, and his wife and child would lose the benefit of his support. Thirdly, the fear of internment was held not to be too remote that it could be ignored. Fourthly, it was held that a threat to intern a person merely because he did not exhibit a willingness to serve in the army was clearly *contra bonos mores*. Finally, the plaintiff was held to have suffered “damage” since he had been forced to incur obligations with which he would otherwise not have been encumbered. Since all five elements were satisfied, Ramsbottom J (Grindley-Ferris J concurring) dismissed the exception, holding that the agreement had indeed been entered into under duress.

Since then, the five elements have invariably been cited with approval and applied by the courts in deciding cases where a party has alleged that a contract has been induced by duress,¹⁰ and *Broodryk*’s case is usually cited as the leading precedent. This five-pronged test continues to exert a vice-grip over the doctrine of duress in South Africa right up to the present day. Although, with respect, Wessels’s list of elements is problematic,¹¹ I shall utilise it as the framework around which I shall build my analysis of the doctrine of duress as it is currently understood in the South African law of contract, inasmuch as these five elements have acquired such hallowed status. Each of these five elements will be examined one-by-one. By using this approach I wish to demonstrate (a) how cases of duress are treated in South African contract law today; (b) that some of the elements stated above are either deficient, or simply confusing (both in terms of the substance of some of the elements, as well as in terms of Wessels’s formulation thereof); and (c) that the South African law of duress is out of touch with modern trends and commercial realities, and thus, in sum, is in need of a thorough overhaul.

Before commencing, one important point needs to be made. The ability to impeach a contract because of duress is a power which applies in the context of all contracts generally. The general principles which I shall discuss below thus have application even in “special” contractual situations. For

⁹ At 52-3.

¹⁰ See *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306B; *Machanick Steel and Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W) at 271C; *Schana v Control Instruments (Pty) Ltd* (1991) 12 ILJ 637 (IC) at 642E-G; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC) at 439D; *Dalgleish v Ampar (Pty) Ltd t/a Sol Energy* [1995] 11 BLLR 9 (IC) at 16H-I; *Rothman v Curr Vivier Incorporated and another* 1997 (4) SA 540 (C) at 551I-J; *Benkenstein v Neisius and others* 1997 (4) SA 835 (C) at 845F-G; *Van den Berg & Kie Rekenkundige Beampies v Boomprops* 1028 BK 1999 (1) SA 780 (T) at 784G-H and *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 825E-G; *Von Aspern t/a Von Manufacturing v Hip Hop Clothing Manufacturing CC* 1997 JDR 0085 (C) at 10-11; *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at 177B-C.

¹¹ Similar criticism of the elements may be found in Du Plessis *Compulsion and Restitution* 128; Christie *Contract* 350; Farlam and Hathaway 362.

example, the same principles apply in the context of an engagement contract,¹² and the conclusion of a marriage, which are contractual arrangements, although *sui generis*.¹³ The principles also apply in the specialised field of employment contracts. Such cases will thus be discussed together with cases of a more general nature. Only in a very few isolated circumstances do different principles apply in these special cases, and these will be highlighted during the course of the discussion that follows.

4.3.1 Element one: actual violence or reasonable fear

4.3.1.1 Actual violence

Actual violence refers to the direct application of force to another party. This can have two effects on the transaction. First, the violence may amount to what the Romans called *vis absoluta*. An example would be where one person physically subdues another, and forces that person's hand to append a signature to a document. In cases of *vis absoluta*, there is no agreement reached between the parties: the signature is written as a result of brute force, and there is no consensus in either a subjective or an objective sense. Consequently, no legal contractual relationship can be considered to have arisen at all.¹⁴ Examples in the case law of actual physical violence in this context are non-existent in South African case law. The reference to *vis absoluta* in Wessels's first element for proving duress seems inappropriate: in neither Roman law nor Roman-Dutch law was the doctrine of duress designed to cover this sort of behaviour. Historically, the doctrine of duress strictly so-called concerns situations in which violence, or threats of violence were used to inspire fear in the victim, and the physical act or threat does induce consent. It is submitted that Wessels ought to have treated direct physical violence amounting to *vis absoluta* as a separate issue on its own, rather than incorporating it into the general list, since the legal effect of direct violence that vitiates consent is conceptually quite different to the effect of physical violence (a beating, for example) or threats that induce fear in a victim, and which results in the conclusion of a voidable contract.

4.3.1.2 Reasonable fear

¹² See *Family Law Service* para A9; Sinclair *The Law of Marriage* 319.

¹³ For a discussion of the principles of duress purely in the context of marriage, see the *Family Law Service* para A36; Sinclair *The Law of Marriage* 359-60. Hahlo *The South African Law of Husband and Wife* 21-2 provides an excellent study of the nature of marriage as a special sort of contract, with certain unique features. In English law, see Manchester "Marriage or Prison: The Case of the Reluctant Bridegroom" (1966) 29 *MLR* 622; Bradley "Duress and Arranged Marriages" (1983) 46 *MLR* 499; Bradney "Duress, Family Law and the Coherent Legal System" (1994) 57 *MLR* 963.

¹⁴ Wessels *Contract* §1168 describes the arrangement as "a nullity". See too Christie *Contract* 349.

The South African doctrine of duress is mainly concerned with regulating the situation where agreements are induced by threats that evoke some form of fear in the victim. The authorities state that the fear does have to be a reasonable one.¹⁵ In *Steiger v Union Government*, Dove-Wilson JP held that “fear will annul an engagement when the fear is not vain or foolish, but such as to overcome a man of ordinary firmness”.¹⁶ The references to “reasonableness” and a person of “ordinary firmness” might suggest at first glance that South African law endorses the objective Roman approach to assessing the nature of the fear. But to adopt such an approach would be unduly strict, and devoid of reality. A purely objective approach to assessing the reasonableness of the fear inspired in the victim would effectively ignore the effect of the threat upon the person to whom it was made, and would substitute him or her with an artificial construct operating in a circumstantial vacuum.¹⁷

The South African courts have recognised this problem, and have preferred to adopt the Roman-Dutch approach¹⁸ to assessing the reasonableness of the fear: was it reasonable for a person in the circumstances in which the victim found him or herself, and with similar characteristics to the victim, to have experienced fear? In *Paragon Business Forms (Pty) Ltd v Du Preez*, Leach J held:¹⁹

“It would be somewhat startling to allow a person to escape from a contract on the ground of duress induced by a fear which is completely unreasonable and has no valid basis.... To prevent the remedy getting out of hand one must, in my view, have regard to the person complaining of the duress and the circumstances in which he found himself at the time, and then gauge, in the light of all those relevant factors, whether it was reasonable for him to have succumbed thereto.”

¹⁵ See *Broodryk v Smuts NO* 1942 TPD 47 at 52; *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (C) at 397H.

¹⁶ (1919) 40 NLR 75 at 79. Other cases which refer to the fear having to be such as would move a person of “ordinary firmness” are: *Salter v Haskins* 1914 TPD 264 at 266; *Kilroe v Bayer* 1915 CPD 717 at 719; *Broodryk v Smuts NO* 1942 TPD 47 at 52; *Astra Furnishers (Pty) Ltd v Arend* 1973 (1) SA 446 (C) at 449B.

¹⁷ For criticism of the purely objective approach, see *Wille’s Principles* 447; *LAWSA* Vol 5(1) §152(c); Farlam and Hathaway 364; De Wet and Van Wyk *Kontraktereg* 50; Joubert *Contract* 109.

¹⁸ See Van Leeuwen *CF* 1.4.41.1; Van der Linden *Koopman’s Handboek* 1.14.2.2; Huber *HR* 4.38.4; Voet 4.2.11.

¹⁹ 1994 (1) SA 434 (SEC) at 441E-F. In this case Du Preez claimed that he had signed an employment contract containing a restraint of trade clause, inspired by a threat that he would be dismissed if he did not sign. The company was seeking to enforce the covenant in restraint of trade against Du Preez. Leach J examined the facts of the case, and found that there were no reasonable grounds for a person like Du Preez (a highly successful and confident businessman, with a wealth of commercial experience) to have imagined, let alone feared, that his job could have been at risk if he did not sign the contract. For a similar case, see *Bid Industrial Holdings (Pty) Ltd and another v Enslin and another* 2001 JDR 0329 (SE).

A good factual example may be found in the case of *Block v Dogon, Dreier and Co.*²⁰ The plaintiff alleged that he had been coerced into handing over two promissory notes worth £98 5s 3d because the defendants had threatened that if he did not do so, he would be arrested and charged with theft. Block later sued for restitution of the documents on the basis of duress. It was alleged by the defendants that it was not appropriate for Block to have been actuated by fear at all. Curlewis J described the plaintiff as ignorant, of low intelligence, and barely able to communicate in English,²¹ and, considering these factors, the nature of the threats made against him, and the predicament he found himself in, held that “the plaintiff was one who could be frightened by such threats”.²²

Christie summarises the legal position succinctly in the following terms:²³

“The point is that every person who complains of duress is entitled to be seen as the sort of person he or she is, but to prevent the remedy getting out of hand he is not entitled to repudiate the contract if he claims to have succumbed to a threat that would be unreasonable even for the sort of person he is.”

These authorities are generally cited as representing the orthodox view that the fear experienced by the victim, in the circumstances, must be reasonable. However, a closer analysis of what the courts are saying makes it clear that speaking of the “fear” experienced by the victim having to be “reasonable” is not in fact a true reflection of how the courts assess cases of duress at all.²⁴ Courts do not look at the state of mind of the victim, and try to assess (a) whether the person was afraid, and (b) whether that was a reasonable fear in the circumstances. A person using threats is not likely to be able to escape the consequences of his actions by saying that the other person ought not to have been scared, or “that no-one but a coward or a fool would have been moved by the threats”.²⁵ This would lose sight of the fact

²⁰ 1910 WLD 330.

²¹ At 332.

²² At 332-3. Other cases where a similar approach has been endorsed are: *White Brothers v Treasurer-General* (1883) 2 SC 322 at 350; *Smith v Smith* 1948 (4) SA 61 (N) at 67 (where Voet’s test of reasonable fear is incorrectly cited as coming from 4.2.2); *Savvides v Savvides and others* 1986 (2) SA 325 (T) at 331I, and *Hamilton Paneelkloppers v Nkomo* 1991 (2) SA 534 (O) at 540. In *Freedman v Kruger* 1906 TS 817, a material fact in this case was that Kruger, who had been arrested and was facing possible criminal charges, was “a man of feeble constitution” (at 818).

²³ Christie *Contract* 351.

²⁴ See *LAWSA* Vol 5(1) §152(c); *Hahlo and Kahn Union* 472.

²⁵ The quote is from Hunt “General Principles of Contract” in 1963 *Annual Survey of South African Law* 127. Hunt describes the requirement of “reasonable fear”, when viewed on its own, as “absurd”. He points out quite correctly that there is no similar requirement in the law of misrepresentation. The person who made the representation cannot argue that it was unreasonable for the party misled by the misrepresentation to have been so misled. See further Hunt “The man with X-ray eyes” (1962) 79 *SALJ* 119 at 120; Farlam and Hathaway 339.

that in any duress case there are two parties involved in a process of contractual negotiation. It is submitted that the true nature of any duress enquiry is whether threats made by one party induced the other to enter into a contract. It is the causal link between the threat and the conclusion of the contract which is in fact the true locus of this enquiry.²⁶ For, as Leach J said in the *Paragon* case, “the party bearing the onus must show that he would not have concluded the agreement but for the duress”.²⁷ The fear experienced by the victim is not really important (for, when faced with a threat, any person may experience a psychological fear of some kind); but it is how the person reacted to a threat which is the issue.²⁸ “Was it reasonable for this person, who acted on the basis of fear, to act in the way in which he or she did?” or: “Was it reasonable, in the circumstances, for this person to have succumbed to these threats, and to have entered into the contract?” It is evident, when one examines the cases, that these are in fact the questions which the courts are asking when they speak of reasonable fear. As a result, it seems that Wessels’s requirement of “reasonable fear” is misleading, since it accentuates a psychological issue, rather than articulating the legal issue: the importance of determining whether the victim acted reasonably in the circumstances in concluding the contract on the basis of compulsion.

The final criticism that can be levelled at this element is one of logic. Stating this requirement of “reasonable fear” right at the beginning of the list of elements is logically unsound, in that it bears no resemblance to the way in which a purported act of duress ought to be assessed. It seems odd to require a court to examine whether a victim’s fear (or, more accurately, their conduct in entering into a contract) was reasonable before discussing what has caused the person to be frightened. Positioning this requirement before a requirement that a threat must have been made (the first “act” in a duress case) appears to put the cart before the horse.

²⁶ The importance of this causal link is emphasised in *Savvides v Savvides and others* 1986 (2) SA 325 (T) at 329E; Van der Merwe *et al* *Contract* 86; *LAWSA* Vol 5(1) §152(c). Contra Farlam and Hathaway 364, who propose tentatively that the issue of reasonableness is relevant to the enquiry as to whether the threat was *contra bonos mores*.

²⁷ 1994 (1) SA 434 (SEC) at 439F. Other cases where the courts mention the importance of causation or inducement are *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 451; *Steiger v Union Government* (1919) 40 NLR 75 at 80; *Padayachey v Lebeso* 1942 TPD 10 at 13; *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 (SR) at 690E; *Savvides v Savvides and others* 1986 (2) SA 325 (T) at 329E; *Hamilton Paneelkloppers v Nkomo* 1991 (2) SA 534 (O) at 540A.

²⁸ De Wet and Van Wyk *Kontraktereg* 50 say: “Here also *Grotius*’s approach is to be preferred, where he submits that the only question is whether the person performed as a result of fear, and attention should not be paid to the reasonableness of the fear.” The original Afrikaans reads: “Ook hier is *Grotius* se benadering te verkies, waar hy meen dat die vraag slegs is of die persoon in vrees gehandel het, en dat daar nie ag geslaan moet word op die ligsinnigheid van die vrees nie.” (My emphasis). The learned authors refer to *Grotius De Iure Belli ac Pacis* 2.11.7. Kerr *Contract* 325 states: “A person using threats cannot expect much sympathy from a court if he alleges that the threats should not have had the effect they apparently did have; but the question of the capacity of a party to resist the particular pressure employed may arise in such a case.” (My emphasis).

4.3.2 Element two: fear caused by a threat of considerable evil to the party or his family

Traditionally, each element of a coherent doctrinal test deals with one particular legal issue of significance. Wessels's second element, on the other hand, can be said to draw attention to three distinct issues at once. These are (a) fear, (b) causation and (c) the existence of a threat. This makes the element cumbersome, not to mention confusing, since a number of issues need to be unpacked, rather than the analysis being directed to one main area of importance.

4.3.2.1 Fear caused by a threat

It is under element two that the need for a causal nexus between fear and threat is articulated. There is a degree of overlap between this requirement and the requirement that the person must have acted reasonably in element one, which blurs the distinction between the two elements. One cannot assess whether a person acted reasonably unless one can determine what caused the person to act. The second problem with this initial aspect of element two is again one of logic. Rather than prioritising the need for a threat, and thereafter focussing on the effect of the threat, the element prioritises the fear of the victim as the first important criterion, and mentions a threat only later. Once again, the concentration on the "fear" of the victim suggests that the court must undertake a subjective psychological test of the victim's mind, rather than testing the victim's conduct in response to the threat, which is in fact what the courts generally do in duress cases.

4.3.2.2 A threat

A *sine qua non* of any true duress case is that one party must have threatened the other.²⁹ This requirement was an intrinsic feature of the law of duress in both Roman and Roman-Dutch times. The

²⁹ This requirement was lacking in the case of *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC). The respondent claimed that he had been induced to sign a new employment contract containing a restraint of trade clause because of a threat that he would be dismissed if he did not. There was no evidence whatsoever (440F) that such a threat was ever made. Other cases in which it could not be proven that a threat had been made are: *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 33A; *Dalgleish v Ampar (Pty) Ltd t/a Sol Energy* [1995] 11 BLLR 9 (IC) at 16-7; *Rothman v Curr Vivier Incorporated and another* 1997 (4) SA 540 (C) at 551H; *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 (1) SA 780 (T) at 794E-G; *Frye/Glasshopper* [1999] 4 BALR 406 (CCMA) at 408E-F.

word “threat” has never been analytically defined by either academic writers or the courts in South Africa, and tends to be understood in a vague, common-sense fashion. This lacuna will be addressed later in the study.³⁰ It has been said that a threat need not necessarily be made expressly, but may be implied from words, silence or conduct.³¹

At this juncture, several special topics having a bearing on the threat requirement need to be discussed.

4.3.2.2.1 *Metus Reverentialis*

Both Scholtens³² and Van Huyssteen³³ conclude from their historical analyses of the Roman term *metus reverentialis* that the existence of a hierarchical relationship between two parties did not imply a situation of threat. *Reverentia* on its own never made out a prima facie case for duress; serious threats needed to be proven in addition to a relationship between the parties. Indeed, Van Huyssteen submits that the term *metus reverentialis* is a “concept without substance”³⁴ in South African law.

Initially, it appeared as if the Appellate Division might take a different approach to the matter. In *Union Government, Minister of Finance v Gowar*,³⁵ Wessels AJA suggested obiter that a contract could be rescinded on grounds of *metus reverentialis*.³⁶ But the learned judge was only able to cite Zoezius, the rather obscure early 17th century jurist from the Southern Netherlands, in support of his proposition, and had to concede that Voet did not agree. Scholtens has shown that Zoezius in fact also required further evidence of threats (*impressio vel violentia*) before a plea of duress would be considered,³⁷ and thus it would appear that Wessels AJA’s dictum is inaccurate, and does not accord

³⁰ See 6.2 below.

³¹ *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 828H; *Hotz v Standard Bank* 1907 Buch AC 53 at 64. See *R v Zonele and others* 1959 (3) SA 319 (A) at 329; *S v Mbele* 1963 (1) SA 257 (N) at 260; *S v Gokool* 1965 (3) SA 461 (N) at 464-5.

³² “Undue Influence” 1960 *Acta Juridica* 276 at 287.

³³ *Onbehoorlike Beïnvloeding* 115.

³⁴ *Onbehoorlike Beïnvloeding* 115. This is a translation of the original Afrikaans “nuttelose begrip”. It was only in the law of succession that an allegation of *reverentia* (which came to fall under a wider notion of testamentary undue influence) could be sufficient to invalidate a will in the context of the European *ius commune*, and Roman-Dutch law in particular. On the development of the law relating to testamentary dispositions, see Scholtens “Undue Influence” 1960 *Acta Juridica* 276 at 283-288.

³⁵ 1915 AD 426.

³⁶ At 452.

³⁷ Scholtens “Undue Influence” 1960 *Acta Juridica* 276 at 284.

with the Roman-Dutch view.³⁸ Indeed, writing several years later in his *Law of Contract*, Wessels in fact aligned himself with the traditional Roman and Roman-Dutch view by dismissing the possibility that *reverentia* on its own could provide grounds for duress.³⁹

The Appellate Division put any lingering uncertainty on the matter to rest by holding, in the case of *Spies NO v Smith*⁴⁰ that a simple allegation of *reverentia* is never sufficient to have an obligation rescinded for duress. There is, in other words, no presumption of duress arising out of a hierarchical or fiduciary relationship, and any person who wishes to escape the terms of an obligation must provide proof that they were in fact coerced by threats.⁴¹ Cases concerning *reverentia* fall to be decided under the doctrine of undue influence, rather than the doctrine of duress.

4.3.2.2.2 Threats by third parties

A question that has inspired some controversy in South African law, and which remains unresolved, is whether an agreement between two parties may be rescinded when the conclusion of the agreement was inspired by threats made by a third party. Of course, in Roman-Dutch law, the aggrieved party would have been entitled to rescind the agreement, no matter who was responsible for the act of duress.⁴² The matter has never been raised directly in the South African courts, although in an obiter dictum in *Broodryk v Smuts NO*, Ramsbottom J did express support for the Roman-Dutch rule.⁴³ Academic opinion on the issue is divided.⁴⁴ The question as to how threats by third parties should be treated will be discussed later in the study.⁴⁵

4.3.2.3 A threat of “considerable evil”

³⁸ Van Huyssteen *Onbehoorlike Beïnvloeding* 116 comes to the same conclusion.

³⁹ Wessels *Contract* §1172.

⁴⁰ 1957 (1) SA 539 (A). The case concerned the impact of duress and fraud upon the validity of a testamentary disposition.

⁴¹ At 547G-H, per Steyn JA. See too *Smith v Smith* 1948 (4) SA 61 (N); Joubert “Some aspects of metus reverentialis” (1970) 87 *SALJ* 94 at 98; Kerr *Contract* 325; Joubert *Contract* 106.

⁴² See Voet 4.2.3 and 4; Huber *HR* 4.38.11; Van Leeuwen *CF* 1.4.41.9; Pothier *Obligations* §23.

⁴³ *Broodryk v Smuts NO* 1942 TPD 47 at 53. A similar assertion was made obiter by Coetzee J in *Ex Parte Coetzee et Uxor* 1984 (2) SA 363 (W) at 365-366.

⁴⁴ Those who support the Roman-Dutch approach are Wessels *Contract* §1193-7; Hahlo and Kahn *Union* 472-3. Those critical of the Roman-Dutch approach are De Wet and Van Wyk *Kontraktereg* 50; *Wille's Principles* 448; Joubert *Contract* 110; Farlam and Hathaway 365; Van der Merwe *et al Contract* 89; Christie *Contract* 358.

⁴⁵ See 6.5 below.

Wessels's second element requires that the threat be of some "considerable evil". As a consequence, where a proposal is put to the other party which is merely annoying, likely only to inconvenience the person in some minor way, or is an empty threat with little or no foundation, the proposal will not contain sufficient venom to be considered a threat of "considerable evil" to which the person ought to have succumbed. This principle was well-known in both Roman and Roman-Dutch law.⁴⁶ The South African courts have been consistent in their endorsement of this principle, and have refused to find duress in situations where the threat was of mere inconvenience or annoyance.⁴⁷

This requirement of "considerable evil" does, though, raise a few difficulties. To say that the threat ought to be one of "considerable evil" is rather vague, and this requirement overlaps in several ways with the requirements articulated in elements one, three and four. To require that the threat be "evil" is rather melodramatic, but can sensibly be interpreted to mean that the threat was *contra bonos mores*. Yet this criterion is repeated in element four. Secondly, requiring that the threat be "considerable" is not substantially different from saying that the threat posed a danger which was imminent (element three), and it was accordingly reasonable in the circumstances for the party to have succumbed, and to have entered into the contract (element one). With respect, this suggests again that the formulation of the elements is logically flawed.

4.3.2.4 A threat directed against the party or his family

The final critical feature of element number two is the statement that a threat may only have a coercive effect if it is directed against oneself or a member of one's family. Although the majority of duress cases concern threats made directly against the other contracting party, there are a few isolated examples of situations where a contract has been induced by a threat directed against a member of the contracting

⁴⁶ D 4.2.5; Voet 4.2.1, 4.2.11 and 4.2.13; Van Leeuwen *CF* 1.4.41.1; Huber *HR* 4.38.6; Pothier *Obligations* §25.

⁴⁷ *Freeman v Corporation of Martizburg* 1882 NLR 117 at 123; *Lilienfield and Co v Bourke* 1921 TPD 365 at 370. A good example may be found in *Sievers v Bonthuys* 1911 EDLD 525. In this case Bonthuys told Sievers, who was in the habit of transporting ostriches along a public road through Bonthuys's property, that he did not want Sievers to do this any more, as the livestock had caused damage to Bonthuys's property in the past. Bonthuys said that if Sievers chose to ignore his request, and any damage was done, Bonthuys would sue him. The court held that no serious threat had been made, and Sievers had merely been inconvenienced by choosing to take a longer route (at 529 (per Kotze JP) and 532 (per Sampson AJ)). One can contrast this with the case of *Hamlyn v Acton* 1919 EDL 189, where a government officer had ordered the driver of ox-wagons to turn back and go home, since the oxen were incorrectly branded. The official in fact had no power to do this, but had been assisted at the time by the police. It was implied that if the order had not been complied with, the driver of the wagons would have been arrested and criminally charged. This was certainly not an empty threat, but a threat of a very real and serious nature in the circumstances.

party's family.⁴⁸ This prerequisite is mystifying. The condition finds its origins in Roman and Roman-Dutch law,⁴⁹ but is certainly far too limited in its scope. Why should a threat directed against one's friend, or even a total stranger, not constitute a threat which might move a person to enter an agreement? Those courts which have cited this condition have done so blandly and without any comment,⁵⁰ and it has never in fact been challenged in the courts. Modern commentators have rightly been critical of this ancient restriction.⁵¹ Hunt states that it should not matter whether the threat concerned "the Prince of Timbuktu"⁵² — if the threat was designed to induce the contract, and did so, that is all, in his opinion, that is relevant. Kerr says the following:⁵³

"With the modern incidence of the taking of hostages it may well be that our courts will be prepared to review this requirement and to hold that in certain circumstances threats against others will bring the rules [of duress] into operation if the other requirements are met."

It is submitted that the above assertions are correct. It would be absurd to deny a person relief simply because the threat was directed at a person who was not a close family member. Granted, most people might feel a deeper affection for close relatives than for others, but this will not always be the case. It may be axiomatic to say that a person will naturally be predisposed to protecting the interests of family members, but it is philosophically indefensible to suggest that a person would have no instinctive desire to protect anyone else. In terms of the rule, a threat directed against one's distant cousin could constitute an actionable threat, but a threat directed against a boyfriend or girlfriend would not!

⁴⁸ *Bezuidenhout v Strydom* (1884) EDC 224; *Oos-Transvaalse Koöperasie Bpk v Heyns* 1986 (4) SA 1059 (O). In *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C), Van Zyl was induced to enter into a suretyship contract because of a threat that his son-in-law and daughter would be prosecuted for theft and/or fraud. In *Broodryk v Smuts NO* 1942 TPD 47 at 52, the threat of internment directed against Broodryk was held by Ramsbottom J to constitute a threat not only against Broodryk himself, but also against his family, since they faced the prospect of being left destitute.

⁴⁹ *D* 4.2.8.3; Voet 4.2.11; Pothier *Obligations* §25.

⁵⁰ See *White Brothers v Treasurer General* (1883) 2 SC 322 at 350; *Broodryk v Smuts NO* 1942 TPD 47 at 52; *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306B; *Van den Berg & Kie Rekenkundige Beampies v Boomprops* 1028 BK 1999 (1) SA 780 (T) at 784G.

⁵¹ De Wet and Van Wyk *Kontraktereg* 50; Christie *Contract* 352.

⁵² Hunt "General Principles of Contract" in 1963 *Annual Survey of South African Law* 127.

⁵³ Kerr *Contract* 298.

4.3.3 Element three: a threat of imminent or inevitable evil

The third element which a party alleging duress will have to prove is that the threat which was made was of an imminent or inevitable evil.⁵⁴ Both the Roman and Roman-Dutch authorities considered this to be a *sine qua non* of a valid duress claim.⁵⁵ The situation is no different in South African law. The requirement was cited for the first time in the early colonial case of *Freeman v Corporation of Maritzburg*,⁵⁶ and has consistently been referred to with approval in the decisions of the courts since then.⁵⁷

But describing the requirement as “a threat of imminent or inevitable evil” does not really explain the true nature of the enquiry here. This element focuses not on the nature of the threat itself, but on the effect the threat had on the other party. To say that the threat must be one of an imminent or inevitable harm really means that the other party has been placed in the classic dilemma situation: the threat is so serious, and the likely consequences of the failure to heed the threat are so immediate and unavoidable, that the victim can protect him or herself only by agreeing to the terms of the contract. As Christie succinctly puts it: “The doctrine of the agony of the moment is obviously applicable here.”⁵⁸ Once again one must query whether this ought to be considered a separate and distinct element of the duress enquiry. For it really amounts to but one important consideration of the (slightly broader) question posed in element one — was it reasonable, in the circumstances, for the party to have succumbed to the threat, and to have entered into the contract?⁵⁹

The courts have occasionally interpreted the requirement of imminence and inevitability to mean that the person was put in a position where he or she had no viable alternative but to accede to the

⁵⁴ *Broodryk v Smuts NO* 1942 TPD 47 at 52; *Wessels Contract* §1167 and 1185. The requirement is also endorsed by *Christie Contract* 355; *Kerr Contract* 319; *Van der Merwe et al Contract* 86; *LAWSA Vol 5(1)* §152(a).

⁵⁵ See *D* 4.2.1 and 4.2.9.pr; *Voet* 4.2.13; *Pothier Obligations* §25.

⁵⁶ 1882 NLR 117 at 123.

⁵⁷ *Salter v Haskins* 1914 TPD 264 at 267; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306B; *Machanick Steel and Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W) at 271C; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC) at 440E; *Van den Berg & Kie Rekenkundige Beamptes v Boomprofs* 1028 BK 1999 (1) SA 780 (T) at 784G; *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at 178-9.

⁵⁸ *Christie Contract* 355.

⁵⁹ For a similar view see *Farlam and Hathaway* 364.

threat.⁶⁰ If the threat poses a spectre of harm which is remote, simply inconvenient, or there are other means by which the person could protect him or herself (other than entering the agreement), then the court will usually hold that the person ought not to have succumbed to the threat, and will not grant the person a remedy for duress.⁶¹ So, in *Lombard v Pongola Sugar Milling Company Ltd*,⁶² Lombard alleged that the Milling Company had forced him to contract to use its transport system for conveying sugar cane from his farm to the mill. Holmes JA gave this argument short shrift, pointing out that the appellant had in no way been obliged to use the company's system. He could easily have transported the cane himself, or hired alternative transport.⁶³ The existence of these simple alternatives meant that the appellant's allegation that he had acted under duress was legally unsupportable. The need to assess the alternatives available to the aggrieved party is a very significant issue, and it will be argued later in the study⁶⁴ that this needs to be clearly articulated and emphasised in a revised test for duress.

4.3.4 Element four: the threat or intimidation must be *contra bonos mores*

Wessels's fourth element is that "the threat or intimidation must be *contra bonos mores*".⁶⁵ This requirement was an important feature of the law of duress both in Roman and Roman-Dutch law, and has frequently been cited by the South African courts.⁶⁶ In *Salter v Haskins*, Gregorowski J said: "The authorities are all clear that the threat which gives rise to the *actio quod metus causa* for setting aside a transaction must be *contra bonos mores*."⁶⁷ Loosely translated, this has been interpreted to mean that

⁶⁰ *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 826H.

⁶¹ See *Freeman v Corporation of Maritzburg* (1882) 3 NLR 117 at 123; *Sievers v Bonthuys* 1911 EDLD 525 at 529 and 532; *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at 178-9.

⁶² 1963 (4) SA 860 (A).

⁶³ At 863F-G. See too Kerr *Contract* 323.

⁶⁴ See 5.5.1 and especially 7.4 below.

⁶⁵ Wessels *Contract* §1167 and 1186; *Broodryk v Smuts NO* 1942 TPD 47 at 52.

⁶⁶ See *Houtappel v Kersten* 1942 EDL 221 at 224; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306B-C; *Machanick Steel and Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W) at 271C; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC) at 439D; *Van den Berg & Kie Rekenkundige Beampptes v Boomprops* 1028 BK 1999 (1) SA 780 (T) at 784G-H; *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 826I and 828G; *Von Aspern t/a Von Manufacturing v Hip Hop Clothing Manufacturing CC* 1997 JDR 0085 (C) at 13.

⁶⁷ *Salter v Haskins* 1914 TPD 264 at 266.

the threat has to be unlawful in some way.⁶⁸ This principle was endorsed by Jansen JA in the Appellate Division (as it then was) in *Kruger v Sekretaris van Binnelandse Inkomste*: “For duress to constitute grounds for restitution, it must be unlawful.”⁶⁹ Occasionally, it has been said that the threat must be “improper”.⁷⁰

When one analyses the case law and the literature, it is evident that there is a little uncertainty about what precisely is meant by this requirement. Does the threat have to be one which is independently illegal? This would seem to have been the opinion of Dove-Wilson JP in *Steiger v Union Government*, where the learned Judge President said, “it is only where fear is caused illegally that restitution is competent.”⁷¹ If this were true, only threats amounting to crimes or delicts (or threats *malum in se*) would suffice. Threatening to exercise one’s legal rights would not constitute duress. This seems to have been Wessels’s attitude:⁷²

“If one party to a contract makes use of his legal right, then the fact that this induces fear in the other party, and leads him to enter into a contract, affords no ground for avoiding the obligation on the principle ‘qui jure solo utitur neminem laedat’.”

De Wet and Van Wyk are of the same view: “If I make a threat that I am lawfully entitled to make, and thereby induce him to conclude a contract with me, the contract is entirely valid.”⁷³

On the other hand, there are those authorities who believe that this interpretation of the requirement is too restrictive. After conducting a careful analysis of both Roman and Roman-Dutch law, as well as the way duress claims have been treated by the courts in South Africa, Olivier⁷⁴ has contended that in our common law, determining the lawfulness or otherwise of a threat depends on the criterion of reasonableness.⁷⁵ He states that a threat will be unreasonable (and therefore, *contra bonos mores*) in two

⁶⁸ *Block v Dogon, Dreier and Co* 1910 WLD 330 at 333; *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 33C; Van der Merwe *et al* *Contract* 87; *LAWSA* Vol 5(1) §152(b); *Wille’s Principles* 447.

⁶⁹ *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A) at 410E. This is a translation of the original Afrikaans: “Vir vreesaanjaging om grond vir restitusie te wees, moet dit onregmatig wees.”

⁷⁰ *Kerr Contract* 296-7; *Joubert Contract* 105; Van der Merwe and Van Huyssteen “Improperly Obtained Consensus” (1987) 50 *THRHR* 78.

⁷¹ *Steiger v Union Government* (1919) 40 NLR 75 at 81. The emphasis is my own.

⁷² *Wessels Contract* §1186.

⁷³ De Wet and Van Wyk *Kontraktereg* 49. The original Afrikaans reads: “As ek iemand met regmatige optrede bedreig, en hom daardeur beweeg om met my ’n kontrak te sluit, is die kontrak heeltemal deugdelik.”

⁷⁴ “Onregmatig Vreesaanjaging” (1965) 28 *THRHR* 187.

⁷⁵ At 203.

circumstances. First, it is wrong to propose to do what is independently unlawful or illegal (ie commit a crime or a delictual act). But secondly, in addition, a prima facie valid threat to exercise a legal right may also be held to be unreasonable if the threat was made in order to achieve an immoral or improper goal or purpose.⁷⁶

The approach of the courts is not consistent. Some courts have adopted the more restrictive approach, but there are some cases in which the broader test has been applied. The question whether a threat was lawful or not, and what test ought to apply, has seldom been discussed in the abstract in South African law, but has tended to be a nettlesome issue in certain specific factual situations. Currently in South African law, the nature and object of the threat is a significant factor in determining whether or not a threat will be legitimate. And not only does the nature and object of the threat play a significant role in the enquiry as to whether a threat is unlawful, and could provide grounds for an action based on duress. The law has also developed to a point where there are even different requirements that have to be proved to make out a case of duress, depending upon the object against which the threat was directed, and which vary Wessels's traditional residual elements. It is submitted that it is inappropriate to foster such a miscellany of rules, extra requirements, and even exclusions, based purely upon the object of the threat, and that such technicalities cloud the basic question whether the threat was legitimate or not. But for present purposes, it is important to examine how various types of threat are currently treated in South African law, in order to expose the inconsistencies and anomalies of the current approach.

4.3.4.1 Threats of physical harm to the person

The classic case of duress concerns threats of physical harm to the person. It has been shown that in Roman and Roman-Dutch law, remedies for duress were limited almost exclusively to situations in which threats had been directed against the victim's person. Since a great deal of the South African law of duress is modelled on Roman-Dutch law, there remains, superficially anyway, a strong psychological bias towards the idea that the "true" province of duress is the situation where threats are made against a person's life, physical integrity, or liberty. This much is apparent from the requirement in element two that the threat must be directed to the person. In a case decided as recently as the mid 1980s, Coetzee J in *Ex Parte Coetzee et Uxor*⁷⁷ rejected a claim of duress simply on the basis that "the

⁷⁶ At 201.

⁷⁷ 1984 (2) SA 363 (W).

threatened harm must amount to an attack on the threatened person's life or body", ⁷⁸ and the threat in this case (excommunication from the family, and the social and economic implications of this) did not constitute such a threat. Similarly, in *Kilroe v Bayer*, ⁷⁹ Juta JP said: "Mere threats are threats and nothing more, unless they are threats of death by one able to carry them out."⁸⁰ This kind of attitude has meant that the doctrine of duress has historically played a very small (and, quite frankly, quaint) role in the South African law of contract generally. Unsurprisingly, there are bitterly few cases concerning blatant threats of physical harm — litigation on such facts is extremely rare. One notable example is *Dhlamini v Dhlamini*, ⁸¹ where a young woman was forced into a marriage as a result of threats that she would be "thrashed" if she did not. Evidence showed that she had already been subjected to physical violence when she had earlier expressed her dissatisfaction at the initiation of marital negotiations with a partner chosen by her father. But one can search the South African law reports in vain for a similarly flagrant example. However, this does not mean that cases concerning duress are non-existent. Most duress cases in South African contract law concern the more sophisticated physical threat of arrest and criminal prosecution, and the attendant threat of incarceration pursuant to a guilty verdict.

4.3.4.1.1 Threats of criminal prosecution

The question whether such threats are *contra bonos mores* or not is a matter of debate. The difficulty is that members of the public are entitled, as of right, to institute criminal proceedings where it appears that a crime has been committed. Consequently, a threat to prosecute someone would not usually be considered an unlawful act. Little assistance on the legality of such threats can be gleaned from the Roman and Roman-Dutch authorities.⁸² Various divisions of the High Court have delivered judgments that differ markedly with respect to the legal principle that should apply in such cases. There is no

⁷⁸ At 366D. The original Afrikaans reads "die bedreigde leed ... 'n aantasting van die bedreigde se lewe of liggaam moet wees". For cases concerning threats to the person in the context of a marriage, see *Smith v Smith* 1968 (4) SA 61 (N) and *Scholtz v Scholtz* 1997 JDR 0556 (SE).

⁷⁹ 1915 CPD 717.

⁸⁰ At 719.

⁸¹ 1953 NAC 266.

⁸² This matter has been fully canvassed in the two previous chapters. All who have researched this topic have come to a similar conclusion. See the remarks of Corbett J in *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 307-8; Trengove J in *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 33-4; Bloch "Duress — Threats of Civil and Criminal Prosecution" 1974 *Responsa Meridiana* 42 at 44; D'Oliveira "Caught Redhanded: Metus and Compounding" (1974) 91 *SALJ* 284 at 287-8; Harker "The Effect of a Threat of Criminal Prosecution on Contract" (1977) 40 *THRHR* 139 at 141.

Supreme Court of Appeal authority on the point. Furthermore, academic opinion on the issue diverges greatly. What follows is a brief analysis of the various approaches.

One can commence with a situation where the South African law is settled. In circumstances where there is no hint of truth in the allegation that a crime has been committed, and the threat of prosecution which induces the contract is entirely vexatious, the threat will be considered *contra bonos mores*. Two examples may be found in the case law. In *Block v Dogon, Dreier and Co*,⁸³ Block (who was the bookkeeper of the defendant company) agreed to hand over two promissory notes (in the amount of approximately £98) to his employers. He alleged that he had been induced to do so by threats that if he did not, he would be reported to the police for theft, since he was £300 short in his accounts. The evidence showed that there was no evidence of any impropriety on Block's behalf (in fact, an audit showed his books were £55 to the good), and that the only reason the company's representatives had made these threats was because they were in dire financial straits, and could not afford to have the promissory notes presented for payment.⁸⁴ The simplest way of protecting themselves was to intimidate Block (who was found to be a rather simple and impressionable individual) into agreeing to hand back the notes. Curlewis J held that the threat was one which was *contra bonos mores*. A similar conclusion was reached in *Hamilton Paneelkloppers v Nkomo*.⁸⁵ In that case the threat of prosecution also had no basis in fact, and was merely an underhand method of inducing an agreement which would allow the panel beater to get a motor vehicle back into his possession, in order that he might exercise a lien over it for repairs. These two cases are indicative of the wider approach to assessing the legitimacy of threats proposed by Olivier.⁸⁶

While the situations in the above-mentioned cases seem fairly easy to resolve, things become more complicated in the fairly common situation where the case concerns theft or fraud. What usually happens is the following: A is confronted with an allegation that he or she has stolen goods or money from Z. The accusations are invariably true. Z threatens that a criminal charge against A will be laid unless A signs an acknowledgement of debt, promising to pay back a stipulated amount in terms of the agreement. A proceeds to sign the agreement, having been induced to do so by the threat of prosecution. It is usually implied that Z will not report A to the police once the agreement is signed.

There are several schools of thought with regard to the validity of threats made in such a scenario. The first school of thought is that the threat will not automatically be adjudged *contra bonos mores*.

⁸³ 1910 WLD 330.

⁸⁴ At 332.

⁸⁵ 1991 (2) SA 534 (O) at 541C (per Smuts JP and Brink J).

⁸⁶ See too *Haupt/Feltz Factoring CC t/a Fashion Sellout & Clothing Warehouse* [2000] 11 BALR 1242 (CCMA).

After all, citizens are perfectly entitled to lay a criminal charge in respect of a crime that they believe has been committed. If the threat is designed merely to induce the person to pay back what has been purloined, then such a threat will not be considered *contra bonos mores*. On the other hand, the threat will be considered *contra bonos mores* in situations where the person making the threat induces an agreement which obliges the alleged criminal to pay an amount to which the person making the threat is not entitled. The enquiry thus involves an assessment of whether the amount lost (a) is clearly quantifiable, or is merely an “indignant guess”;⁸⁷ and (b) whether the amount which the person agrees to pay is congruent with the loss, or is extortionate. This approach has been followed in the Transvaal and Natal Divisions of the High Court,⁸⁸ and it appears that in the latest reported duress case in South African law, *BOE Bank Bpk v Van Zyl*,⁸⁹ a full bench of the Cape High Court now seems to have adopted this approach.

The second school of thought is more restrictive, and differs from the first school of thought in the following ways. The first difference concerns how a court assesses whether or not the person making the threat is merely receiving something to which he or she is entitled. According to this approach, it will not only be the financial similarity between the loss suffered and the amount claimed that will be relevant; the nature of the contract that is induced, and its terms, will also be material to the enquiry. In *Arend and another v Astra Furnishers (Pty) Ltd*,⁹⁰ Corbett J identified a number of advantages that could accrue when such a contract was induced by a threat of criminal prosecution. These were:⁹¹

“(a) The person obtains an acknowledgment of debt in liquid form, which provides certain important procedural advantages with regard to claiming the debt, like the facility of provisional sentence or summary judgment proceedings.⁹² The acknowledgment could also provide the person with a secured claim they would not ordinarily have had.⁹³

⁸⁷ Per Milne J in *Ilanga Wholesalers v Ebrahim and others* 1974 (2) SA 292 (D) at 297A.

⁸⁸ *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 33; *Ilanga Wholesalers v Ebrahim and others* 1974 (2) SA 292 (D) at 297H-298A; *Machanick Steel and Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W) at 272C-D. Academic support for this approach may be found in Kerr *Contract* 322 and n432; Christie *Contract* 356-7; Van der Merwe *et al Contract* 87; Joubert *Contract* 108; D’Oliveira “Caught Redhanded: Metus and Compounding” (1974) 91 *SALJ* 284 at 289.

⁸⁹ 2002 (5) SA 165 (C) at 180.

⁹⁰ 1974 (1) SA 298 (C).

⁹¹ At 309D-F.

⁹² This point was also made in *Freedman v Kruger* 1906 TS 817 at 821-2.

⁹³ In *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C), the bank acquired a surety for a debt which would otherwise have been unsecured. This was held to be an “advantage” by Griessel J (at 830D-E).

- (b) The agreement fixes the value of the goods stolen, which absolves the person of the task of proving his loss, and also effectively denies the thief the chance of challenging this assessment.
- (c) The contract may contain, amongst its terms, a whole number of commercial advantages — for example, a term requiring the thief to pay interest, acceleration and forfeiture clauses, and suchlike.”

It is apparent, when one looks at this list, that there would be very few (if any) settlement agreements that would not fall foul of one of these categories.

The second difference is more fundamental. Corbett J said the following in the *Arend* case:⁹⁴

“[In] modern South African law, it seems to me that an important consideration is the fact that, generally speaking, an agreement of the type under discussion would constitute an unlawful compounding. This would not only render the threat unlawful, from the point of view of the application of the principles of duress, but would vitiate the entire agreement as being void for illegality.”

In other words, since it is implicit in such cases that the thief will not be prosecuted, the purported agreement will be void *ab initio* for illegality, because the arrangement between the parties constitutes a criminal compounding.⁹⁵ The crime of compounding is defined as follows: “Compounding consists in unlawfully and intentionally agreeing for reward not to prosecute a crime which is punishable otherwise than by fine only.”⁹⁶ This approach has been popular particularly in the Cape High Court, prior to the recent *BOE Bank* appeal referred to above.⁹⁷

A third school of thought is that any agreement entered into under a threat of criminal prosecution is immediately void *ab initio* for illegality. This is so since it is a hallowed general principle of our law of contract that any agreement which interferes with the administration of justice is void, since it is contrary to public policy.⁹⁸ According to this approach, public policy requires citizens to report the

⁹⁴ 1974 (1) SA 298 (C) at 308D and 311G-H.

⁹⁵ This approach has been supported by Bloch “Duress — Threats of Civil and Criminal Prosecution” 1974 *Responsa Meridiana* 42 at 52-54; MacLennan “Extra-judicial Settlement of Criminal Cases — or the Sale of Mercy” (1971) 88 *SALJ* 161. See too Burchell “Criminal Law” in 1961 *Annual Survey of South African Law* 333; Milton *Common Law Crimes* 212-4.

⁹⁶ The definition is that of Hunt, which may now be found in Milton *Common Law Crimes* 204. The definition was cited with approval in *Arend and another v Astra Furnishers* 1974 (1) SA 298 (C) at 308E and *Bobat’s Shoe-Box v Mahomed* 1993 (1) PH H24 (T). Other similar definitions may be found in *Levy v Lazersohn* 1961 (3) SA 737 (W) at 739 and *Du Plooy NO v National Industrial Credit Corporation Ltd* 1961 (3) SA 741 (W) at 745.

⁹⁷ Although there are indications of a move away from this approach in the latest reported duress case in the Cape. See *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at 180.

⁹⁸ For the general rule that contracts contrary to public policy will not be enforced, see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8; *Eastwood v Shepstone* 1902 TS 294 at 302. For the general rule that contracts

commission of criminal offences, and for the criminal courts to deal with such offenders. Private individuals are not entitled to interfere with the administration of justice by stifling prosecutions, and having recourse to the law of contract to resolve their dispute. Questions regarding “entitlement”, or whether what has occurred constitutes the crime of compounding, are accordingly irrelevant — the agreement is automatically void *ab initio*, since it is contrary to public policy.⁹⁹

It remains a moot point as to which of these three approaches ought to be followed in our law. This thorny problem will be re-visited later in the study.¹⁰⁰

4.3.4.2 Other forms of threat

Although Wessels’s list of elements, as well as certain courts cited above, give the impression that only threats that could result in some form of physical harm or incarceration are relevant to the doctrine of duress in South Africa, this is not a true reflection of the current legal position. A number of other forms of threat have been the subject of litigation, and require discussion. These include threats of civil litigation, threats to property, and threats to economic interests.

4.3.4.2.1 Threats of civil litigation

The legal position in South African law with regard to these sort of threats is by no means clear. The first impression one gets when one examines the cases is that the South African courts have tended to follow the Roman and Roman-Dutch approach: it is hardly illegal to threaten anyone with litigation, and thus, such threats will not be *contra bonos mores*, and an agreement inspired thereby could not be avoided for duress. The words of Sampson AJ in the case of *Sievers v Bonthuys* clearly reflect this line of thinking:¹⁰¹

“But when we look at the threat, so far from its being a threat to take the law into his own hands, it is a threat to invoke the aid of the law, in the assertion of his alleged right.... No person is liable in damages for bringing a civil action against another. The courts are free to all; and the only penalty for rash litigation is

injurious to the administration of justice will not be recognised, see, for example, *Schierhout v Minister of Justice* 1925 AD 417, and the discussion in Christie *Contract* 405.

⁹⁹ For examples of this approach, see *Harris v Executrix of Krige* (1883) 2 SC 399; *Bezuidenhout v Strydom* (1884) 4 EDC 224; *Hotz v Standard Bank* 1907 Buch AC 53; *Wells v Du Preez* (1906) 23 SC 284 [aka *Van der Poel v Du Preez* (1906) 16 CTLR 232]; *Oos-Transvaalse Koöperasie v Heyns* 1986 (4) SA 1059 (O); Harker “The Effect of a Threat of Criminal Prosecution on Contract” (1977) 40 *THRHR* 139ff; *LAWSA* Vol 5(1) §152n10.

¹⁰⁰ See 6.4.3.2 below.

¹⁰¹ *Sievers v Bonthuys* 1911 EDLD 525 at 532.

costs. How then can the mere threat of litigation bring greater penalty than the litigation itself?”

In *Salter v Haskins*,¹⁰² *Houtappel v Kersten*¹⁰³ and *Benkenstein v Neisius*,¹⁰⁴ allegations that a threat of civil action were *contra bonos mores* were rejected by the courts. Wessels, Christie, and De Wet and Van Wyk cite the above authorities in support of the proposition that threats to sue are not *contra bonos mores*.¹⁰⁵ This approach is indicative of the restrictive approach to the issue: it is only those threats which are illegal per se which are considered to be *contra bonos mores*; threatening to exercise one's legal rights cannot be *contra bonos mores*.

But is it possible to treat threats to sue, and the decisions themselves, in such a binary fashion? The decisions in *Salter v Haskins* and *Houtappel v Kersten* deserve careful attention. In *Salter v Haskins*, Salter sought to rescind an agreement entered into between himself and his business partner (Haskins), in which Salter had agreed to sell his interest in the partnership for £100. Salter alleged the agreement had been entered into under duress. He alleged he had been induced to enter into the agreement because of a threat that if he did not do so, Haskins would commence divorce proceedings against his wife, and would cite Salter as the co-respondent. (Under the law in force at the time, this would have meant that the co-respondent could have been liable in damages for this conduct.) The court held that this sort of threat was not one which could be considered actionable. Gregorowski J pointed out that there was never an allegation in the papers that the allegations of adultery were untrue; quite the contrary was evident, in fact. In the premises, Haskins was fully entitled to threaten to proceed with an action for divorce and an action against Salter for damages. In addition, since the nature of a partnership business is such a personal one, Gregorowski J held that “it is obvious that the defendant could not be expected to remain in partnership with a man who had injured him in this way”,¹⁰⁶ and that Haskins was also entitled to bring the partnership to an end.

Both Bloch¹⁰⁷ and Olivier¹⁰⁸ submit that this decision must be interpreted in the light of its facts, and ought not to be taken as saying that all threats of civil action are automatically lawful. Their careful analysis of the judgment shows that the motives behind the making of the threat were an important

¹⁰² 1914 TPD 264.

¹⁰³ 1940 EDL 221.

¹⁰⁴ 1997 (4) SA 835 (C) at 845B-H.

¹⁰⁵ Wessels *Contract* §1186; Christie *Contract* 355-6 and fn30; De Wet and Van Wyk *Kontraktereg* 49.

¹⁰⁶ At 266.

¹⁰⁷ At 49-50.

¹⁰⁸ “Onregmatige Vreesaanjaging” (1965) 28 *THRHR* 187 at 201.

criterion in assessing whether or not the threat was *contra bonos mores*. Gregorowski J was at pains to emphasise both that the allegation of adultery was never disputed, and that the sale of the share of the business for £100 was a reasonable compromise in the circumstances. Both Olivier and Bloch suggest that the judgment is in fact indicative of the wider test of unlawfulness: a court will not simply say that a threat of litigation is acceptable, *cadit quaestio*; a prima facie lawful threat may nonetheless be *contra bonos mores* if it is made for an illegitimate purpose. On the facts of this case, the motive behind the threat was not improper, and thus the threat could validly be made. Olivier speculates that the result of the case could have been quite different if the allegation of adultery were untrue, or the price of the partnership share was outrageously out of proportion to its market value.

In *Houtappel v Kersten*, Dr Houtappel had treated Kersten in Amsterdam for a severe bladder condition. Just before Kersten's return to South Africa, he received a bill from the doctor for £607 11s 2d, which Kersten considered to be exorbitant and unreasonable. An initial amount of just over £109 was paid. The two parties then entered into discussions about the payment of the rest of the fee, and Kersten eventually handed Houtappel a cheque for £497 13s 5d. But Kersten stopped payment on the cheque when he returned to South Africa, and so Houtappel sued for provisional sentence. Kersten alleged that he was entitled to stop payment, since he had been forced to sign the cheque under duress. He alleged that the doctor had threatened him with civil action unless he settled his account immediately. Kersten alleged that he had succumbed to the threat since he knew court action could delay his departure from Holland for quite some while. Kersten, being an old man, was anxious to get home, particularly since the weather was growing worse, and he was worried that his delicate physical condition would not handle the cold European winter.¹⁰⁹ The court held that there was no evidence that the fee which Dr Houtappel had charged was at all unreasonable, and, in the circumstances, making a threat to sue unless he was paid was no more than the doctor was entitled to do.¹¹⁰

Once again, Bloch and Olivier suggest that the court was not prepared simply to assess the nature of the threat on its own.¹¹¹ They continue to espouse the view that a threat of civil action may be prima facie lawful, but before a final determination can be made, the purpose or reason behind the making of the threat must, in addition, be assessed. In the *Houtappel* case, the court placed great emphasis on the question whether the fee which Houtappel was intending to sue for was reasonable, and that there was no evidence that Houtappel was attempting to claim any more than that which he was legitimately

¹⁰⁹ One might speculate, too, that the prospect of remaining in the Netherlands in late 1938, when Hitler was flexing his muscles ominously, would not have been a palatable one.

¹¹⁰ At 532-3.

¹¹¹ Bloch "Duress — Threats of Civil and Criminal Prosecution" 1974 *Responsa Meridiana* 42 at 48; Olivier "Onregmatige Vreesaanjaging" (1965) 28 *THRHR* 187 at 201.

entitled to charge for his services.¹¹² Since both the nature of the threat, as well as its purpose were *bona fide*, the threat was found to be lawful on the particular facts of the case.

When viewed in this light, it appears possible that the wider test of unlawfulness could well apply to cases where threats to sue have been made, and that one should not say blandly that such threats are automatically valid. According to this view, both the nature of the threat, as well as its purpose must be assessed in order to determine whether the threat is one which satisfies the *boni mores*. In particular, the question whether the aggressor is seeking to obtain some unreasonable or undue advantage will be highly relevant. This view has been endorsed by several modern commentators, over and above Olivier and Bloch.¹¹³ From the review of the authorities one can see that there thus is some debate about whether or not threats to sue are *contra bonos mores*, and how this determination should be made. This is another issue that will be re-examined later in the thesis.¹¹⁴

But before leaving this topic, one other decision deserves attention. In *Shepstone v Shepstone*,¹¹⁵ Mr Shepstone sued for summary judgment on a claim for R8500, which he alleged his former wife owed him in terms of a contract. The background to this agreement was as follows. The divorce order between the parties had granted Mrs Shepstone custody of the children of the marriage. After her divorce, Mrs Shepstone commenced an openly adulterous affair with one Mr Clarke, who was a married man. Mr Shepstone felt that this brazen behaviour would serve as just cause for having the children handed over into his custody. He threatened his ex-wife that he would sue for a variation of the custody order, but promised he would not take such action if she agreed to pay him R8500. She agreed, but never performed in terms of the contract. Mr Shepstone therefore sued her for the money. In court, Mrs Shepstone denied liability, contending that she had been coerced into the agreement by the threats that the custody order could be varied, and that she had agreed to the payment rather than face the prospect of losing her children. James JP gave her argument short shrift:¹¹⁶

¹¹² One can compare the words of Jansen JA in the case of *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A) at 410F: “A person who pays a debt out of fear that action will be instituted for a valid debt that is owed can hardly say that the coercion is unlawful.” This is a translation of the original Afrikaans: “’n Persoon wat ’n vonnis skuld betaal uit vrees vir die teenuitvoerlegging van ’n geldige vonnis kan kwalik sê dat die vreesaanjaging onregmatig was.”

¹¹³ Kerr *Contract* 322 says: “It is clear that one who, believing that he has grounds for civil action, threatens to institute it, does not act *contra bonos mores*.” (My emphasis). This indicates that the purpose behind the threat must be a moral (*bona fide*) one. Other adherents of this approach are Van der Merwe *et al Contract* 87n113; Joubert *Contract* 107; *LAWSA* Vol 5(1) §152(b).

¹¹⁴ See 6.4.3.1 below.

¹¹⁵ 1974 (1) SA 411 (D).

¹¹⁶ At 413H.

“The plaintiff, in seeking to amend the custody order, was exercising a legitimate right to approach the Court for relief because of changed circumstances brought about by the defendant’s conduct as custodian parent. In my view a threat to take lawful action in the Courts cannot, in these circumstances, be regarded as *contra bonos mores*.”

James JP’s decision is certainly representative of the approach that sees nothing wrong with threatening to sue. But the nature of the threat in this case seems to have been highly irregular: to extort a financial payment out of Mrs Shepstone, which allowed her to “buy off” an enquiry into the best interests of her children. Nonetheless, James JP declared the threat of civil action (and thus, the agreement) to be valid — a conclusion that certainly gives one’s sense of justice a bit of a jolt. It surely cannot be acceptable to compromise an enquiry into the custody arrangements of children with an agreement providing for the payment of an arbitrary financial amount.¹¹⁷ Not surprisingly, James JP’s decision in the *Shepstone* case was the subject of an appeal, and in a welcome decision, a Full Bench of the Natal Provincial Division overturned the order of the court *a quo*. The court in the appeal rightly refused to condone this sort of conduct, and simply held (considerations of duress aside) that this sort of agreement was one which was contrary to public policy, and was therefore void *ab initio* for illegality.¹¹⁸ The decision draws a suitable distinction between the nature of the enquiry into the legality of a threat to sue for business reasons or for a debt on the one hand, and a threat to use children as a bargaining pawn for extortionate ends, on the other hand.

4.3.4.2.2 Threats to property

Despite the emphasis on threats to the person in Wessels’s list of elements, and by some courts, South African law has now developed to a point where a threat to property may indeed be actionable in the law of contract. However, the path to this denouement has been a circuitous one, and the law in this area has developed in an idiosyncratic fashion.

The first case in which the matter was raised and discussed was *White Brothers v Treasurer-General*.¹¹⁹ This case did not in fact concern a situation where a contract was induced by duress. At

¹¹⁷ Wessels *Contract* §537 states: “A contract by a parent to transfer to another parent all obligations towards a child is void.... It is the legal duty of a parent to maintain his or her child.... It is contrary to the interests of the child that the parents should be able voluntarily to divest him or herself of that duty.” Others who express disquiet about the judgment of James JP are Bloch “Duress — Threats of Civil and Criminal Prosecution” 1974 *Responsa Meridiana* 42 at 46-7; Christie *Contract* 356.

¹¹⁸ *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 464-6, per Miller J (Van Heerden J and Hill AJ concurring). See too Hahlo *The South African Law of Husband and Wife* 403.

¹¹⁹ (1883) 2 SC 322. For a full analysis of this case, see 8.3.2 below.

issue was whether it was possible for a party to reclaim a payment of money which had been made to obtain the release of property which the other party had unlawfully threatened to detain. The cause of action here is not contractual, but is based upon the principles of the law of unjustified enrichment. Nevertheless, De Villiers CJ was disposed to analyse the doctrine of duress in a more general sense, including the operation of the doctrine in contract. De Villiers CJ's analysis of the Roman-Dutch authorities led him to conclude that it was only threats to the person or one of his family that would invalidate a contract. The learned judge went on to say:¹²⁰

“The principles of the Civil Law must have been clearly present in the mind of Lord DENMAN in giving judgment in the case of *Skeate v Beale* (11 Ad+E 990): ‘We consider,’ said he, ‘the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods.’”

In *Skeate*'s case, Lord Denman had drawn the following distinction between duress of the person, and “duress of goods”, as the English called it:¹²¹

“[T]he former is a constraining force, which not only takes away the free agency, but may leave one room for appeal to the law for a remedy...; but the fear that goods may be taken or injured does not deprive anyone of his free agency who possesses an ordinary degree of firmness which the law requires to exist.”

In other words, a threat directed against one's property ought to be far easier to resist than a threat to one's person, and a reasonable person simply ought not to succumb to this sort of threat. In De Villiers CJ's opinion, the law as stated in *Skeate*'s case was congruent with Roman-Dutch law, and was the position that applied in South Africa — contracts concluded by threats to property are unimpeachable.

But the position with regard to payments of money made to secure the release of property unlawfully withheld, was, in the opinion of his lordship, different. De Villiers CJ held that in such cases we should adopt the English rule that such payments can be recovered, provided the payment had been made under protest.¹²² South African law had thus come to adopt the schizophrenic English rule (which applied at the time) that: (a) in enrichment law, money which had been paid over in order to recover possession of property unlawfully detained could be recovered if the money was paid under duress; but (b) a contract could not be rescinded because it had been induced by a threat against the aggrieved

¹²⁰ At 350.

¹²¹ *Skeate v Beale* (1840) 11 Ad&El 983 at 990.

¹²² At 351.

party's property, and a claim for performance under the contract could not be resisted.¹²³

Was De Villiers CJ correct in drawing this distinction? With respect, the learned judge took a rather limited and selective view of the English law of the time. In fact, Lord Denman had criticised his own judgment in *Skeate*'s case in the later case of *Wakefield v Newbon*,¹²⁴ where he conceded that his finding in that earlier case had been inaccurate and overstated. Furthermore, there is English authority directly contradicting *Skeate*'s case. In a subsequent case of *Tamvaco v Simpson*,¹²⁵ an attempt to rescind a contract where the agreement had been induced by a threat directed against property was indeed successful. Modern English commentators are uniformly of the opinion that *Skeate v Beale* was wrongly decided, and that it is spurious and illogical to argue that there ought to be such a distinction drawn between threats to the person and threats to property.¹²⁶

Although De Villiers CJ may have misrepresented the 19th century English law on the point, his opinions certainly did not attract any negative comment in South Africa. As a result, it was taken for granted for a long time that it was not possible to rescind a contract which had been induced by a threat directed against one's property, nor to claim restitution. The finding of De Villiers CJ to this effect was in fact endorsed by the Appellate Division (per Innes CJ) in the case of *Union Government (Minister of Finance) v Gowar*.¹²⁷ In his concurring judgment in the *Gowar* case, Wessels AJA did point out that there were a handful of Roman-Dutch writers who had intimated that a threat to property might afford grounds for rescission of a contract.¹²⁸ But since the *Gowar* case did not concern the inducement of a contract, his lordship never discussed the matter further, nor took issue with De Villiers CJ's statement of the law in the *White Brothers* case. It still appeared as if threats to property did not provide grounds for rescinding a contract for duress in South African law. When compared with the law of unjustified enrichment, where a remedy was available in circumstances where money had been paid over in order to obtain the release of property unjustly withheld, the situation was undoubtedly absurd and unfair.

It was only in the 1970s that the South African courts came to review the question whether a contract could be rescinded where it had been induced by a threat to property. The leading case here

¹²³ The English cases which represented the polarities of this rule were: (a) *Astley v Reynolds* (1731) 2 Str 915; *Maskell v Horner* [1915] 3 KB 106, and (b) *Skeate v Beale* (1841) Ad&El 983; *Atlee v Backhouse* (1838) 3 M&W 633 at 650. The implications of this dichotomy will be discussed fully in Chapters 8 and 9 below.

¹²⁴ (1844) 115 ER 107 at 109.

¹²⁵ (1866) LR 1 CP 363.

¹²⁶ See Beatson "Duress as a Vitiating Feature in Contract" 1974 *Cambridge LJ* 97 at 106-8; Chitty §7-009. For a South African perspective on the old English law, see Cassim "Economic duress in the law of unjustified enrichment in USA, England and South Africa" (1991) 24 *CILSA* 37 at 67-8.

¹²⁷ 1915 AD 426 at 433.

¹²⁸ At 451-2.

is *Hendricks v Barnett*.¹²⁹ In this case Hendricks was the manager of Barnett's stud farm. In 1973, Barnett decided to sell the farm, and he said that once the sale was concluded, he would pay Hendricks a large bonus in recompense for his years of loyal service. Four days before the auction sale of all the bloodstock was due to take place, Hendricks telephoned Barnett and threatened him that if he did not immediately disclose the amount which he would be paying as a bonus, he would leave the farm the next day. Barnett was deeply perturbed by this, since Hendricks was the only person who knew the horses intimately, and would be able to identify the horses at the auction. Barnett therefore drove down to the farm where, after some heated discussion, he agreed to pay Hendricks R10 000 as a bonus. Barnett claimed he truly believed that if he did not accede to Hendricks's demands, Hendricks would have left, and the auction would have been a total disaster, which would have occasioned him severe losses.¹³⁰ Barnett gave Hendricks two cheques for R5000 each, the first payable immediately, and the second post-dated. The first cheque was honoured, but Barnett stopped payment on the second. Hendricks therefore sued for provisional sentence on the cheque. Barnett argued that he was entitled to resist payment since the bonus agreement had been concluded under duress.

Hoexter J held that it was theoretically possible for Barnett to seek rescission of the agreement. But "[w]here a litigant seeks restitution *metus causa* a distinction must be drawn between the case where the *metus* resides in a threat to his person, and the case where the improper pressure is exerted through duress of goods".¹³¹ The learned judge held that in cases where a contract is induced by duress of goods, the aggrieved party will only succeed if he can prove that, at the time the contract was entered into, he had protested about having to make the payment.¹³² Since there was no proof of protest on the part of Barnett, the plea of duress failed, and the order of provisional sentence was granted.

These principles were endorsed very soon after, in the case of *Kapp v TC Valuta (Pty) Ltd*,¹³³ where Coetzee J confirmed that in cases of duress of goods, a defendant could succeed in his defence, but only if he or she could prove that some unequivocal protest had been made at the time the agreement had been concluded.¹³⁴

Although in neither of these cases did the attempt to have the contract rescinded on the basis of

¹²⁹ 1975 (1) SA 765 (W).

¹³⁰ At 767G.

¹³¹ At 768-769A.

¹³² At 769D.

¹³³ 1975 (3) SA 283 (T). See too *Von Aspern t/a Von Manufacturing v Hip Hop Clothing Manufacturing CC* 1997 JDR 0085 (C) at 11.

¹³⁴ At 284E. Since there was no proof that any protest of any kind had been noted, the defence of duress failed in this case.

duress of goods succeed, the judgments seem to indicate that the courts do now consider threats to property to be a good ground for the rescission of a contract. This is certainly the view that most authorities take of these two decisions, in any event.¹³⁵ The old English distinction between duress of goods in the contractual and enrichment spheres, drawn by De Villiers CJ in the *White Brothers* case, seems to have fallen away, and in both situations, a litigant may now have a remedy on the basis of duress. Christie sums up the position as follows:¹³⁶

“[I]t can now be said that, whatever lip service may have been paid to the English distinction between duress of goods and the recovery of money paid under protest, we have accepted duress of goods as a valid ground for rescinding a contract.”

Such a development would be logical and welcome. There seems to be no justifiable reason for differentiating between contracts entered into because of duress of the person and duress of goods. A threat against one's property (for example, to set fire to one's house or car) is likely to be just as coercive as a threat to one's person. This might lead one to believe that the decisions in *Hendricks* and *Kapp* have had a positive effect upon the law. But the decisions have, generally speaking, not been properly understood, in fact do not constitute authority for the principles of law which are attributed to them, and have actually had a confusing effect upon the South African doctrine of duress. It is necessary to dissect these decisions very carefully in order to demonstrate why this is so. I will focus particularly on *Hendricks's* case, since Coetzee J simply adopted Hoexter J's reasoning in his judgment in the *Kapp* case.

First of all, having identified the case as one where a contract was induced by duress of goods, Hoexter J made no direct reference to, nor commented on, the statements of De Villiers CJ in the *White Brothers* case, and Innes CJ in the *Gowar* case, that a contract induced by a threat to property could not be rescinded in our law. Strictly speaking, those assertions could be construed as obiter dicta, since the *White Brothers* case and the *Gowar* case did not concern contracts induced by threats to property; rather, they were unjustified enrichment cases. Nevertheless, it is regrettable that Hoexter J did not discuss them, or indicate expressly that they were inappropriate. This is so particularly when one considers that *Gowar's* case is an Appellate Division decision, and Hoexter J was sitting as a single judge in the Natal Provincial Division. An obiter dictum of the Appellate Division, although not

¹³⁵ Kerr *Contract* 320; Wille's *Principles* 447; De Wet and Van Wyk *Kontraktereg* 50; Van der Merwe *et al* 90.

¹³⁶ Christie *Contract* 353.

binding, does have a great deal of persuasive force,¹³⁷ and when one considers that it had been generally understood ever since the *White Brothers* and *Gowar* cases that contracts could not be rescinded for duress of goods, the decision in *Hendricks*'s case marked a radical departure from that position. Hoexter J's failure to address the previous position explicitly certainly compromises the value of his decision.

The second important feature of Hoexter J's decision is that in cases where a contract is induced by duress of goods, an extra requirement has to be proved by the aggrieved party before they will be able to rescind the agreement. That is, there must be proof that at the time the agreement was concluded, the party noted some protest about the arrangement. Hoexter J did state in his judgment that a protest "relates to the matter of proof rather than the actual ingredients of the cause of action",¹³⁸ but this comment does not reflect the ratio decidendi of the judgment. It is quite clear from the decision in both the *Hendricks* and *Kapp* cases that a protest has been elevated to the status of an additional requirement which has to be satisfied before a court will find duress of goods. In fact, the two decisions show that it is the key requirement in duress of goods cases. In both cases the main substantive issue was whether a protest had been made, and both cases collapsed because this requirement was not satisfied. The result is that in South African law, different basic rules apply to cases concerning threats to the person on the one hand, and cases concerning threats to property on the other hand.

The requirement of protest is, it is submitted, an inappropriate one.¹³⁹ There appears to be no reason at all for such an additional element. The key issue in duress cases (whether they concern threats to person or property) is: was the agreement induced by illegitimate threats? Surely the elements that need to be proven in cases of duress of the person are sufficient to prove duress in cases of duress of goods. The enquiry should be: "was there duress?", not: "was there a protest?". A protest may occasionally be useful and cogent evidence of coercion, but to elevate it to the status of an essential element, without which a plea of duress will fail, seems illogical and unduly restrictive. In fact, in most situations where threats are made, it would probably be extremely unwise to grumble, lest the other party be antagonised any further.

From whence did this requirement of protest originate? Hoexter J's source of authority for this requirement was the following statement made by De Villiers CJ in the *White Brothers* case:¹⁴⁰

"There is a similar absence of free consent where goods are illegally obtained, and a sum of money is paid

¹³⁷ For a more detailed analysis of this matter, see Hahlo and Kahn *The South African Legal System* 270-2; Kerr "The persuasive force of obiter dicta" (1975) 92 *SALJ* 250.

¹³⁸ At 769A.

¹³⁹ See too Farlam and Hathaway 368, who describe the additional rule in such cases as "unacceptable", and Du Plessis *Compulsion and Restitution* 130-1.

¹⁴⁰ (1883) 2 SC 322 at 351-2. See *Hendricks v Barnett* 1975 (1) SA 765 (W) at 769B-C.

simply for the purpose of obtaining possession of those goods again. There is however this difference between the case of menaces to the person and that of duress of goods, that in the former the menaces – if sufficient to affect the mind of a person of ordinary firmness – might *per se* be enough to prove the absence of free consent, although no objection may have been made to the payment at the time it was made, whereas in the latter case, all reasons for fear of bodily danger being absent – it is impossible to know whether the payment is voluntarily or involuntarily made unless some unequivocal objection to the payment is raised at the time it is made.”

With respect, this passage does not provide authority for Hoexter J’s findings at all. The *White Brothers* case was a matter concerning duress in the law of unjustified enrichment, and not contract. Of course, there is no reason why the elements of a duress claim should not be the same in the two fields of the law of obligations.¹⁴¹ But, more importantly, De Villiers CJ’s findings concerning the requirement of protest in unjustified enrichment cases (which he drew from his understanding of English law) are in fact inaccurate, and even in that area of law, proof of some sort of protest ought not to be instrumental to a successful claim.¹⁴²

The third major difficulty with the judgment in the *Hendricks* case (and indeed the *Kapp* case) is that neither case concerns duress of goods at all. Certainly not in the sense in which the term “duress of goods” is traditionally understood in South African law — a threat directed against property. In the *Hendricks* case, Barnett stated explicitly in his affidavit that the thing he feared was not corporeal damage in the traditional sense, but “very substantial pecuniary loss”.¹⁴³ In other words, Barnett was not worried that his horses would physically be harmed in any way; rather, he was petrified that Hendricks’s threatened departure would mean he would not be able to sell his horses for their proper value, and would make a loss at the auction. In *Kapp*’s case too, the aggrieved company did not fear any physical damage to their property; rather, feared the possible adverse effects a police investigation would have upon the profitability of their business. In truth, the threats in these two cases were, strictly speaking, threats to economic interests, and had nothing to do with threats to property (even though this is how the two cases are traditionally interpreted).

This fact did not escape Hoexter J in the *Hendricks* case. Indeed the learned judge stated that “the case must be dealt with on the basis that the plaintiff’s threat to the defendant amounted to a threat that the plaintiff would commit an unlawful breach of his contract of employment”.¹⁴⁴ So how did Hoexter

¹⁴¹ I shall argue for a uniform approach myself in Chapter 9 below. See 9.5.

¹⁴² See the full discussion of this matter at 8.4.5 and 9.5.2 below.

¹⁴³ At 767G.

¹⁴⁴ At 768D.

J come to reach the conclusion that this was a case of duress of goods? Once again, the answer is that Hoexter J found his authority in the duress cases in the realm of unjustified enrichment — another example in the judgment of the cross-pollination of these two areas of law. Hoexter J pointed out, quite correctly, that payments made under duress to secure the release of property unlawfully withheld can be reclaimed in terms of the law of unjustified enrichment. Traditionally (in English law, and in 19th century South African law) this was known as “a claim for repayment of money made under duress of goods”. However, to continue to apply the term “duress of goods” to the unjustified enrichment scenario has, for a long time, been misleading, since the law in that area has outgrown this requirement. It is no longer payments made to release corporeal property alone which may be recovered (what we would normally understand to be duress of “goods”); in our law a payment unjustly made may be reclaimed if the payment was made in a situation where what was being withheld was an incorporeal legal right.¹⁴⁵

Hoexter J drew a rather curious analogy between this development, and the situation in the *Hendricks* case, where a contract had been induced by a threat to breach a contract. His lordship said:¹⁴⁶

“[I]f payment made to obtain possession of goods wrongly detained was an involuntary payment, the same might be said where what was unlawfully withheld was not the delivery of goods but the delivery of a right, in the sense of a non-performance of a contractual obligation.”

Hoexter J therefore suggested that because enrichment law had expanded to allow the restitution of a payment where what was withheld to induce the payment was an incorporeal right, then surely *Hendricks*’s threat to leave the farm also amounted to withholding a right — that of his duty to perform his contract. The rules laid down by De Villiers CJ in the *White Brothers* case could therefore be applied to the facts of this case. His use of the term “duress of goods”, as used in the judgment, appears to have originated from the traditional terminology found in the leading unjustified enrichment cases cited in Hoexter J’s judgment. The term “duress of goods” has misled the bulk of authorities into concluding (erroneously, in my view) that the *Hendricks* case (and the *Kapp* case) are authority for the view that a contract may be rescinded in a situation where the threat which induced the contract was directed against property.¹⁴⁷ Since these cases did not concern threats to property at all, this cannot be

¹⁴⁵ For authority, see *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 435. This matter will be discussed in detail at 8.4.1.2 below.

¹⁴⁶ At 768G-H.

¹⁴⁷ *Hendricks*’s case is cited as approval by the following authors for the propositions which I quote from their works: Kerr *Contract* 319-20: “the pressure must relate to an imminent injury to be suffered by the party himself, or by his family, in person, or in property.” (my emphasis); *Wille’s Principles* 446-7: “It is usually said that the threat must be of an imminent or inevitable evil to the life, person, freedom or honour or – provided he protests

accurate. If one adopts Goodhart's approach to determining the ratio decidendi of a case, the ratio is made up of (a) the facts treated by the judge as material, and (b) the decision based upon them.¹⁴⁸ It is not possible for the ratio decidendi of *Hendricks's* case to be that threats to property may constitute duress, and may allow a party to rescind a contract induced by such threats (provided that a protest was noted at the time), when (on the facts) there were no threats directed against property in that case. The same is true of *Kapp's* case. It is my submission that if the term "duress of goods" is going to continue to be used by our courts, it requires careful definition and clarification, and ought to be confined to threats to property alone. Otherwise the term will continue to obfuscate this area of law, particularly if it is used to refer to threats which do not concern property (as was done in *Hendricks's* case).

But Hoexter J's approach is indicative of an even more fundamental problem. That is that the methods of deciding cases of duress in contract, on the one hand, and in the law of unjustified enrichment, on the other hand, diverge markedly both in terms of substance and form. This is a matter that will receive detailed attention in Chapters 9 and 10. With the greatest respect, Hoexter J appears to have been confused about the distinction between how duress cases are decided in the law of unjustified enrichment on the one hand, and the law of contract on the other hand, and chose to resolve a contractual issue by utilising the principles developed in the enrichment cases, rather than using Wessels's contractual test as his lodestar. Hence the unfortunate introduction of the requirement of protest, which has been a feature of the enrichment cases on duress since the *White Brothers* case, but which had not previously been relevant in either Roman, Roman-Dutch or South African contract law.

In sum, the legal situation with regard to threats to property in the law of contract is a rather uncertain one, and requires clarification. It is submitted that there is no reason why threats to property ought to be treated differently from other types of threat, and this anomalous position needs to be rectified.¹⁴⁹

4.3.4.2.3 Threats to economic interests

The current orthodoxy is that, in the context of contractual formation, South African law does not recognise "economic duress", and that threats to economic interests are not actionable.¹⁵⁰ For example,

unequivocally at the time – to the property of the party concerned." (my emphasis); *LAWSA* (Vol 5(1) §152(a): "*There must be threat of imminent evil, for example to the life, person, honour or property of a person or a member of his family.*" (my emphasis).

¹⁴⁸ See Goodhart "The Ratio Decidendi of a Case" (1930) 40 *Yale LJ* 161.

¹⁴⁹ This matter will be addressed at 6.4.2 below.

¹⁵⁰ Most authorities simply do not consider the possibility of a threat of patrimonial harm constituting duress at all, and require expressly that the threat must be directed either at the person or the property of the victim. This

in *Farlam and Hathaway* it is stated that “[t]he exercise of superior bargaining power does not, in South African law, afford the financially weaker party a right of cancellation on account of so-called economic duress.”¹⁵¹ The concept of economic duress has indeed been discussed and applied in South Africa in the case of *Malilang and others v MV Houdda Pearl*.¹⁵² But this was a case in which the Appellate Division was sitting as a Court of Admiralty, and was applying the rules of English maritime law, where economic duress is recognised. Thus, the case holds little but persuasive value as far as the South African common law is concerned. Recently, a litigant did attempt to argue that the concept of economic duress ought to form part of the South African law. This occurred in the case of *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 BK*. The argument was given short shrift. Van den Heever AJ’s opinion was clear and unequivocal:¹⁵³

“I am not convinced that the principles of ‘economic duress’ in English law are part of our law. I have been referred to no authorities where this has specifically been stated, and I could not dredge up any such authority from my own research. That our law could potentially develop in this direction, and the question whether we could find a place for this in our common law sources of authority, is something about which I do not need to speculate. I do not see this as the task of a judge sitting in a court of first instance.”

With respect, it is disappointing that the learned judge was not even prepared to examine the question whether the common law was ripe for development in this field. Indeed, the suggestion that a judge in a trial court ought not to indulge in the exercise of developing the law reflects an unduly limited and positivist approach to the functions and powers of a judicial officer sitting in a court of first instance. There are many examples of situations in our law where judges at the trial level have taken the initiative to develop the common law boldly and creatively in order to ensure that the law keeps pace with social and economic developments.¹⁵⁴ To leave this task exclusively to courts of appeal would effectively place

includes threats to breach a contract — the most common form of economic duress. See *Caterers Ltd v Bell and Anders* 1915 AD 698 at 712.

¹⁵¹ *Farlam and Hathaway* 369.

¹⁵² 1986 (2) SA 714 (A). This judgment reversed the decision of the court *a quo* in *Magat and others v MV Houdda Pearl* 1983 (3) SA 421 (N).

¹⁵³ 1999 (1) SA 780 (T) at 792I-793A. This is a translation of the original Afrikaans, which reads: “Ek is nie oortuig dat die beginsels van ‘economic duress’ in die Engelse reg deel is van ons reg nie. Ek is na geen gesag verwys waarin dit pertinent beslis is nie en ek kon in my eie navorsing ook geen sodanige gesag opspoor nie. Dat ons reg moontlik nog in daardie rigting kan ontwikkel en of in ons gemeenregtelike bronne die nodige aanknopingspunte daarvoor te vind is hoef ek nie oor te besin nie. Ek sien dit nie as my taak waar ek sit as Regter in ’n Hof van eerste instansie nie.”

¹⁵⁴ One obvious example is the bold judgment of Friedman J in the case of *Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA 607 (C), in which the learned judge held (contrary to a strongly worded obiter dictum of Wessels JA in the case of *Hamman v Moolman* 1968 (4) SA 340 (A) at 348) that damages could be awarded to a person

a hand-brake on the creative powers of the majority of judges, and would compromise the evolution of the legal system, since so few cases end up going on appeal.

To be fair to Van den Heever AJ, any comments that he might have made with regard to the question of economic duress would in any event have been obiter, since he found on the facts that there was no duress in the *Boomprops* case.¹⁵⁵ Interestingly enough, Boomprops was granted leave to appeal the matter to the Supreme Court of Appeal.¹⁵⁶ Its appeal was unsuccessful. Although this decision was entirely justifiable on the facts, unfortunately the Supreme Court of Appeal gave no guidance in principle as to the possible status of threats to economic interests, or the concept of economic duress in South African law, since the appeal was dismissed without written reasons being given by the panel.¹⁵⁷

By failing thus far openly to embrace the concept of economic duress in the context of the law of contract generally, South African law lags far behind most other countries, which have recognised the principle of economic duress for some time. For example, economic duress is already recognised as a

who was induced into entering a contract on the basis of a negligent misstatement. This decision was finally confirmed by the Appellate Division in *Bayer SA (Pty) Ltd v Frost* 1991 (4) SA 559 (A).

¹⁵⁵ At 793B. The facts of the case were, briefly, that one Mrs De Villiers decided to sell her farm. She asked Van den Berg, her friend and confidante, to make arrangements to this effect. Van den Berg ultimately convinced Mrs De Villiers to contract with Boomprops, giving them the sole mandate to sell the property. One of the terms of this contract was that Van den Berg would be paid R200 000 as a commission for convincing Mrs De Villiers to give Boomprops the sole mandate. The farm was sold for R19,8 million, and Boomprops earned 10% of this (or just under R2 million) in commission fees. Once the sale was concluded, Van den Berg demanded his R200 000. Boomprops refused to pay, claiming it had been forced to enter into that agreement under duress. It alleged that Van den Berg had threatened them that unless it did not agree to the payment, he would convince Mrs De Villiers not to give Boomprops the mandate to sell the property, and, desperate for business, the CC was forced to agree. Van den Heever AJ held (from 793) that this was not a case of duress at all. There was no proof that any threat was made by Van den Berg at all, which was fatal to the plea. Van den Berg had simply made an offer to contract with Boomprops on particular terms. Furthermore, it was not as if Boomprops were put in a situation whereby it had no alternative but to submit, and enter the contract. But it chose to conclude the contract with open eyes, mindful of the fact that a sole mandate could (and indeed did) mean a lucrative sale at a huge commission of nearly R2 million. It seems as if Boomprops felt that R200 000 was an acceptable price to pay for such a golden opportunity. Van den Heever AJ was accordingly quite correct in holding that this was not a duress case at all.

¹⁵⁶ The case of *Boomprops 1028 BK v Van den Berg & Kie Rekenkundige Beamptes* was argued before the Supreme Court of Appeal on 7 September 2000: http://www.law.wits.ac.za/sca/sca2_2000.html (accessed on 20 August 2000).

¹⁵⁷ The appeal was dismissed in this manner on 7 September 2000 by the Supreme Court of Appeal. See http://www.law.wits.ac.za/sca/sca3_2000.html (accessed on 4 October 2000). As an aside, one could question the desirability of the country's highest court of appeal in common law matters handing down judgment without giving written reasons. As a court of public record, dealing with matters of such legal significance, one would expect at least some written reasons to be tabled, even if simply to confirm the reasoning of the court *a quo*. Reasons are useful not only for the parties themselves, but also for the purposes of the doctrine of judicial precedent: ready access to the court's reasoning provides clarity to both practising lawyers and academics as to the legal position the court is likely to take in similar matters in the future, and the state of the law in that particular area. But it is a practice of the court to dispose of certain appeals *ex tempore* by only giving reasons orally, where the panel considers it expedient to do so.

part of the law in neighbouring Namibia.¹⁵⁸ In the context of our modern commercial society, it seems strange to think that a contract could not be rescinded if it was induced by a threat of patrimonial harm. It is submitted that such threats can and do have just as coercive an effect as a threat to one's person or property. One of the main goals of this thesis will be to argue for the full recognition of the concept of economic duress in South African law of contract, in terms of a modernised theory that allows duress cases of all types to be dealt with according to one set of general principles.¹⁵⁹

4.3.5 Element five: the moral pressure used must have caused damage

The fifth essential element of a successful duress claim in contract identified by Wessels is that “the moral pressure used must have caused damage.”¹⁶⁰ This element has been referred to with approval in several cases since it was first cited in *Broodryk v Smuts NO*.¹⁶¹ What did Wessels mean when he spoke of “damage”? He explained the requirement in the following way:¹⁶²

“Unless the person who made a contract under duress has been damaged, no action for restitution will lie (Voet 4.2.17). Thus, if a creditor by a threat extorts from his debtor money which is legally due to the creditor, no action for restitution can be brought by the debtor (Voet *ibid*).”

It is evident from this passage, and the example that is given, that when Wessels spoke of “damage” he was referring to some form of patrimonial loss which had been suffered by the person who was coerced into the contract. It is submitted, with respect, that requiring “damage” of the patrimonial kind to be proved in all cases (as a general substantive element) before a court can find that there is duress, cannot be correct. There is no reason why, in all circumstances, there ought to be damage of this kind suffered before a court can find that there is duress. Indeed, the presence of this requirement on the traditional list of elements has been criticised.¹⁶³ It is true that the question whether a person has

¹⁵⁸ See *Vlasius v President of the Republic of Namibia* 1994 NR 332; Christie *Contract* 354.

¹⁵⁹ See Chapters 5, 6 and 7 below.

¹⁶⁰ Wessels *Contract* §1167 and 1191.

¹⁶¹ 1942 TPD 47 at 52. See *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306A-C; *Machanick Steel and Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W) at 271C-D; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC) at 439D; *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 (1) SA 780 (T) at 784H.

¹⁶² Wessels *Contract* §1191.

¹⁶³ Kerr *Contract* 323-4; *Van der Merwe et al Contract* 90; Farlam and Hathaway 364-5; Joubert *Contract* 109; Van Huyssteen *Onbehoorlike Beïnvloeding* 139-40; Van der Merwe and Van Huyssteen “Improperly

suffered patrimonial loss may be important in certain circumstances. In some cases courts have taken the matter into account in determining whether a prima facie lawful threat is in fact *contra bonos mores*, because the threat was made for an extortionate purpose.¹⁶⁴ But this concerns the question whether the threat was legitimate or not, not the question of harm, and does not mean that damage ought to be proved in every single case, as a substantive element, before a case of duress may be made out. By way of comparison, it is not necessary to prove an element of damage in cases where a contract is induced by a misrepresentation.¹⁶⁵

Secondly, and more importantly, the question of loss or damage only truly becomes important after it has been established that the agreement has been entered into under duress, and when the time comes for the aggrieved party to choose his or her remedy. In the passage cited above, Wessels in fact concedes this very point. He contradicts his main premise (that proof of damage is an essential element to be proved before there will be “duress”), by stating that if a contract has been entered into under duress (ie duress has already been proved) the person will not be entitled to a remedy of restitution if there was no damage suffered. Wessels himself accordingly recognises that the presence or otherwise of damage is not a prerequisite to determining whether the agreement was entered into under duress; rather, it is important in determining whether a particular remedy is available, once duress has been established.

Perhaps the best indication of the problems that this requirement of damage has posed for the courts may be found in *Broodryk v Smuts NO*, where the plaintiff instituted a claim for rescission of a contract induced by duress. In this case, there was no proof that the plaintiff had suffered any harm of a patrimonial nature. But because Ramsbottom J was predisposed to stick rigidly to the five elements set down by Wessels, the learned judge was constrained to find some form of “damage” which would satisfy the requirement. Ramsbottom J eventually held that “the plaintiff has become subject to obligations with which he would otherwise not have been burdened, and he has thus suffered the kind of damage which the fifth element requires”.¹⁶⁶ This was certainly not what Wessels was contemplating when he spoke of “damage”. Van Huyssteen submits that to say that Broodryk had entered into a contract he would not ordinarily have concluded amounts to no more than saying that Broodryk was induced into entering into a contract as a result of the threats directed against him. The requirement is effectively watered down to one of a causal nexus between the threat and the contract, which has already

Obtained Consensus” (1987) 50 *THRHR* 79 at 81; Du Plessis *Compulsion and Restitution* 129.

¹⁶⁴ See the sections on threats of criminal prosecution and civil action above, and Farlam and Hathaway 365; Van Huyssteen *Onbehoorlike Beïnvloeding* 140.

¹⁶⁵ See *Woodstock, Claremont, Mowbray & Rondebosch Councils v Smith* (1909) 26 SC 681 at 699-701; *Service v Pondart-Diana* 1964 (3) SA 277 (D) at 279; Van der Merwe *et al Contract* 84; *LAWSA* Vol 5(1) §147.

¹⁶⁶ 1942 TPD 47 at 53.

been an important feature of the duress enquiry in the previous elements, and renders the term “damage” virtually meaningless.¹⁶⁷ In the alternative, it might be possible to suggest that what Ramsbottom J did was to replace a narrower requirement of “damage” with a broader requirement of “prejudice”; in other words, an element that the transaction must ultimately have been prejudicial to the aggrieved party in some way. This would mirror the position in the law of undue influence, where a party has to show that they were persuaded to enter into a contract which was “to their detriment”.¹⁶⁸ Ultimately, in most cases, the transaction which the person has been induced into concluding may prove to be undesirable, or even prejudicial. But there seems to be no reason why some sort of prejudice ought to be alleged and substantiated in every case as a separate element before a court can find that there is duress. This would be particularly true in situations where a party merely seeks rescission of the agreement because of duress. Why should a wrongdoer be entitled to escape the consequences of his actions because the victim suffered no apparent prejudice, or even acquired some benefit from the transaction?¹⁶⁹ It has already been shown that it is not necessary to prove such an element in situations where a contract is induced by a misrepresentation. Furthermore, the requirement of “detriment” or prejudice which the courts have stipulated as an element in cases of undue influence has also been subjected to criticism by academic writers, who have argued that proof of some detriment ought not to be an essential element of an undue influence claim either.¹⁷⁰

In the light of what has been said above, it is therefore submitted that proof of “damage” (in either a narrow or wide sense) is not a requirement which belongs on the list of essential elements. The duress enquiry concerns the question whether illegitimate threats induced the other party to enter into the contract, and the question of damage or prejudice is not a factor which is essential to this enquiry in all cases.

4.3.6 Remedies

This chapter has concentrated on the substantive requirements or elements of the duress defence in South African law, and all the problems associated with the existing principles and rules of duress in

¹⁶⁷ Van Huyssteen *Onbehoorlike Beïnvloeding* 139. The same point is made in Farlam and Hathaway 365; Van der Merwe *et al Contract* 90.

¹⁶⁸ See *Preller v Jordaan* 1956 (1) SA 483 (A) at 492H.

¹⁶⁹ Similar views are held by Farlam and Hathaway 364; Joubert *Contract* 109.

¹⁷⁰ Van der Merwe *et al Contract* 95 say: “In fact, as in the case of misrepresentation and duress, it can be argued persuasively that in instances of undue influence, too, rescission should not depend on the presence or absence of detriment as a separate requirement.” For further criticism of the detriment requirement, see *Wille’s Principles* 449; Farlam and Hathaway 374; Van Huyssteen *Onbehoorlike Beïnvloeding* 140.

the law of contract. Of course, once an aggrieved party has proved a cause of action amounting to duress, that party will be entitled to a remedy. As the law stands, an aggrieved party is entitled to claim rescission of the agreement; restitution, where some performance has occurred, and restitution is appropriate; and/or an award of damages. Since the main goal of this section of the study is to review of the substantive law of duress, I shall not discuss the nature and scope of these remedies in any detail at this point. A separate chapter (Chapter 10) has been dedicated to the issue of remedies and related matters.

4.4 Conclusion

In this chapter the doctrine of duress, as it is currently understood and applied in South African contract law, has been discussed. The picture that has emerged is that the law remains rather rudimentary and archaic, and has not developed far beyond its Roman and Roman-Dutch roots. Wessels's classical list of elements, which have been adopted by the South African courts for the resolution of duress cases in contract, are unsatisfactory in both substance and form. There is a need for a thorough review of the current position, which will commence in Chapter 5 below.

Chapter Five

Duress in Contract Reconsidered: Contextualising the Enquiry

“The principle of good faith may be [an] idea whose time has come.”

Roger Brownsword *Contract Law: Themes for the Twenty-First Century* v

5.1 Outline

The analysis conducted in Chapter 4 shows that there are a number of fundamental problems with the way duress cases are treated in South African law. One of the objectives of this chapter, and the two chapters that follow it, is ultimately to propose a more defensible and coherent theoretical framework for dealing with duress cases in contract in the future, and which will also take cognisance of modern commercial realities.

But before the concept of duress itself can be re-examined, there are a number of foundational issues that need to be addressed, which are designed to set the scene for the detailed re-examination that is to follow. This chapter will focus mainly on these antecedent foundational issues. The first of these is whether the doctrine of duress ought to retain a place in the law of contract. It will be argued that the doctrine retains an important role as a legal institution in contract, provided that it is understood correctly, and can be developed to meet the challenges of modern commerce. In this respect, the main question that will be considered in this chapter is the place of the duress doctrine in the law of contract, and the theoretical basis for the existence of the doctrine in our law. The issue requires examination because the problem of duress needs to be understood in its wider jurisprudential and contractual setting, rather than as an isolated issue that is unrelated to the rest of the law of contract. It will be argued that the duress doctrine does not find its basis in considerations of involuntariness, but rather finds its niche as a contextualised facet of the contractual principle of good faith. In order to show why this is so, it will be necessary to explain fully the role and place of the good faith principle in the South African law of contract generally, and what sort of common law and constitutional values an act of duress violates. At the end of this chapter, I shall propose new elemental framework for dealing with duress cases, the details of which will be discussed in greater detail in subsequent chapters.

5.2 Ought the doctrine of duress to exist?

Since the doctrine of duress is such a hallowed and ancient feature of the law in almost all jurisdictions around the world, posing the question whether the doctrine ought to exist or not might seem extraordinary. But this question needs to be tackled, since there have been those in South Africa who have suggested that the doctrine may have outlived its usefulness.

5.2.1 “Improperly obtained consensus”

There are a number of authorities who have proposed that South African law ought to recognise that there is only one ground for avoiding a contract, viz “improperly obtained consensus”.¹ They argue that this should be so for several reasons. First, they point out that while some traditionalists believe that the doctrines of misrepresentation, duress and undue influence constitute a *numerus clausus* of defences that can render a contract voidable, this is not so. The Supreme Court of Appeal has seen fit to extend the list in the last 20 years to include bribery in agency contracts, and (potentially) a failure to explain all potential terms when negotiating suretyship contracts.² But secondly, and more importantly, they argue that all the specific defences that have thus far been recognised in our law have one thing in common: all concern situations where a contract is voidable because the consent of the aggrieved party was obtained in an improper manner. And so, instead of wasting time trying to determine under which doctrine the case should be treated, the courts should be free to dispose of the case on this simple ground. Two main proponents of this view, Van der Merwe and Van Huyssteen, articulate their theory in the following way:³

¹ See in particular Van der Merwe and Van Huyssteen “Improperly Obtained Consensus” (1987) 50 *THRHR* 78; Van der Merwe *et al* *Contract* 96-99. Lubbe, in Zimmermann and Visser *Southern Cross* Ch 8, while discussing misrepresentation, duress and undue influence separately, suggests that in particular that the conceptual barriers between duress and undue influence have “collapsed”, and that the two will no longer be understood as distinct substantive categories of law, but will be treated under one general principle of improperly obtained consensus (at 293-4).

² In *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 (1) SA 819 (A) and *Extel Industrial (Pty) Ltd and another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) the Appellate Division held that where a contractant had bribed the agent of a principal to contract with him during the negotiations, the principal was allowed to rescind the contract (at 848C-D and 728-9 respectively)). In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) Olivier JA suggested that creditors in a suretyship contract have a duty to explain fully the contents of all terms of the contract to the surety, and to ensure they are understood, during the course of negotiations, or the creditor will be deemed to have acted in bad faith. His comments were obiter, though, as his was a minority opinion.

³ Van der Merwe and Van Huyssteen “Improperly Obtained Consensus” (1987) 50 *THRHR* 78 at 79.

“Should our law recognise such a shift of emphasis, the advantage would be that a court could give effect to the requirements of equity in a particular case without having recourse to a particular category which has crystallised. This cannot mean that a court would receive an unlimited discretion to decide according to what it regards as fair and just. The conduct in point, namely obtaining the consensus, must be *improper*. A plaintiff will have to prove, for instance, that the other party to the contract acted unscrupulously or unconscionably ... or that he exploited the plaintiff’s circumstances, in other words that he acted in a manner which according to the generally recognised norms of conduct is not acceptable and reasonable. This is nothing other than the element of wrongfulness of the conduct by which the consensus was obtained.”

According to this approach, the focus will fall squarely upon whether the conduct of the one party was improper: the particular form of conduct will not be particularly relevant. These authorities argue that courts spend far too much time trying to determine which technical defence is appropriate (and making mistakes in doing so), rather than getting on with the main task of determining whether the contract is voidable. In particular, they cite what they consider to be the collapsing barriers between the doctrines of duress and undue influence⁴ as evidence of this problem. Some practitioners and courts appear to find it difficult to distinguish between these two doctrines. Most problematic in this regard is the case of *Savvides v Savvides*.⁵ The problem that faced Myburgh AJ in that case was that the learned judge was presented with a set of papers that alleged the applicant had acted under duress, when strictly speaking the relevant cause of action should have been undue influence. Since, on equitable grounds, the papers showed clearly she was entitled to some form of relief, the judge was faced with a dilemma, foisted upon him by what appeared to be a procedural straitjacket. It appeared that he could either take a hard line, state that the papers were faulty, and dismiss the application, or he could try to “read” duress into the facts, to ensure justice was done. In the end, Myburgh AJ chose the latter approach. The decision was a disappointing one, as it had the effect of unnecessarily blurring the distinction between duress

⁴ In order to prove a case of undue influence, the aggrieved party has to prove: (i) that the other party exercised an influence over him; (ii) that this influence weakened his powers of resistance and made his will pliable; (iii) and that the other party exercised this influence in an unscrupulous manner in order to induce him to consent to a transaction which (a) was to his detriment and (b) which he, with normal free will, would not have concluded. See *Patel v Grobbelaar* 1974 (1) SA 532 (A) at 534A; *Preller and others v Jordaan* 1956 (1) SA 483 (A) at 492G-H; *Hofer NO v Kevitt NO* 1998 (1) SA 382 (A) at 388E.

⁵ 1986 (2) SA 325 (T). In this case, a wife signed a power of attorney in favour of her husband, which would have entitled the husband to transfer ownership of the family home (which vested solely in the wife) into the names of their minor children, and hence to himself. The background to this was the following. The couple had had an enormous fight, which resulted in the husband being ordered out of the house. He left the country and went to Cyprus for four months, before returning to South Africa. Upon doing so, he went to live with his brother, ignored attempts at reconciliation with his wife, and declared he would only return home if she signed the power of attorney. The wife was a young woman, relatively naive and unskilled, who had been brought up in a traditional, protected Greek home, where the woman’s role has always been one of subservience and dependence. Evidence showed that without her husband, she was financially and emotionally vulnerable, and was extremely concerned for the future support of her children.

and undue influence. And what makes the decision even more difficult to understand is that Myburgh AJ was not so constrained. A court is not bound in an application to decide a case only upon the points of law raised in the papers. Indeed “the court may decide an application on a point of law that arises out of the alleged facts even if the applicant has not relied on it in his application”.⁶ But the option chosen by the judge, and the problems of definition that this sort of decision has created, has been highlighted by those who support the flexibility of a doctrine of improperly obtained consensus.

The attempt to develop a doctrine of improperly obtained consensus echoes attempts in other jurisdictions to create a general doctrine of inequality of bargaining power. The most famous example of this occurred in the 1970s in England, when Lord Denning MR suggested that courts in England had the discretion to overturn any contract that had been entered into in a situation where some form of “inequality of bargaining power” tainted the transaction. It was in *Lloyd’s Bank Ltd v Bundy*⁷ that Lord Denning proposed the following:⁸

“English law gives relief to one who, without independent advice, enters into a contract upon terms that are very unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired because of his needs or desires, or his ignorance or infirmity coupled with undue influence or pressures brought to bear on him on or by or for the benefit of another.”

The way Lord Denning chose to articulate his concept of “inequality of bargaining power” shows that he was attempting to collapse commonly known traditional defences *in contrahendo*, like misrepresentation, duress and undue influence, under one generic doctrine. As far as English law is concerned, this attempt by Lord Denning to draw the various doctrines affecting contractual negotiations under one head has failed. Lord Denning’s proposal was received with alarm by most English commentators,⁹ and as soon as the both the Privy Council (in *Pao On v Lau Yiu Long*¹⁰), and

⁶ See Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 368. This rule of practice has the support of the Appellate Division. See *Van Rensburg v Van Rensburg* 1963 (1) SA 505 (A); *Argus Printing and Publishing Co Ltd v Die Perskorporasie van Suid-Afrika Bpk* 1975 (4) SA 814 (A).

⁷ [1975] 1 QB 326.

⁸ At 339c-d. The Master of the Rolls repeated his views in *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd’s Rep 98 at 102 and *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69 at 78.

⁹ See Sealy “Undue Influence and Inequality of Bargaining Power” 1975 *Cambridge LJ* 21 at 23; Tiplady “The Limits of Undue Influence” (1985) 48 *MLR* 579 at 583-4; Chitty 7-088; Treitel 384-5; Cheshire, Fifoot and Firmston 342-4

¹⁰ [1980] AC 614 at 632-4. Lord Scarman did not specifically refer to Lord Denning’s proposal, but his criticism of the idea of a doctrine of “inequality of bargaining power” is clear especially at 634D-F. Lord Denning’s views were also criticised by the Privy Council in *Hart v O’Connor* [1985] AC 1000.

the House of Lords (in *National Westminster Bank plc v Morgan*¹¹) were afforded the opportunity, Lord Denning's recommendation was crushed. Both the commentators and the Law Lords expressed the view that such an open-ended concept was too vague to be useful, and could lead to burgeoning litigation. In their view, adopting such a notion would allow too great a scope for judicial interference on undefined grounds.¹² There are a number of other problems with such a broad doctrine.¹³ The fact that an inequality in bargaining power existed does not necessarily mean it was abused. Secondly, the courts are given no clear guidelines to determine whether an abuse has occurred, which would mean the courts are likely to resist interfering, traditionally being conservative about their role in policing contracts, and not being trained economists with a knowledge of the market. The doctrine would not be very useful as a result. The uncertainty that the doctrine could create would also be unattractive to both lawyers and commercial players. In both the Privy Council and the House of Lords Lord Scarman has held that more specifically defined and developed doctrines like duress (in the *Pao On* case) and undue influence (in the *National Westminster Bank* case) were more suitable devices to use to tackle cases of this nature than an indeterminate doctrine of inequality of bargaining power.

It is my submission that the proposal to draw traditional defences under one doctrine of "improperly obtained consensus" in South African law, is likewise inappropriate, and for the same reasons identified in the preceding paragraph. Furthermore, the whole notion of improperly obtained consensus rests upon the assessment of the wrongful nature of the conduct of the other party to the contract. The first potential difficulty is the terminology. Why then use the term "improperly" obtained consensus? Perhaps it is because the term "wrongful" is rather too closely associated with the law of delict, and situations where aggrieved parties seek damages for loss, rather than situations where rescission of a contract is sought? If so, then why suggest that the doctrine ought to be based in a concept of wrongfulness? Secondly, focusing purely on the conduct of one party appears too reductionist an assessment of what the courts have to consider in deciding such cases. This sort of approach loses sight of the fact that there are two parties to any contract, and the conduct of both parties is going to have to be scrutinised when any dispute arises. A finding that the conduct of the party attempting to enforce the contract was unlawful is not going to take the enquiry far enough. Whether the case happens to be one concerning a misrepresentation, or an act of duress, there are a number of elements that the aggrieved party will have to prove in order to succeed: that their conduct was unlawful is only one of

¹¹ [1985] 1 AC 686.

¹² *Pao On v Lau Yiu Long* [1980] AC 614 at 634; *National Westminster Bank plc v Morgan* [1985] 1 AC 686 at 708.

¹³ For a penetrating criticism of the doctrine of inequality of bargaining power, see Ogilvie "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 *McGill LJ* 289 at 312-3. For a recent criticism of the doctrine see Conaglen "Duress, Undue Influence and Unconscionable Bargains—The Theoretical Mesh" (1999) 18 *New Zealand Universities LR* 509 at 542.

these. Finally, one ground of “improperly obtained consensus” creates a vague and shapeless legal creature that appears to be incapable of definition in any other way than by referring to traditional doctrines, or more defined and specific doctrines. If a judge were to ask him or herself whether the contract was improperly obtained, he or she would in all likelihood go on to say: “The only way I can find out is to determine whether this contract was induced by misrepresentation, duress or undue influence, or it constitutes another particular category of unacceptable conduct *in contrahendo* that I can identify and define.”¹⁴ This was certainly the approach of the court in the recent case of *BOE Bank Bpk v Van Zyl*, where the court *a quo* and a full bench on appeal refused to recognise the existence of a broad defence of improperly obtained consensus.¹⁵ Each of the defined doctrines operate in a particular factual context, and a plaintiff has to prove the elements particular to that form of conduct. Doctrines such as those of duress and misrepresentation were conceived by the Romans to ensure that these sorts of legal problems could be dealt with in a principled and logical manner. And in more recent times, the South African courts have added other doctrines (such as undue influence and bribery of a co-contractant) to the list, to combat different types of problem that did not fit under the traditional Roman doctrines.¹⁶

While it may be true that under a more modern definition of duress, the boundaries of duress and undue influence may require clarification, this does not mean that there are no longer identifiable boundaries at all. It needs to be recognised that the defences of duress and undue influence are designed to combat different problems, and the essential elements that need to be proved in order to make out

¹⁴ Remembering, of course, that the traditional doctrines of misrepresentation, duress and undue influence do not form a *numerus clausus*.

¹⁵ 1999 (3) SA 813 (C) at 824D-E, where Griessel J said: “Some writers also propose one overarching defence, that is ‘improperly obtained consensus, or ‘abuse of circumstances’.... However, our law has not yet reached the point one overarching defence is generally recognised. This is also neither the opportunity nor the place to provide any more support for this potential development in our law. For present purposes I accept that the doctrines of duress and undue influence continue to be independent defences at this point in time in our law.” This is a translation of the original Afrikaans: “Meerdere skrywers staan dan ook ’n enkele oorkoepelende aanvegtingsgrond voor, te wete ‘die onbehoorlike verkryging van wilsooreenstemming’ of ‘misbruik van omstandighede’.... Ons regsontwikkeling het egter nog nie die stadium bereik waar ’n enkele oorkoepelende aanvegtingsgrond algemeen erken word nie. Hierdie is ook nie die geleentheid of die plek om enige verdere stukrag aan hierdie moontlike ontwikkeling in ons reg te verleen nie. Vir doeleindes hiervan aanvaar ek dat die regsfigure van dwang en onbehoorlike beïnvloeding in die huidige stand van ons reg steeds afsonderlike en selfstandige aanvegtingsgronde daarstel.” This passage was cited with approval in the appeal. See *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at 182E-F.

¹⁶ In making this assertion, I am of course aware that the majority of the Appellate Division in *Preller and others v Jordaan* 1956 (1) SA 483 (A) described the doctrine of undue influence as a species of *dolus*, or fraud. However, it is evident that the Appellate Division’s argument has been discredited as an attempt to retain the appearance of the purity of our Roman-Dutch system of private law. For more on the point, see Van Huyssteen *Onbehoorlike Beïnvloeding* 114-118; Scholtens “Undue Influence” 1960 *Acta Juridica* 276; De Wet & Van Wyk *Kontraktereg* 51; Van der Merwe *et al Contract* 91. See too Ellison Kahn “Undue Influence in the Formation of a Contract” (1974) 91 *SALJ* 307.

a case either way are different. The doctrine of duress is designed to impeach contracts illegitimately induced because one party makes a threat that puts the other party in an unreasonable dilemma situation, and intimidates the other party into choosing the lesser of two evils. The doctrine of undue influence, on the other hand, may be used to rescind a contract induced by manipulative persuasion, deception or abuse of trust. The first key difference between the two doctrines is the existence or otherwise of an intimidatory threat:¹⁷ in undue influence cases, the aggrieved party may not even be aware that he or she is being exploited.¹⁸ The second difference is that generally speaking in undue influence cases there is some form of fiduciary relationship between the parties.¹⁹ For the legal system to remain doctrinally efficient it must be recognised that each of these particular doctrines are distinguished by a specific *modus operandi*. The facts of each case will guide the lawyer to the relevant doctrine. It does not seem logical to argue that because there may occasionally be situations where there may be a degree of overlap on the facts, we need to institute a merger at the doctrinal level itself. In the words of Lord Steyn, penned in a recent speech in the House of Lords in *Attorney-General v Blake*:²⁰ “In law classification is important. Asking the right questions in the right order reduces the risk of wrong decisions.”

5.2.2 An institutional approach

By taking this view, it will be evident that I have adopted an institutional approach to the law in this area. The institutional theory of law was developed by MacCormick and Weinberger.²¹ This theory of

¹⁷ Cf Kerr *Contract* 326: “Undue influence differs from *metus* in that it may be exercised without any threat being issued or menace being present.” The point is also made by Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 202n7 and “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?” (1996) 16 *OJLS* 503. For comment on the difference between the two doctrines, see Voet 2.14.19; *Preller and others v Jordaan* 1956 (1) SA 483 (A) at 490D; *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 824G-H. See also Chunn “Duress and Undue Influence: A Comparative Analysis” (1970) 22 *Baylor LR* 572.

¹⁸ The facts of the two leading cases, viz *Patel v Grobbelaar* 1974 (1) SA 532 (A) and *Preller and others v Jordaan* 1956 (1) SA 483 (A), are examples of this. Lubbe, in Zimmermann and Visser *Southern Cross* 289 states that undue influence is often reverted to in situations where the aggrieved party has limited intellectual capacity, and has accordingly not clearly understood what has been happening during the negotiation and conclusion of the contract.

¹⁹ It should be noted that in South Africa we have a unitary doctrine of undue influence, unlike English law, which recognises two categories, viz actual undue influence and presumed undue influence. The latter category concerns fiduciary relationships in the main. For a full discussion of the English position see *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 953; *Barclays Bank plc v O’Brien* [1994] 1 AC 180 at 189-90; Goff and Jones 356ff; Cheshire, Fifoot and Furmston 345.

²⁰ [2000] 4 All ER 385 at 402.

²¹ *An Institutional Theory of Law*, especially from 10-53.

law advocates the recognition and utilisation of defined legal institutions to promote an ordered, principled and uniform understanding of legal problems. Such institutions allow us to understand the nature of the law and a legal problem more coherently, and to solve legal disputes more efficiently. “Legal institutional facts (or legal institutions) exist as certain ways of thinking, of making meaningful and readily identifiable statements of a particular relationship between people.”²² In short, an institutional approach stimulates both formal and instrumental rationality in the law of contract. Formal rationality necessitates that legal doctrines should be defined, and not vague or contradictory.²³ Instrumental rationality requires that legal doctrines should be capable of guiding action — they should be clear, efficient and consistent. This is so that people can identify with greater certainty how they are expected to behave, so that there can be greater predictability in cases of dispute, and unnecessary litigation can be avoided.²⁴ But it is not the design of the institutional theory of law to impose a classically pure or value-free formalist approach upon adjudication. Each legal institution must constantly be interpreted and re-interpreted to ensure that the institution reflects societal values and policy. A legal institution is the culmination of the desire to articulate and understand a particular problem. But it is never cast in stone, and is constantly subject to re-examination. In Van der Merwe’s words:²⁵

“[The attraction of the institutional theory] lies in two central notions: One is that the law is about constructing meaning, rather than designating or representing meaning. The other is that meaning is constructed by constantly organising and re-organising an historically determined apparatus of explanation of the social world to better incorporate within that apparatus the values, goals and preferences that determine people’s actions.”

In this respect, the institutional theory of law ties in closely with Dworkin’s philosophy of law and

²² Van der Merwe “Constitutional colonisation of the common law: A problem of institutional integrity” 2000 *TSAR* 12 at 23. Professor Derek van der Merwe is the leading advocate of an institutional theory of law in South Africa. See too his “*Iudicis est ius dicere, non dare*: Judicial law-making by institutional development of the common law” in Van Wyk and Van Oosten *Nihil Obstat* 225; and “Juridical institutions in the common law: Towards a theory for common-law adjudication” 1993 *TSAR* 580. His views should not be confused with those of Professor Schalk van der Merwe, who has argued for the defence of improperly obtained consensus.

²³ A full discussion of the concept of formal rationality as a desirable feature of the law of contract may be found in Brownsword *Contract Law: Themes for the Twenty-First Century* 210-215. For the importance of the principle of rationality in South African law, see *S v Makwanyane* 1995 (3) SA 391 (CC) at para [156], and see further 9.3 below.

²⁴ For a discussion of instrumental rationality, see Brownsword *Contract Law: Themes for the Twenty-First Century* 215-221.

²⁵ Van der Merwe “Constitutional colonisation of the common law: A problem of institutional integrity” 2000 *TSAR* 12 at 24-5.

adjudication, especially his metaphor of the chain novel. Dworkin argues that in developing and applying the law one must show fidelity to the historical and moral institutions²⁶ of the legal system, and ensure that the solution one comes up with is one that “fits” in the broader context of the legal system. In this way, one who seeks to develop the law is like a person who is asked to write the next chapter of a chain novel, based on what has been written by others beforehand. Dworkin states:²⁷

“Each judge must regard himself, in deciding a new case before him, as a partner in a complex enterprise of which [the] innumerable decisions, structures, conventions and practices are history. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own.”

Advancing the enterprise will hopefully mean that the outcome will be substantively rational: the principle behind the doctrine, as well as the elements of which it consists, will be legitimate, and the doctrine will exist for a good or valuable reason.²⁸ In Hill’s words, a doctrine like the doctrine of duress

“provides an organizing principle that serves to explain and systematize our pre-analytic normative judgments. It explains, in the case of duress, the reason or purpose for the defense; this also serves to limit the proper scope of the defense to cases where this purpose is satisfied. Second, this principle guides the judge’s decision in particular cases.”²⁹

During the course of my re-examination of the doctrine of duress, I hope to show faith to this approach, and to attempt to re-formulate the doctrine in a way that is principled, but which accords with the needs of society today.³⁰ The doctrine of duress ought to be put to work in a more meaningful way, rather than being abandoned, or subsumed into other more general and nebulous doctrines, as some have suggested.

²⁶ Dworkin *Law’s Empire* 251ff uses the term “compartmentalization”.

²⁷ Dworkin *Law’s Empire* 258.

²⁸ For a discussion of the need for substantive rationality in the law of contract, see Brownsword *Contract Law: Themes for the Twenty-First Century* 221-227.

²⁹ Hill “A Utilitarian Theory of Duress” (1999) 84 *Iowa LR* 275 at 280.

³⁰ The benefits of this sort of approach in the context of duress are discussed by Mather “Contract Modification Under Duress” (1982) 33 *South Carolina LR* 615 at 624.

5.3 Methodological considerations

5.3.1 Traditional considerations

It is now necessary to clarify the matters that have been considered, and the approach that has been adopted in compiling the re-analysis of the duress doctrine in the South African law of contract. First of all, it is important to be aware of the need to ensure that the re-analysis, and the proposals that have been made in the wake of this re-analysis, are congruent with the basic fundamentals of the South African legal system in general, and of the law of contract in particular. When conducting a critical review of any area of law, one must be mindful of the need to show fidelity to the fundamentals of the system within which the doctrine has to operate, or the result may be something that looks elegant and logical when viewed in splendid isolation, but will no longer “fit” in its broader legal context.³¹ As a result, it will be important in this re-analysis to show faith to the fundamental principles that underpin the doctrine of duress, which derive their roots mainly from Roman-Dutch law.

But while much of the Roman-Dutch legal foundation remains valuable, certainly from a perspective of principle, there are situations where there have been radical changes to the nature of the world — social changes, economic changes, political and administrative changes, technological advances — and the law has to keep pace with these advances. This fact has not gone unnoticed in South African law. In the words of Innes CJ:³²

“There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.”

So, while it is important to show fidelity to the fundamental principles of Roman-Dutch law, it would hardly be appropriate, in any analysis of an area of South African law, to expect that the Roman-Dutch law as it flowed from the pens of luminaries like Johannes Voet and Hugo Grotius is perfect in every sense. Any common law system, in order to survive, must be

“a virile system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent

³¹ For a similar view, see Lambiris *Restitutio in Integrum* 7-8; Van der Merwe and Olivier *Die Onregmatige Daad* 20-23. As far as the question of “fit” is concerned, see Dworkin *Law’s Empire* 151ff and 176 ff.

³² *Blower v Van Noorden* 1909 TS 890 at 895.

basic principles to deal effectively with the increasing complexities of modern organised society”.³³

The evidence of Chapter 4 is that this sort of enquiry has not really happened in the context of the doctrine of duress in South African law, and as a result, the doctrine is in a neglected state. In South Africa, the changing complexion of public policy has historically provided the spur for the re-analysis and development of an aspect of the law, to ensure that it is coherent, functional and understandable, as well as remaining in step with the values, norms and expectations of society. The process is informed by moral and ethical precepts, changing perceptions about how to balance certain competing values, socio-economic and political advances, norms of international law, and developments in other jurisdictions around the world. Ultimately, any development in the law must be purposive, in that it advances the utility of the particular area of law, as well as ensuring that the legal institution, seen in the broader context of the system as a whole, measures up to society’s perceptions of what justice requires.³⁴

This has been the traditional way in which piecemeal developments of the common law (especially developments in the law of contract) have occurred. But the traditional approach has undergone something of a paradigm shift in recent times. The process of “developing the common law” has acquired a new impetus primarily as a result of the political and constitutional changes that have been experienced in the last ten years in the South African legal system.

5.3.2 The development of the common law since 1994

The year 1994 marked a significant change in the legal and political landscape of South Africa. Minority rule under a system of parliamentary sovereignty was replaced by majority rule and a system of constitutional supremacy.³⁵ This has had an important effect on the development of the South African

³³ Per Lord Tomlin in *Pearl Assurance Co v Union Government* 1934 AD 560 at 563.

³⁴ In *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) at 528-9 Van Zyl J said: “The community’s perception of *boni mores* is closely linked to the concept of good faith in community relations. These concepts, again, are similarly associated with the community’s perception of justice, equity and reasonableness. This has been recognised not only in historical and comparative context, but in the contemporary decisions of our own Courts.... From this it appears that public policy, in the sense of *boni mores*, cannot be separated from concepts such as justice, equity, good faith and reasonableness, which are basic to harmonious community relations and may indeed be regarded as the purpose of applying public policy considerations.” For a review of the role of public policy in shaping the South African common law, see Corbett “Aspects of the Role of Policy in the Evolution of our Common Law” (1987) 104 *SALJ* 52. In addition, see Zimmermann and Visser *Southern Cross*, which constitutes a comprehensive doctrinal history of all the institutions of South African private law, and how they have been developed to suit the needs of contemporary South African society.

³⁵ The Interim Constitution (Act 200 of 1993) came into force on the 27th of April 1994. It was ultimately replaced by the Final Constitution (Act 108 of 1996), which came into force on the 4th of February 1997. I will discuss only the Final Constitution in this thesis.

common law. The common law is not a discreet “system” of law that operates independently of constitutional law: it is subordinate to the requirements of the supreme Constitution.³⁶ The Constitution contains a Bill of Rights, and allows for the judicial critique of all law and conduct in accordance with the values contained in the Bill of Rights. This includes private law and private relationships. The fact that the Constitution is supreme over all forms of law is made quite clear in s2 of the Bill of Rights: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

The Constitution can have an impact on private law and private relationships in three ways.³⁷ First, the Constitution imposes a number of duties upon the State vis-a-vis its citizens. While many of these duties notionally fall into the domain of public law, of course there are many situations where the State operates in the domain of private law, and where private law is applicable to disputes between citizens and the State in terms of the State Liability Act.³⁸ In such cases, any relevant duties imposed upon the State by the Constitution would apply, where relevant, to private law relationships between the State and private citizens, and the areas of private law that regulate these relationships.

Secondly, s39(2) of the Bill of Rights allows for the indirect percolation of constitutional values into the common law through the development and reinterpretation of public policy. The inherent power of the courts to develop the common law has been retained and entrenched in s173 of the Constitution:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice.”

As a result, the power of the courts to develop the common law in accordance with the dictates of public policy remains. But this does not mean it is merely “business as usual” as far as the development of the law and the interpretation of public policy is concerned. For s39(2) declares: “When ... developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

This provision means that the founding values contained in the Bill of Rights must radiate into the

³⁶ See *Pharmaceutical Manufacturers Association of SA and another: in re ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) at 696B.

³⁷ I would like to acknowledge the assistance of Adv Wim Trengove SC, Visiting Professor in the Faculty of Law at Rhodes University, in shaping my thinking in this regard.

³⁸ Act 20 of 1957. Section 1 reads: “Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.”

common law when a matter concerning public policy is considered by the courts. Whenever a matter concerning public policy comes before the courts, the courts cannot simply treat the matter as if public policy remains as it always was. Public policy needs to be reinterpreted, and where necessary reformulated, in the light of the values contained in the Constitution. In *Afrox Healthcare Ltd v Strydom*,³⁹ Brand JA held:⁴⁰

“The second potential situation [where the Constitution will have an effect on the common law] is where a pre-constitutional decision of this court was based on considerations such as the *boni mores* or public policy. If the High Court is of the opinion that this decision, when measured up against constitutional values, no longer truly reflects the *boni mores* or the considerations of public policy, the High Court is bound to depart from that view.”

The Bill of Rights, being a dependable reflection of public opinion in some significant areas, also provides the courts with a more reliable and concrete indication of some of the fundamental values our society considers to be important, and these constitutional values will (where they are relevant) now inform and guide developments of the common law on policy grounds.⁴¹ As Cameron JA said in *Brisley v Drotosky*:⁴² “In its modern guise, ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines.”

The third way in which the Constitution can have an effect on the common law is through the direct horizontal application of a right contained in the Bill of Rights in terms of s8 of the Constitution.⁴³ Section 8 reads as follows:

³⁹ [2002] 4 All SA 125 (SCA).

⁴⁰ At 134i. This is a translation of the original Afrikaans: “Die tweede moontlike situasie is waar die pre-konstitusionele beslissing van hierdie Hof gebaseer was op oorwegings soos *boni mores* of openbare belang. Indien die Hooggeregshof van oordeel is dat hierdie beslissing, met inagneming van konstitusionele waardes, nie meer die *boni mores* of die oorwegings van openbare belang juis reflekteer nie, is die Hooggeregshof verplig om daarvan af te wyk.”

⁴¹ Hopkins “The Common Law is Indeed a Living Creature: A Noteworthy Decision is Handed Down in the Cape High Court” (2001) 118 *SALJ* 149 at 154; Christie “The Law of Contract and the Bill of Rights” *Bill of Rights Compendium* §3H-8.

⁴² 2002 (4) SA 1 (SCA) at 34G.

⁴³ In *Afrox Healthcare Ltd v Strydom* [2002] 4 All SA 125 (SCA) at 134h, Brand JA referred to the situation “where the High Court is convinced that the common law is in conflict with a constitutional provision. In such a case, the High Court is required to depart from the common law. The fact that the particular rule of the common law was laid down by the Supreme Court of Appeal before the constitution came into force, makes no difference. The Constitution is the highest law, and where the common law conflicts with it, the latter must yield”. This is a translation of the original Afrikaans “waar die Hooggeregshof oortuig is dat die gemenereg in stryd is met ’n grondwetlike bepaling. In dié geval is die Hooggeregshof verplig om van die gemenereg af te wyk. Die feit dat die betrokke reël van die gemenereg pre-konstitusioneel deur hierdie Hof neergelê is, maak geen verskil nie. Die Grondwet is die hoogste reg en waar ’n reël van die gemenereg daarmee in stryd is, moet laasgenoemde wyk”.

- “(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court —
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).”

The interpretation of these provisions, and therefore the extent to which the Constitution and the rights contained in the Bill of Rights applies to private law, is now largely a settled issue.⁴⁴ Section 8(1) makes it clear that the Bill of Rights applies to all law (including the common law and customary law) and not just to legislation. But s8(2) qualifies the position slightly by declaring that not all constitutional rights will necessarily be directly applicable to private relationships — a right can only be appealed to directly by a litigant in a private dispute if, taking into account the nature of the right and any duties imposed by the right, it is appropriate to do so (ie the right is applicable to the relationship between the parties). As far as the private law is concerned, the Constitution thus only has what is known as restricted direct application.⁴⁵ Finally, s8(3) determines the method in which a right may be applicable (in a practical sense) to a private dispute. That subsection stipulates that where a right contained in the Bill of Rights is found to be applicable, it is the common law that must be applied (or developed) in order to achieve that end.⁴⁶ The relevant right cannot be appealed to and applied *in abstracto*; the specific doctrine of

⁴⁴ See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), and *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) at 420. For academic comment, see Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontality’” *Bill of Rights Compendium* Chapter 3A; De Waal *et al* *The Bill of Rights Handbook* 32; Cheadle and Davis “The application of the 1996 Constitution in the private sphere” (1997) 13 *SAJHR* 44; Wallis “The Evolution of Private Law under the Constitution” (1997) 18 *Obiter* 206. The debate about whether the Interim Constitution had horizontal or vertical application was far more heated. See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), and De Waal and Erasmus “The constitutional jurisprudence of South African courts on the application, interpretation and limitation of the fundamental rights during the transition” (1996) 7 *Stellenbosch LR* 179; Woolman and Davis “The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions” (1996) 12 *SAJHR* 361.

⁴⁵ Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontality’” *Bill of Rights Compendium* §3A-8. So, for example, it appears highly unlikely that there would be a situation where the rights of arrested, detained and accused persons (s35) or the right to healthcare, food, water and social security (s27) would be relevant or applicable to private relationships. However, the right to life (s11), dignity (s10) or privacy (s14) are certainly relevant to private relationships.

⁴⁶ Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontality’” *Bill of Rights Compendium* §3A-9.

the common law in question has to be applied (or developed) to give effect to the right. This institutional approach seems eminently sensible. The goal is not to abandon the common law.⁴⁷ Rather, the constitutional value (or values) becomes a significant factor in assisting a court to find an appropriate legal explanation to the debate about that particular doctrine of the common law. This approach has the advantage of promoting the continuity and integrity of the legal system.⁴⁸ Furthermore, this approach recognises that common lawyers have grappled for many centuries with the problem of how to balance the rights and duties of private parties, and this collected wisdom cannot be ignored in assessing the appropriateness of our private law institutions in modern times.

A court will be expected to investigate the potential applicability of a constitutional right to a private dispute in the following manner. First of all, the court will have to determine whether the right referred to is in fact relevant to the private dispute at hand (the s8(2) enquiry). If not, *cadit quaestio*. But if the right is applicable, the second stage of the enquiry commences — what Davis AJ has described as the “constitutional audit”.⁴⁹ In a nutshell, the court has to decide what to do about the right in the context of the common law (the s8(3) enquiry). In some circumstances, the norms of private law developed over the centuries will appropriately embody the right, or will already balance competing rights in a suitable way.⁵⁰ In such cases, the court will be able to state that the common law complies with constitutional principles, and will merely have to apply the common law as it stands. But if the common law is somehow deficient when measured up against the relevant fundamental right, then the court will have to develop the common law to give effect to the right.⁵¹

In *Carmichele v Minister of Safety and Security*,⁵² the Constitutional Court laid down the ground rules for how courts are expected to go about developing the common law in the light of the

⁴⁷ Wallis “The Evolution of Private Law under the Constitution” (1997) 18 *Obiter* 206 at 213 states: “The Constitution does not enjoin us in a flurry of enthusiasm for the impact of constitutional rights in private law, to throw out the healthy baby of our common law with the dirty bathwater of a discredited political system.” See too Rautenbach *General Provisions of the South African Bill of Rights* 80.

⁴⁸ These virtues are specifically identified by Cheadle and Davis “The application of the 1996 Constitution to the private sphere” (1997) 13 *SAJHR* 44 at 63, in their discussion of s8(3).

⁴⁹ *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) at 87E-F.

⁵⁰ In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para [58] Ackermann J said: “In many cases the common law will be broad enough to provide all the relief that would be ‘appropriate’ for a breach of constitutional rights.”

⁵¹ One example is the extended powers of *locus standi* permitted by s38 of the Constitution. See for example *McCarthy v Constantia Property Owners Association* 1999 (4) SA 847 (C) at 854-5. There is some speculation that the rules of natural justice contained in s33 may potentially also be applied to private bodies exercising public powers in terms of this mechanism. But this argument did fail in *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T).

⁵² 2001 (4) SA 938 (CC). See also *Jooste v Botha* 2000 (2) SA 199 (T) at 204 and *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) at 420.

Constitution. First, the court made it clear that it remains the role of the legislature to make significant or wholesale changes to the legal system; courts will only be responsible for making piecemeal, incremental changes to ensure the law keeps pace with public opinion.⁵³ But in suitable cases, where a court examines the precedents, and identifies a deficiency in the common law — in other words, an aspect of the common law somehow departs from the spirit, purport and objects of the relevant fundamental right — the court is under an obligation to develop the law to remove that deficiency.⁵⁴ The common law may have to be changed to give greater prominence to the fundamental right, or the common law may have to be altered in such a way that a particular right is limited in a reasonable and justifiable manner, in accordance with the limitations clause of the Constitution.⁵⁵ The result must be one that appropriately balances the interests of the parties, and the needs of society, reflecting the importance of the constitutional principle of proportionality to the development and application of the law.⁵⁶ In conducting the exercise of developing the law, the court must have recourse to those interpretative guidelines and sources contained in s39(1) of the Constitution — the court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law, and may consider foreign law.

The effect of all this is that as the courts interpret and apply the Constitution, they will be influencing every legal and social relationship in South Africa, including the common law and the development thereof. In the words of Mahomed DP in *Du Plessis v De Klerk*:⁵⁷

⁵³ At 954E. In *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at para [61] Kentridge AJ cited the Canadian Judge Iacobucci J in *R v Salituro* (1992) 8 CRR (2d) 173, who said in that case: “In a constitutional democracy like ours it is the Legislature and not the courts which has the major responsibility for law reform.... The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.” See too *Ferreira v Levin* 1996 (1) SA 984 (CC) at 1090G-H and *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA) at 1332C.

⁵⁴ At 954A and 955G-H.

⁵⁵ See s8(3)(a) and (b) of the Constitution above. The limitations clause (section 36(1)) states: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.” A discussion of limitations clause jurisprudence falls beyond the scope of this thesis. For an analysis, see De Waal *et al The Bill of Rights Handbook* 144ff; Rautenbach and Malherbe *Constitutional Law* 308ff.

⁵⁶ On the question of proportionality, see *S v Makwanyane* 1995 (3) SA 391 (CC) at paras [103]-[105]. The approach of the South African courts to proportionality mirrors that adopted by the Canadian Supreme Court in *R v Oakes* (1986) 26 DLR (4th) 200. For a recent application of the test of proportionality in the private law context, see *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

⁵⁷ 1996 (3) SA 850 (CC) at 897H.

“[The courts have] a very clear and creative role in the active evolution of our constitutional jurisprudence by examining, and in suitable circumstances expanding, the traditional frontiers of our common law by infusing it with the spirit of Chapter [2] of the Constitution and its purport and objects.”

The result is that it is not only traditional questions of public policy that have to be considered in the review and development of the duress doctrine in South Africa. Additionally, it must be considered whether any constitutional values have a role to play in shaping the development of this common law doctrine too.

5.3.3 Comparative methodology

An important feature of both the traditional approach to legal analysis and the development of the common law, as well as the constitutional directions to this end, is the fact that referring to comparative sources for guidance is encouraged. In this light, during the course of undertaking a systematic review of the current position with regard to the doctrine of duress, a comparative approach has been adopted, and guidance has been sought from other legal systems around the world, where the approach to the doctrine of duress is more advanced and articulate than our own, in terms of both substance and form. Adopting a comparative approach when considering a contractual issue is important in the light of the increasing homogeneity and inter-connectedness of the world's economic and commercial system. The development of the European Union with its new single currency, and entities like the World Bank and the World Economic Forum are examples of this trend. And law is not escaping this homogenising process.⁵⁸ International boundaries and divergent municipal systems of law (especially commercial law) are hindrances to efficient global trade and the simple resolution of commercial disputes. Steps are being taken to try to address this problem. For example, in Europe the drive to develop a single “European” system of commercial law, which transcends national boundaries, is fast growing momentum.⁵⁹ In the 1970s the Lando Commission was set up to attempt to formulate a uniform commercial code for Europe, which has resulted in the publication of Part One of a set of proposed

⁵⁸ For a general discussion of this globalisation process in the law of contract, see the excellent analysis entitled “The Globalisation of Contract Law” in Brownsword *Contract Law: Themes for the Twenty-First Century* 145ff. See also Cheshire, Fifoot and Furmston 28-9.

⁵⁹ For general comment on the development of a “European” system of law (particularly with regard to contract), see Kötz and Flessner *European Contract Law*; Beale “The ‘Europeanisation’ of Contract” in Halson *Exploring the Boundaries of Contract* 23; Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law*; Van Caenegem *European Law in the Past and the Future*.

uniform principles for European contract law in 1995.⁶⁰ There are other examples of how the law of contract is increasingly taking on a uniform international flavour. The International Institute for the Unification of Private Law (UNIDROIT) has published the UNIDROIT Principles for International Commercial Contracts.⁶¹ The United Nations Commission on International Trade Law (UNCITRAL) has produced the Vienna Convention on Contracts for the International Sale of Goods, which came into force in 1988,⁶² and, more recently, a significant piece of work called the UNCITRAL Model Law on Electronic Commerce, which looks set to form the basis of e-commerce laws around the world.⁶³ South Africa, as a country and as a legal system, faces the challenge of adapting itself and its laws to cope with these legal and commercial trends. It is submitted that the re-examination of the South African doctrine of duress must be seen and conducted in the context of this process, since the current legal position lags behind that recognised in other leading jurisdictions, both in terms of its formulation and the breadth of its application.

The main source of comparative inspiration in this regard has been the Anglo-American jurisdictions of England, the United States, Canada and Australia. These jurisdictions have been consulted for a number of reasons. First, there are close ties between the South African law of contract, and the law of contract that applies in common law legal systems.⁶⁴ A great deal of the South African law of contract has been heavily influenced by English law. There are examples of this influence with regard to the doctrine of duress itself, as can be seen from the cases of *Arend v Astra Furnishers (Pty) Ltd*,⁶⁵ and *White Brothers v Treasurer General*.⁶⁶ Since the hybrid South African system of private law

⁶⁰ The principal work on the Lando Commission's work is Lando and Beale *The Principles of European Contract Law*. In that work the authors state (at xix): "The longer term objective [of the work] is to help bring about the harmonisation of general contract law within the European community." See too Brownsword *Contract Law: Themes for the Twenty-First Century* 147-149.

⁶¹ Letterman *UNIDROIT's Rules in Practice: Standard International Contracts and Applicable Rules* constitutes a very recent analysis of the UNIDROIT principles. See also Furmston "Unidroit General Principles for International Commercial Contracts" (1996) 10 *Journal of Contract Law* 11.

⁶² For a discussion of this Convention, see Nicholas "The Vienna Convention on International Sales Law" (1989) 105 *LQR* 201.

⁶³ South Africa has adopted the UNCITRAL model with regard to e-commerce transactions in the Electronic Communications and Transactions Act 25 of 2002.

⁶⁴ For a full analysis of this issue, see Hahlo and Kahn *The South African Legal System* 578-596 and Zimmermann and Visser *Southern Cross*; Palmer (ed) *Mixed Legal Jurisdictions Worldwide: The Third Legal Family*. See also Beinart "The English Legal Contribution to South Africa: The Interaction of Civil Law and Common Law" 1981 *Acta Juridica* 7; Zimmermann "Synthesis in South African Private Law: Civil Law, Common Law and the *Usus Hodiernus Pandectarum*" (1986) 103 *SALJ* 259; Visser "Daedalus in the Supreme Court: The Common Law Today" (1986) 49 *THRHR* 127; Erasmus "Thoughts on Private Law in a Future South Africa" (1994) 5 *Stellenbosch LR* 107.

⁶⁵ 1974 (1) SA 296 (C) at 309G, where Corbett J stated, before looking at the English law: "In view of the relative dearth of authority in our law, it is perhaps appropriate to look elsewhere for persuasive authority on these

has a strong English character and tradition, it makes sense to seek guidance from that system of law in particular, where it is appropriate to do so.

Secondly, those countries that have a common law tradition have developed a very similar theoretical and elemental approach to the question of duress, despite each national system being autonomous. Indeed, one can say that (insignificant differences apart) an “Anglo-American” approach to duress has evolved, the foundational precepts of which are the same, whether one happens to be in America, England, Australia or Canada.⁶⁷ There has been a great deal of cross-pollination of ideas between these nations on the most suitable method to deal with duress claims. The fact that the leading judges and academics of these nations have developed a fairly uniform approach to the doctrine of duress across all common law systems, makes their research and findings an extremely valuable source to consult.

Thirdly, and, perhaps, most importantly, the Anglo-American approach to duress provides us with a highly coherent and modern approach to the problem of duress from a philosophical, social, economic and legal perspective. Although all these various factors are important, probably the most significant force of all these is the economically or commercially advanced nature of the doctrine of duress that has developed in Anglo-American jurisdictions, where the recognition of economic duress has given this area of law renewed vigour and relevance.

The arguments above apply not only to Anglo-American systems, but also apply *mutatis mutandis* to civilian based European systems of law. Since South African private law is mainly based upon Roman-Dutch law, the continental influence on our legal system is already immense. And this is not limited to developments in the Netherlands; many facets of South African law derive their roots from a broader European *ius commune*.⁶⁸ Most European countries, being developed nations, are also at the forefront of economic advancement and commercial internationalisation. It thus also makes sense to seek counsel from developed European systems of law (particularly the Netherlands and Germany, which retain the closest links to the South African system) when reviewing the South African doctrine

points.” See too *Malilang and others v MV Houde Pearl* 1986 (2) SA 714 (A), where the English rules of duress were carefully analysed and applied by the Appellate Division, albeit wearing its hat as a Court of Admiralty, where English law is applied.

⁶⁶ (1883) 2 SC 322 at 350.

⁶⁷ There are a number of authors who write about the doctrine of duress using authority interchangeably from all the leading common law systems. See Sutton “Duress by Threatened Breach of Contract” (1974) 20 *McGill LJ* 554; Rafferty “The Element of Wrongful Pressure in a Finding of Duress” (1980) 17 *Alberta LR* 431; Fridman “Duress in the Canadian and English Law of Restitution” (1987) 11 *Dalhousie LJ* 47; Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201. Brownsword *Contract Law: Themes for the Twenty-First Century* 154 discusses this trend in contract in general in a section entitled “Convergence within the common law world”.

⁶⁸ This matter has already been discussed at 3.2 above.

of duress.

In the best traditions of the South African hybrid system of law, I shall therefore seek, where the current legal position is deficient, to draw comparative inspiration from developments in both civil law and common law jurisdictions. The approach recommended by Olivier JA in *Thoroughbred Breeders' Association v Price Waterhouse*⁶⁹ has been followed. In his judgment in that case, Olivier JA referred to the use of comparative authority and said that the importance of this exercise is to use “the underlying principles and philosophies developed by other courts as an aid in clarifying our own thoughts”.⁷⁰ Most of the fundamental principles underpinning the doctrine of duress that are found in foreign developed systems of law have always existed in the South African common law. It is just that these principles are not very coherently articulated, have been haphazardly applied, and the approach to duress is rather primitive. What the South African doctrine of duress requires is a principled re-systematisation and some modernisation; not a revolutionary overhaul that will change its character entirely.

5.4 The theoretical basis underpinning the existence of the duress doctrine in contract

The first question that needs to be considered in undertaking this review is the theoretical basis of the doctrine. This question is significant, since the answer will give important indicators as to why the doctrine exists, what purpose it serves in the context of the law of contract, and what must be proved in order to make out duress as a cause of action or a defence.

5.4.1 The overborne will theory

One of the cornerstones of the classical theory of contract that reached its apogee in the 18th and 19th centuries was the idea that a legally binding contract was the product of the subjective meeting of the minds of the two parties.⁷¹ This approach became known as the will theory — that a contract was an expression of the free wills of the two parties. The progenitors of this theory were 17th century civilians

⁶⁹ 2001 (4) SA 551 (SCA).

⁷⁰ At 605F.

⁷¹ A full examination of the will theory of contract falls beyond the scope for this work. For a review, see Atiyah *The Rise and Fall of Freedom of Contract* 405ff; Van der Merwe *et al Contract* 13ff.

like Grotius and Pufendorf,⁷² but the idea took root and became extremely popular in both France and England, mainly as a result of the support for the theory expressed in Pothier's *Obligations*⁷³ and Blackstone's *Commentaries*.⁷⁴ As a result of its influence on English law, the will theory came to play a dominant role in shaping classical contract law and theory in the 18th and 19th century in all common law and commonwealth jurisdictions.⁷⁵ The problems inherent in this subjective approach to contracting are the subject of an enormous amount of literature, which mostly falls beyond the scope of this thesis. That is, apart from the problem of how the doctrine of duress was to be drawn under a theory of contract that was predicated upon the idea of free will, and how the solution to that problem has come to cloud the concept of duress as a legal doctrine.

At a fundamental level the doctrine of duress is designed as a mechanism of policing fair bargaining in contract. Now under the classical will theory of contract, this posed something of a problem, as it was not supposed to be the province of the courts to police contractual bargaining.⁷⁶ The doctrine had to be justified within the bounds of classical contract theory. To classical contract theorists, the solution as to how to correlate duress with the will theory was a relatively simple one: it became known as the "overborne will" theory. Free will was the crux of the classical liberal theory of contract. A coercive act of duress rendered the free will of the victim overborne, and therefore negated his or her consent. Unless consent was freely given, it was not consent at all. This classical view of duress was articulated in various ways in the 19th and 20th century all over the world. For example in England, in *The Siboen and the Sibotre*,⁷⁷ Kerr LJ stated that "the Court must in every case at least be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of any animus contrahendi".⁷⁸ In

⁷² See Grotius *De Jure Belli ac Pacis* 2.11; Pufendorf *De Iure Naturae et Gentium* 3.4.3 and O'Brien *Restitutio in Integrum* 32ff.

⁷³ For a discussion of the importance of Pothier's *Obligations* (especially Evans's 1806 English translation) to the rise of the will theory in England, see Cheshire, Fifoot and Furmston 17; Ogilvie "Wrongfulness, Rights and Economic Duress" (1984) 16 *Ottawa LR* 1 at 3.

⁷⁴ Blackstone *Commentaries on the Law of England* IV 2, where he describes the underlying reason for the existence of the doctrine of duress as "the want or defect of will".

⁷⁵ For the role it has played (and continues to play) in South African law, see *Saambou Nasionale Bouvereeniging v Friedman* 1979 (3) SA 978 (A).

⁷⁶ For a discussion of the underlying philosophical reasons for the development of the overborne will theory, see Dalton "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 *Yale LJ* 997 at 1024.

⁷⁷ [1976] 1 Lloyd's Rep 293. See too *Styros Shipping Co SA v Elaghill Trading Co* [1981] 3 All ER 189 (QB) at 192 where Styros J said that "the question of duress turns on whether the commercial pressure exerted by the one party on the other was such as to vitiate the other party's consent by the coercion of his will".

⁷⁸ At 336 (my emphasis).

*Pao On v Lau Yiu Long*⁷⁹ it was held by the Privy Council that “[d]uress, whatever form it takes, is a coercion of the will so as to vitiate consent”;⁸⁰ that the coercion must be such that “the victim must have entered the contract against his will”⁸¹ and that the aggrieved party’s act “was not a voluntary act on his part”.⁸² In *United States v Bethlehem Steel Corporation*⁸³ the United States Supreme Court rejected a claim instituted by the government that it had been coerced during wartime into concluding financially draining ship-building contracts under duress. The government’s claim failed on the grounds that there was no evidence that the government “involuntarily accepted”⁸⁴ Bethlehem Steel’s terms, and “there is no evidence of that state of overcome will which is the major premise of the petitioner’s argument of duress”.⁸⁵

Although the overborne will theory has had the occasional modern supporter,⁸⁶ in recent times this theory has been heavily criticised.⁸⁷ Halson has described the reasoning underlying the theory as

⁷⁹ [1980] AC 614. This test was quoted verbatim from the early case of *Astley v Reynolds* (1731) 2 Str 915 at 916, and was repeated by Kerr LJ in *The Siboen and the Sibotre* [1976] 1 Lloyd’s Rep 293 at 336.

⁸⁰ At 635 (my emphasis).

⁸¹ At 636 (my emphasis).

⁸² At 636 (my emphasis).

⁸³ 315 US 289 (1941).

⁸⁴ At 301 (my emphasis).

⁸⁵ At 301 (my emphasis). See too *Barry v Equitable Life Assurance Society* 59 NY 587 (1875) at 591 where it was stated that “where there exist coercion, threats, compulsion and undue influence, there is no volition”.

⁸⁶ For academic support for the overborne will theory, see Lanham “Duress and Void Contracts” (1966) 29 *MLR* 615; Tiplady “Concepts of Duress” (1983) 99 *LQR* 188. Qualified support for the importance of considering the question of autonomy comes from Smith “Contracting Under Pressure: A Theory of Duress” (1997) 56 *Cambridge LJ* 343 at 358ff.

⁸⁷ See Dalzell “Duress by Economic Pressure I” (1942) 20 *North Carolina LR* 237; Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253 at 267; Atiyah “Economic Duress and the ‘Overborne Will’” (1982) 98 *LQR* 197 and “Duress and the Overborne Will Again” (1983) 99 *LQR* 353; Hale “Bargaining, Duress and Economic Liberty” (1943) 43 *Columbia LR* 603 at 615ff; Nozick *Anarchy, State and Utopia* 263; Kronman “Contract Law and Distributive Justice” (1980) 89 *Yale LJ* 472; Murphy “Consent, Coercion, and Hard Choices” (1981) 67 *Virginia LR* 79; Philips “Are Coerced Agreements Involuntary?” (1984) 3 *Law and Philosophy* 133; Wertheimer *Coercion* 288; Beatson “Duress as a Vitiating Feature in Contract” (1974) 33 *Cambridge LJ* 97, “Duress by Threatened Breach of Contract” (1976) 92 *LQR* 496 and *The Use and Abuse of Unjust Enrichment* 113-117; MacDonald “Duress by Threatened Breach of Contract” 1989 *JBL* 460 at 461; Ogilvie “Wrongfulness, Rights and Economic Duress” (1984) 16 *Ottawa LR* 1 at 19; Provost “A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law” (1995) 73 *Texas LR* 629 at 644; Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 207; Hill “Moralized Theories of Coercion: A Critical Analysis” (1997) 74 *Denver University LR* 907 at 915ff and “A Utilitarian Theory of Duress” (1999) 84 *Iowa LR* 275 at 286ff.

specious,⁸⁸ and Birks has even described it as a “heresy”.⁸⁹ This is so for numerous reasons. First, it is not accurate to say that a victim of duress has no choice at all, that his or her consent is “negated”, or that he or she acted “involuntarily” in a state of automatism. This may be how the law treats cases of *vis absoluta* (eg where someone physically forces one’s hand to write) but it does not make sense in cases where a threat is made. In most cases of duress the aggrieved party is faced with a dilemma caused by a threat. That person knows what his or her options are, and must make a choice, even if it is unpleasant and of the Hobsonesque variety. To put it in philosophical terms, the threat creates an “imposed situation of choice”⁹⁰ that is “biconditional”.⁹¹ In fact, in duress cases the intention to consent is probably more pronounced than in most contractual situations.⁹² Furthermore, the overborne will theory cannot be harmonised with the well-established rule that a contract entered into under duress is voidable, and not void.⁹³ The pivotal difference between void and voidable contracts is that in the latter, the element of consensus is deemed to exist. The doctrine of duress is designed to determine whether it was justifiable for the aggrieved party to have chosen to consent under the pressure of the moment. To put it in terms more common to pleading in civil matters, raising duress in a contractual context amounts to confession and avoidance, rather than a flat denial of the existence of an agreement. The fact that a contract concluded under duress can also be ratified⁹⁴ adds weight to this view, for it would not be possible to ratify something that had never existed.

Secondly, the overborne will theory is innately contradictory, since the court has to examine the options and alternatives available to the aggrieved party to determine whether they were so terrible that it would justify the conclusion that the aggrieved party had no options at all, and the aggrieved party acted involuntarily — an uneasy application of a *reductio ad absurdum*.⁹⁵

Finally, from the South African perspective, the overborne will theory does not accord with the approach to duress cases embraced by the Romans and most of the institutional writers of the Roman-

⁸⁸ Halson “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 *LQR* 649 at 665.

⁸⁹ Birks “The Travails of Duress” (1990) 3 *Lloyd’s Maritime and Commercial Law Quarterly* 342.

⁹⁰ Philips “Are Coerced Agreements Involuntary?” (1984) 3 *Law and Philosophy* 133 at 141 (my emphasis).

⁹¹ Gorr “Toward a Theory of Coercion” (1986) 16 *Canadian Journal of Philosophy* 383 at 401.

⁹² See Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253 at 267; Atiyah “Economic Duress and the ‘Overborne Will’” (1982) 98 *LQR* 197 at 200.

⁹³ In England see Chitty §7-002. In the United States see *Restatement, Second, Contracts* §175; *Williston on Contracts* §3.4.

⁹⁴ See *Carruthers v Van der Venter* (1862) 4 Searle 96; Kerr *Contract* 319.

⁹⁵ In both *The Siboen and The Sibotre* [1976] 1 *Lloyd’s Rep* 293 at 337 and *Pao On v Lau Yiu Long* [1980] AC 615 at 636 and the nature of the “alternative remedies” was held to be a significant factor in the duress enquiry. See too Atiyah “Economic Duress and the ‘Overborne Will’” (1982) 98 *LQR* 197 at 200.

Dutch law. As was shown in Chapters 2 and 3,⁹⁶ the Roman and Roman-Dutch authorities chose to avoid the philosophical potholes of the consent debate, and generally endorsed the *coactus volui* argument: a coerced will is nevertheless a will.

The fallacy implicit in the overborne will theory has been exposed in a number of leading cases around the world. In *Union Pacific Railway Co v Public Service Commission*⁹⁷ the American Supreme Court Justice Oliver Wendell Holmes made the point in his inimitable way:⁹⁸

“It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is a characteristic of duress properly so called.”

Justice Holmes pointed out quite correctly in *The Eliza Lines*⁹⁹ that this principle was “as old as the Roman law”.¹⁰⁰

In England the overborne will theory was rejected unanimously as a theory of duress by the House of Lords in *Director of Public Prosecutions for Northern Ireland v Lynch*.¹⁰¹ Although this was a criminal case, the thinking of the House of Lords was certainly not confined merely to criminal law, and Lord Simon of Glaisdale specifically discussed the position in contract. His lordship said:¹⁰²

⁹⁶ See 2.2.4.2 and 3.3.1.2 above.

⁹⁷ 248 US 67 (1918). See too Holmes J’s comments in *Fairbanks v Snow* 145 Mass 153, 154 (1887).

⁹⁸ At 70. See also Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253 at 267, where he said: “[T]he instances of more extreme pressure are precisely those in which the consent expressed is *more* real; the more unpleasant the alternative, the more real the consent to a course which would avoid it.”

⁹⁹ 199 US 119 (1905).

¹⁰⁰ At 130-1.

¹⁰¹ [1975] AC 653.

¹⁰² At 695B. The other law lords were of the same opinion. At 670F Lord Morris of Borth-y-Gest said: “Someone who acts under duress may have a moment of time, even of the utmost brevity, within which he decides whether he will or will not submit to a threat. There may consciously or subconsciously be a hurried process of balancing the consequences of disobedience against the gravity or the wickedness of the action that is required. The result will be that what is done will be done unwillingly but yet intentionally.” Lord Wilberforce at 680A said: “‘Coactus volui’ sums up the situation: the victim completes the act and knows that he is doing so.” Lord Kilbrandon at 703C-D: “The effect of a threat upon its recipient may be said to reduce his constancy, so that he is forced to do what he knows to be wrong and would not have done unless he had been threatened.... He has decided to do a wrong thing, having balanced in his mind, perhaps unconsciously, the consequences to himself of refusal against the consequences to another of acquiescence.” See too the dicta of Lord Edmund-Davies at 709-10. *Lynch*’s case has been influential in shaping the theoretical foundations of the duress defence in Canada. See Reilly and Mikus “*R v Hibbert: The Theoretical Foundations of Duress*” (1996) 30 *University of British Columbia LR* 181.

“Duress again deflects, without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms. But there is *coactus volui* on his side. The contrast is with *non est factum*. The contract procured by duress is therefore not void: it is voidable — at the discretion of the party subject to duress.”

The comments on contract may have been obiter, but it was not long before the overborne will theory was rejected as the theoretical basis for duress cases in contract by the House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*,¹⁰³ and *Dimskal Shipping Co SA v International Transport Workers Federation*.¹⁰⁴ The overborne will theory has also been renounced by the courts in Australia.¹⁰⁵

Due in part to the fairly consistent approach of the majority of the ancient sources, as well as the work of Olivier¹⁰⁶ in the mid 20th century, the debate about whether or not duress negates consent has been more muted in South Africa than in the common law jurisdictions. Nevertheless, there have been occasions where the South African courts have expressed the view that the duress doctrine is grounded in the overborne will theory.¹⁰⁷ There are those who temper the absolute nature of certain articulations of the overborne will theory by saying that we should refer to a lack of “free” (ie unconstrained) consent. But in response there are those who argue that in almost every contractual scenario there is a degree of constraint that compromises full and unfettered freedom — whenever we purchase our food or our homes we do so because we are compelled to do so: if we do not, we starve or we have no shelter.¹⁰⁸

¹⁰³ [1983] AC 366 at 384B-C (per Lord Diplock) and 400D (per Lord Scarman).

¹⁰⁴ [1992] 2 AC 152 at 166B-C (per Lord Goff of Chieveley).

¹⁰⁵ In *Crescendo Management (Pty) Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46 McHugh JA said: “In my opinion the overbearing of the will theory of duress should be rejected.”

¹⁰⁶ “Onregmatige Vreesaanjaging” (1965) 28 *THRHR* 187.

¹⁰⁷ In *Block v Dogon, Dreier and Co* 1910 WLD 330 at 333 it was held that “these threats were such as to induce him to do what he would not have done voluntarily”. In *Steiger v Union Government* (1919) 40 NLR 72 at 79 it was held that “it is the want of free consent on the part of the person entering into the contract ... that lies at the root of the rule which invalidates contracts or payments extorted by fear or intimidation”. Similarly Corbett J said in *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305-6 that “intimidation or improper pressure renders the consent of the party subjected to duress no true consent”. In *Tjollo Ateljees (Edms) Bpk v Small* 1949 (1) SA 856 (A) at 872, Van den Heever JA described duress as “a negation of free volition”. For a review of the South African position see my article “The Theoretical Basis for the Existence of Remedies for Contractual Duress” 1997 *Responsa Meridiana* 46.

¹⁰⁸ Those who argue this point are Hale “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38 *Political Science Quarterly* 470; Llewellyn “What Price Contract?” (1931) 40 *Yale LJ* 704 at 728; Dalzell “Duress by Economic Pressure I” (1942) 20 *North Carolina LR* 237 at 238-9; Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253 at 266-7; Coote “Duress by Threatened Breach of Contract” (1980) 39 *Cambridge LJ* 40 at 45; Halson “Opportunism, Economic Duress and Contractual

It is submitted, in conclusion, that resorting to the terminology of the overborne will is dangerous for a number of other reasons over and above the innate contradictions I have already listed. First, a finding that a person's will overborne is a philosophical/psychological conclusion, rather than a clearly articulated and logical test. This sort of conclusion saves a court from investigating the true limits of coercion in the legal system, and reduces the problem of duress solely to a matter of fact, unconstrained in any way by principle or policy.¹⁰⁹ Secondly, it deflects a court from the true enquiry; the real questions that need to be analysed.¹¹⁰ Viewed as a whole, the legal system is, to a significant degree, a coercive system. Some forms of pressure are morally, economically and legally acceptable, and others are not acceptable. The only way to make sense of duress as a legal doctrine is to determine what kinds of pressure are acceptable and what kinds are not, and whether the other party's choice to conclude the contract was a legitimate one in the circumstances.

5.4.2 Good faith

If the overborne will theory will not do, then what is the true jurisprudential basis for recognising that a contract induced by duress is voidable? It is submitted that the most suitable answer to the question is that an act of duress, at a fundamental level, constitutes a breach of the residual contractual duty imposed on all parties to negotiate and contract according to the dictates of good faith. This suggestion is not a novel one. For example, in the early 1990s, Cockrell made the following recommendation:¹¹¹

“While the use of good faith in the interstices of the law is controversial, it is also possible to reformulate many established — and less controversial — doctrines of contract law in a manner that makes clear the extent to which the law already requires that parties act towards one another in a spirit of good faith. The defences of ‘misrepresentation’, ‘duress’ and ‘undue influence’ may be usefully recast in the language of bona fides....”

In other words, acts of duress, like misrepresentations and acts of undue influence, constitute improper (ie socially, morally, legally and economically objectionable) conduct during the pre-contractual

Modifications” (1991) 107 *LQR* 649 at 665; Trebilcock *The Limits of Freedom of Contract* 79.

¹⁰⁹ Cf Atiyah “Duress and the Overborne Will Again” (1983) 99 *LQR* 353 at 356; Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 207-8.

¹¹⁰ Cf Atiyah “Economic Duress and the ‘Overborne Will’” (1982) 98 *LQR* 197 at 202.

¹¹¹ Cockrell “Substance and Form in the South African Law of Contract” (1992) 109 *SALJ* 40 at 56. See too Van der Merwe and Van Huyssteen “Improperly Obtained Consensus” (1987) 50 *THRHR* 78; Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 237; Glover “Good Faith and Procedural Unfairness in Contract” (1998) 61 *THRHR* 328 at 334-5.

negotiation stage, violate the principle of good faith that is foundational to the South African law of contract, and for this reason, are impeachable. This is neither a philosophical nor a doctrinal innovation. Rather, it is a basic contractual axiom, but one that has been camouflaged by contractual theorists of the 18th, 19th and 20th centuries over-emphasising the role and relevance of the will theory at the pre-contractual stage, and under-emphasising the importance of the principle of good faith in contract. At this juncture a discussion of the role and place of the good faith principle in South African contract law is necessary, in order to provide the background to this proposition. In order to make sense of the principle of good faith in South African law, some background to the South African law of contract is necessary.

5.4.2.1 Substance and form in the South African law of contract

From the perspective of substance and form,¹¹² the tendency around the world has undoubtedly been that the individualist/formalist ideology of contract has dominated our understanding of this branch of the law.¹¹³ To use the term coined by Derrida, this individualist/formalist approach has traditionally been “privileged” over a view of contract that is more collectivist and standards-based.¹¹⁴ Judges and writers have tended to perceive the law of contract as a seamless entity of rules designed mainly to provide the outer boundaries within which contracting in the marketplace can occur. What happens within those boundaries is a private matter that is up to the individual contracting parties. The values of freedom of contract and the sanctity of contract are frequently cited, and the courts are expected to play a relatively muted role with regard to contractual disputes — to interpret the terms, determine if there is a breach, and to enforce the terms of the bargain between the two parties, who are understood

¹¹² Cockrell “Substance and Form in the South African Law of Contract” (1992) 109 *SALJ* 40 at 41 states: “The matters of substance deal with the political morality that underpins the law of contract; the matters of form deal with the manner in which legal doctrines are to be expressed.” The seminal analysis of the theories of substance and form is that of Duncan Kennedy “Form and Substance in Private Law Adjudication” (1976) 89 *Harvard LR* 1685. See also the treatise by Atiyah and Summers *Form and Substance in Anglo-American Law* for an analysis of the different approaches to legal reasoning and legal theory in America and England respectively. For an excellent analysis see Adams and Brownsword “The ideologies of contract” (1987) 7 *Legal Studies* 205. Cockrell’s article cited above constitutes the pre-eminent analysis of South African contract law from the perspective of substance and form.

¹¹³ The most famous critical analysis of this is Dalton’s “An Essay in the Deconstruction of Contract Doctrine” (1985) 94 *Yale LJ* 997 from 1010. See also Feinman and Gabel “Contract Law as Ideology” in Kairys (ed) *The Politics of Law: A Progressive Critique* 373.

¹¹⁴ For a description of Derrida’s views with regard to privileging, see Dalton “An Essay in the Deconstruction of Contract Doctrine” (1985) 94 *Yale LJ* 997 at 1007 and Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 from 761.

to have negotiated their deal as equals.¹¹⁵ The courts thus prefer to play the role of neutral umpires, whose role in contractual disputes is merely to ensure that “the rules of the game” (ie the rules contained in the contract) are strictly enforced. It is not the job of the court to take decisions about whether the bargain is fair or just. That is the job of the “invisible hand” of the market place.¹¹⁶ This *laissez-faire* attitude to contract is epitomised in the oft-quoted words of Sir George Jessel MR:¹¹⁷

“If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred.”

This tendency is reflected in South African law: the dominant contractual paradigm has been one which has encouraged individual autonomy in the bargaining process, and the value of “freedom of contract”.¹¹⁸ As such, people (as contracting parties ostensibly negotiating on equal terms) are understood to have the greatest possible liberty to determine for themselves the nature of their bargains in the marketplace. And since this has been the cardinal philosophy, the South African courts have traditionally tended to take a “hands-off” approach to contractual bargaining: provided the parties have not acted illegally, the parties are expected to honour their bond. As Millner has pithily pointed out: “In our system of society, paternalism is not a characteristic of the economic relations of men nor of the common law which mirrors those relations.”¹¹⁹ The most famous articulation of this sort of

¹¹⁵ See Atiyah *The Rise and Fall of Freedom of Contract* 404; Brownsword *Contract Law: Themes for the Twenty-First Century* 57.

¹¹⁶ This approach to contract was inspired mainly by the work of the free market economic theorists like Adam Smith, and the utilitarian philosophies of men like Jeremy Bentham. For a full analysis of the influence of political economics on the law of contract, see Atiyah *The Rise and Fall of Freedom of Contract* 292-358.

¹¹⁷ *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465. The statement has been cited in South Africa in *Wells v South African Alumenite Co* 1927 AD 69 at 73; *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) at 379; Corbett “Aspects of the Role of Policy in the Evolution of Our Common Law” (1987) 104 SALJ 52 at 64; Zimmermann and Visser *Southern Cross* 240. For other cases in which the freedom of contract is promoted, see *Law Union and Rock Insurance Co Ltd v Carmichael’s Executor* 1917 AD 593 at 598; *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 531 at 546.

¹¹⁸ The seminal analysis of the libertarian “freedom of contract” theory, and the dominant role it played in legal society from the 19th century onwards, is Patrick Atiyah’s *The Rise and Fall of Freedom of Contract*, especially at 388-405. The authors of Farlam and Hathaway 20 state (in a South African context): “When one looks at the requirements for a valid contract, it appears that the ideal of individual autonomy is paramount, ie the notion that individuals are to be allowed the greatest possible measure of self-determination and self-realization compatible with the interests of their fellows. In this respect, South African contract law bears more than a superficial resemblance to the so-called classical theory of contract.” See too Cockrell “Substance and Form in the South African Law of Contract (1992) 109 SALJ 40 at 55.

¹¹⁹ Millner “Fraudulent Non-Disclosure” (1957) 74 SALJ 177 at 183.

approach in South Africa, penned by Professor Hahlo, mirrors the words of Sir George Jessel:¹²⁰

“Provided a man is not a minor or a lunatic, and his consent is not vitiated ... his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature is also the law of the market-place.”

The high water mark of this approach in the South African context was the decision of the Appellate Division in *Bank of Lisbon and South Africa Ltd v De Ornelas*.¹²¹ For much of the 20th century it had been argued by certain academic commentators,¹²² as well as certain judges of the High Court,¹²³ that the Roman *exceptio doli generalis* had evolved from its restricted Roman roots into a substantive equitable defence, which allowed a defendant to avoid having to perform a contract on the grounds that it would be unfair and inequitable for the court to order specific performance, since there was something unfair or reprehensible about the plaintiff seeking to enforce the contract in the circumstances of the case. This was rejected by Joubert JA in the *Bank of Lisbon* case. After conducting an in-depth historical analysis of the relevant Roman and Roman-Dutch authorities, the learned judge held that the *exceptio doli generalis* had disappeared as a self-standing defence by the time of Post-classical Roman law, and certainly did not exist during the Middle Ages, when a general theory of contract had developed, and the Roman distinction between contracts *stricti iuris* and contracts *bonae fidei* had fallen away.¹²⁴ It was held as a result that the *exceptio doli generalis* had never been received into Roman-

¹²⁰ “Unfair Contract Terms in Civil-Law Systems” (1981) 88 *SALJ* 70.

¹²¹ 1988 (3) SA 580 (A). Another important decision in similar vein was that in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) where Joubert JA stated that the principle of *uberrimae fides* that was thought to be implicit in the law of insurance did not in fact have a place in South African law.

¹²² See in particular the extensive argument of Kerr *Contract* 637ff; Aronstam “Unconscionable Contracts: the South African Solution” (1979) 42 *THRHR* 21; Van Warmelo “*Exceptio Doli*” 1981 *De Jure* 202. Those who criticised this view were: De Wet ‘*Estoppel by Representation*’ in *die Suid-Afrikaanse Reg* 83-9; Van Huyssteen *Onbehoorlike Beïnvloeding* 23n174; Olivier “Aanspreeklikheid weens onskuldige wanvoorstelling by kontraksluiting” (1964) 27 *THRHR* 20 at 26; *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T); *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T); *Novick and another v Comair Holdings Ltd and others* 1979 (2) SA 116 (W).

¹²³ See *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 292-3; *Zuurbekom v Union Corporation Ltd* 1947 (1) SA 514 (A) at 535ff; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 27-8; *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) at 214. The most ardent advocate of this view in the courts was Jansen JA. See his dissenting opinion in the *Bank of Lisbon* case at 611ff, and Lewis “Towards an Equitable Theory of Contract and the Contribution of Mr Justice EL Jansen to the South African Law of Contract” (1991) 108 *SALJ* 249.

¹²⁴ At 596-7 and 601-5.

Dutch law, nor into South African law.¹²⁵ Furthermore, equity as a concept had to remain subordinate to the substantive rules of contract, and it was held that the courts had no generalised powers to override the established rules of the law of contract, nor to modulate the rights and duties of contracting parties by invoking vague precepts of fairness or reasonableness *in abstracto*.¹²⁶

Although there was little opposition to the demise of the *exceptio doli generalis* as an institution,¹²⁷ the bulk of commentators expressed some alarm at the “formalistic and clinical”¹²⁸ conclusions of the majority in the *Bank of Lisbon* case with regard to the broader issue of contractual equity. The chorus of disapproval was indicative of a key trend: the classical *laissez-faire* theory of contract, fortified by the majority in the *Bank of Lisbon* case, was increasingly being exposed as a failure, and commentators were beginning to think about and evaluate the contractual process in a very different way in South Africa, following a trend that was growing momentum throughout the world in the 20th century.¹²⁹ The notion of individual parties operating on an equal footing, and contracting freely after a period of negotiation and reflection, is an inaccurate explanation of the way much of the law of contract works in the modern era. People are more frequently than ever in a position of unequal bargaining power vis-a-vis the other party, and naturally, this has led to commercial exploitation. The question of how to deal with contractual fairness and inequalities in bargaining power has vexed contractual theorists and courts around the world for the last 2000 years, but has become especially problematic in the last 100 years. From an ideological perspective, the message has been simple: the law of contract can no longer be

¹²⁵ In Joubert JA’s famous words, at 607B of his judgment: “All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as a superfluous, defunct anachronism. *Requiescat in pace*.”

¹²⁶ At 606A and 610. Cf the statement of Innes CJ in *Burger v Central Africa Railways* 1903 TS 571 at 576 that “our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable”.

¹²⁷ The one notable exception (apart from Jansen JA in his dissenting judgment in the case) is Professor Kerr. See Kerr *Contract* 637ff. The debate about the correctness or otherwise of the decision in the *Bank of Lisbon* case, and the views of Jansen JA and Kerr in this regard, falls outside the scope of this thesis.

¹²⁸ The words in quotation marks are those of Van der Merwe, Lubbe and Van Huyssteen “The Exceptio Doli Generalis: Requiescat in Pace — Vivat Aequitas” (1989) 106 *SALJ* 235 at 239. For other comments on the judgment, see Lambiris “The *Exceptio Doli Generalis*: an Obituary” (1988) 105 *SALJ* 648; Farlam and Hathaway 391; Lewis “The Demise of the *Exceptio Doli Generalis*: Is There Another Route to Contractual Equity?” (1990) 107 *SALJ* 26; Zimmermann and Visser *Southern Cross* 255; Erasmus “Roman Law in South Africa Today” (1989) 106 *SALJ* 676; Zimmermann “The Law of Obligations: Character and Influence of the Civilian Tradition” (1992) 3 *Stellenbosch LR* 5.

¹²⁹ Once again, the leading work here is Atiyah *The Rise and Fall of Freedom of Contract* Part III, 571-779. See also Gilmore *The Death of Contract*; Gordley *The Philosophical Origins of Modern Contract Doctrine*; Barton “The Enforcement of Hard Bargains” (1987) 103 *LQR* 118. For a detailed analysis of this question in South African law, see Harker “The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society” (1984) 101 *SALJ* 121 at 123ff.

viewed as a value free discipline.¹³⁰

When viewed in this light, it is clear why the rejection of the existence of any equitable contractual defence in South African law by the majority in the *Bank of Lisbon* case was met with some dejection by commentators. By thinking laterally, some commentators have proposed novel methods that might be employed to restore a balance between law and equity in the contractual milieu, in the absence of the *exceptio doli generalis*.¹³¹ But time has shown that the most significant effect of the decision in the *Bank of Lisbon* case has been to prompt the courts (particularly the Appellate Division, now the Supreme Court of Appeal) to undertake a re-analysis of the traditional approach to contract. Initially, the courts did so by reviewing the role public policy plays in shaping the law of contract.

5.4.2.2 Public policy in the law of contract

The idea that in society the process of contracting should occur in the public interest (and its corollary — that agreements contrary to public policy should not be recognised) has a long history.¹³² The most famous articulation of this fundamental tenet of our law of contract was that of Innes CJ in *Eastwood v Shepstone*.¹³³

“Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result.”

¹³⁰ See in this regard Lubbe “*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontrakereg” (1990) 1 *Stellenbosch LR* 7 at 24-5; Carey Miller “*Judicia Bonae Fidei*: A New Development in Contract?” (1980) 97 *SALJ* 531 at 537; Atiyah *The Rise and Fall of Freedom of Contract*; Adams and Brownsword “The ideologies of contract” (1987) 7 *Legal Studies* 205 at 222; Harker “The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society” (1984) 101 *SALJ* 121 at 123; Neels “Regsekerheid en die korrigerende werking van redelikheid en billikheid” part 1 — 1998 *TSAR* 702, part 2 — 1999 *TSAR* 256, Part 3 — 1999 *TSAR* 477.

¹³¹ Lambiris “*The Exceptio Doli Generalis — An Obituary*” (1988) 105 *SALJ* 644 at 649 suggests that courts could ameliorate the position by exercising their discretion and refusing to grant orders of specific performance in cases where it would be unfair to do so. But he concedes that this is not an ideal solution (at 650). Lewis “*The Demise of the Exceptio Doli Generalis: Is There Another Route to Contractual Equity?*” (1990) 107 *SALJ* 26 suggests that if our courts were prepared to follow a more enlightened, value coherent approach to interpreting contracts, this might produce fairer decisions.

¹³² In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 34G, Cameron JA described it as “a doctrine of very considerable antiquity”.

¹³³ 1902 TS 294 at 302.

The *locus classicus* on the role public policy plays in our law of contract in modern times is *Sasfin (Pty) Ltd v Beukes*.¹³⁴ The decision in this case marked a turning point in the philosophical approach to public policy and contract in the (then) highest court. In *Sasfin*, Smalberger JA confirmed the general principle that our courts will not recognise agreements that are contrary to public policy.¹³⁵ His lordship conceded that the concept of “public policy” is vague, and is difficult to define,¹³⁶ but this did not deter him from trying to give some guidance as to what factors are relevant in determining what public policy might be in a contractual context. The first key factor to consider is that, generally speaking, public policy promotes the idea of the sanctity of contract, that freedom of contract should not be unduly limited or circumscribed, and agreements entered into with open eyes should be strictly enforced.¹³⁷ Innes CJ again said it best: “[P]ublic policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject matters.”¹³⁸

But in a significant shift, Smalberger JA was quick to point out that on the other side of the spectrum, public policy also ought to favour the doing of simple justice between man and man.¹³⁹ And in this context, the public interest does also require that there be limitations on the freedom of contract. Where a contract is somehow contrary to the interests of the community,¹⁴⁰ a court is entitled to intervene and refuse to recognise the validity of the agreement. The learned judge said:¹⁴¹

¹³⁴ 1989 (1) SA 1 (A).

¹³⁵ At 71. See also *Kuhn v Karp* 1948 (4) SA 825 (T) at 838; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891G.

¹³⁶ The concept is a slippery one, which has been described picturesquely as an “unruly horse”. See *Richardson v Mellish* (1824) Bing 229 at 252. See also *Amicable Society v Bolland* (1830) 4 Bligh 194, where Burroughs J said: “Public policy is a restive horse, and when you get astride of it, there is no knowing where it will carry you.”

¹³⁷ At 9E-F.

¹³⁸ *Law Union and Rock Insurance Co Ltd v Carmichael’s Executor* 1917 AD 593 at 598. For similar sentiments, see: *Wells v SA Alumenite Co* 1927 AD 69 at 73; *Armstrong v Magid* 1937 AD 260 at 270; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) at 766-7; *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* 1977 (4) SA 494 (N) at 505; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 436; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 893.

¹³⁹ At 9G. See too *Jajhbay v Cassim* 1939 AD 537 at 544.

¹⁴⁰ At 8A. Wessels *Contract* §480 states: “An act which is contrary to the interests of the community is said to be an act contrary to public policy.” Aquilius “Immorality and Illegality in Contract” (1941) 58 *SALJ* 337 at 346 defined a contract which is contrary to public policy as “one stipulating performance which is not *per se* illegal or immoral but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community”. Aquilius was in fact Van den Heever J (as he then was). See Kerr “Morals, Law, Public Policy and Restraints of Trade” (1982) 99 *SALJ* 183.

¹⁴¹ At 8C-D.

“The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social and economic expedience, will accordingly, on the grounds of public policy, not be enforced.”

Smalberger JA made it clear that although there has been a tendency amongst judges and academics to identify specific “types” of contracts that are contrary to public policy, this is purely a matter of convenience, and there is no set *numerus clausus* of contracts which are, for whatever reason, contrary to public policy. At the end of the day, the flexible notion of public policy is the key criterion that will determine whether a contract is enforceable or not.¹⁴²

The contrast with the decision in *Bank of Lisbon* is striking. In an about-turn from the formalist decision in that case, which had been decided less than a year earlier, the Appellate Division in *Sasfin* chose to emphasise, as a matter of legal policy, that the courts not only have a form of equitable jurisdiction to regulate unfairness in contracts, but that the courts should not shrink from using it where the circumstances justify it.¹⁴³

Although the change in attitude is perceptible, the court clearly did not intend the decision to be revolutionary, and placed careful constraints on the power to exercise this equitable jurisdiction. The Appellate Division made it clear that although courts should not be frightened of striking down a contract for policy reasons, the power should only be exercised sparingly and in the clearest of cases.¹⁴⁴ In the words of Kriegler J in *Donnelly v Barclays National Bank Ltd*,¹⁴⁵ *Sasfin* does not amount to “a free pardon for recalcitrant and otherwise defenceless debtors”.¹⁴⁶ Courts were not given a licence to strike down a contract or a provision in a contract simply because it seemed a little unfair.¹⁴⁷ Rather, the court encouraged a more balanced approach be taken to the assessment of contracts, and the role of the judiciary in enforcing contracts. The values of freedom of contract and sanctity of contract

¹⁴² At 8E-G. The *Sasfin* judgment has been endorsed by the Appellate Division in *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782-3, and *Ex Parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Donnelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A) at 4.

¹⁴³ The court did in fact strike down the contract for being contrary to public policy in this case. See also *Baart v Malan* 1990 (2) SA 862 (E).

¹⁴⁴ At 9B. See too *Fender v St John-Mildmay* [1938] AC 1 at 12; *Olsen v Standaloft* 1983 (2) SA 668 (ZS) at 763G.

¹⁴⁵ 1990 (1) SA 375 (W).

¹⁴⁶ At 381F.

¹⁴⁷ For recent endorsement of this view by the Supreme Court of Appeal see *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 420F; *De Beer v Keyser and others* 2002 (1) SA 827 (SCA) at 837C-E; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 18E-F.

remain important; but now these formerly dominant values needed to be moderated by the needs of justice, and could even be trumped if the circumstances necessitated it.

While *Sasfin* promised a new era for contract in South African law, the decision was vague about what this new approach entailed. The two contrasting decisions in *Bank of Lisbon* and *Sasfin* therefore naturally awakened an extensive debate about contractual equity in South African law, and the direction that our law of contract might be taking. Of paramount importance was the need to define more closely what factors were going to be instrumental in determining legality or public policy in the modern era of contract. Of course, the *Sasfin* decision made it clear that the traditional values of freedom of contract and sanctity of promises were to remain fundamentally important factors. But what factors were going to be identified on the other side of the proverbial scales of justice, to balance out the potential harsh effects of the traditional factors, and promote a degree of equity and fairness in our law of contract? For it was clear “the need to do simple justice between man and man” was not going to be good enough on its own. And secondly, once those factors were identified, how should we define them, and give them some substantive content? In the last ten years or so, this debate has zeroed in on the principle of good faith, and its utility as a balancing policy factor. Most commentators have expressed the view that this principle has the greatest potential to be harnessed as a mechanism for promoting justice, equity and responsibility between contracting parties in the modern commercial world, while at the same time ensuring that traditional values remain important, and that the law of contract is not turned on its head.¹⁴⁸

5.4.2.3 The principle of good faith and its traditional place in South Africa’s common law

The Roman-Dutch idea that all contracts are grounded in the principle of good faith has been received into South African law, and it has commonly been stated in decisions of the courts (particularly the Supreme Court of Appeal) that the principle of good faith underpins our law of contract.¹⁴⁹ For

¹⁴⁸ For example, Van der Merwe, Lubbe and Van Huyssteen “The Exceptio Doli Generalis: Requiescat in Pace — Vivat Aequitas” (1989) 106 *SALJ* 235 at 242 state: “Both judgments in *Bank of Lisbon v De Ornelas* have brought South African law to the point where an analysis of bona fides, at policy and technical levels, has become inescapable.” For other proponents of this view, see Farlam and Hathaway 391; Cockrell “Substance and Form in the South African Law of Contract (1992) 109 *SALJ* 40 at 55; Lubbe “*Bona Fides*, Billikheid en Openbare Belang in die Suid-Afrikaanse Kontrakereg” (1990) 1 *Stellenbosch LR* 7; Zimmermann and Visser *Southern Cross* 218; Van Aswegen “The future of South African contract law” (1994) 57 *THRHR* 448 at 456; Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 221-2; Neels “Die aanvullende en beperkende werking van redelikheid en billikheid in die kontrakereg” 1999 *TSAR* 684 at 698ff.

¹⁴⁹ See *Neugebauer & Co Ltd v Hermann* 1923 AD 564 at 573; *MacDuff & Co Ltd (in Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 589 and 610; *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 292; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 28; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 651ff; *Magna Alloys and Research (SA) (Pty)*

example, in *Meskin NO v Anglo-American Corporation of SA Ltd*,¹⁵⁰ Jansen J stated that “[i]t is now accepted that all contracts are *bonae fidei*...”.¹⁵¹

To state blandly that parties in South African law have a duty to contract in good faith, does not tell one very much when read on its own. In a Fulleresque sense one might agree that contracting parties have a basic duty to negotiate and contract in good faith.¹⁵² But while it is all well and good to say so, it is extremely difficult to articulate what this really means. For the principle of good faith is an elusive, vague and uncertain creature.¹⁵³ Anyone working with the principle faces the same challenges that others working with similar equitable principles in a doctrinal context face — how to give the concept a precise, workable definition. Like all principles of law,¹⁵⁴ the principle of good faith certainly does suffer from the problem that it does not have the “all-or-nothing” defining quality of a positive rule of law. However, as Dworkin has so convincingly shown, any theory of law that does not recognise the importance and rich value of principles must be deficient. And if we are to make use of such principles in legal adjudication, then surely there must be some way in which we can give them a workable meaning?

The primary difficulty with trying to define the good faith principle in South African law is that it

Ltd v Ellis 1984 (4) SA 874 (A) at 893C; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 433; *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) at 599 and 601; *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 480; *Botha (now Griessel) and another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782J; *Van der Merwe v Meades* 1991 (2) SA 1 (A) at 4 and 10; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (A) at 318ff. For academic support for this view, see Wessels *Contract* §1976 and 1997; Christie *Contract* 19; Kerr *Contract* 301ff.

¹⁵⁰ 1968 (4) SA 793 (W).

¹⁵¹ At 802A.

¹⁵² Fuller *The Morality of Law* 5-6 suggested that a legal system, in order to be a valid legal system, must exhibit certain fundamental or basic characteristics, in order for the legal system to command our fidelity. This he described as the “morality of duty”. His submission was that rather than postulating the perfect legal system, we should rather try to identify what the basic requirements of a workable, moral legal system are, which can then be used as a springboard for fulfilling our aspirations of making the legal system even better.

¹⁵³ See Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 213; Brownsword, Hird and Howells “Good Faith in Contract: Concept and Context” in Brownsword *et al Good Faith in Contract* 3; Brownsword “Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law” in Brownsword *et al Good Faith in Contract* 17. Van der Merwe, Lubbe and Van Huyssteen “The Exceptio Doli Generalis: Requiescat in Pace — Vivat Aequitas” (1989) 106 *SALJ* 235 at 240 state pithily: “A specific content has not yet been given to bona fides.” Lubbe “*Bona Fides*, Billikheid en Openbare Belang in die Suid-Afrikaanse Kontraktereg” (1990) 1 *Stellenbosch LR* 7 at 20 says: “*Bona fides* is an open concept that has not been clearly defined in our private law.” This is a translation of the original Afrikaans: “*Bona fides* is ’n oop begrip wat nog nie in ons privaatreë uitputtend omlyn is nie.”

¹⁵⁴ I use the term “principle” in the sense that it is used by Ronald Dworkin. In *Taking Rights Seriously* 22 he defines a principle as “a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”.

has not, traditionally anyway, played a prominent role in the South African contractual milieu, beyond the occasional statement that the principle exists. It has been shown that for most of the 20th century in South Africa, the dominant contractual paradigm had been one which encouraged individual autonomy in the bargaining process. Judges were not supposed to evaluate contractual terms to see whether they were fair or not. Since this had been the dominant philosophical view of contract for so long, and because the principle of good faith is at its heart an equitable principle, it is understandable that the principle of good faith has played an understated role in the South African system.¹⁵⁵ For prioritising good faith requires a far less individualistic approach, where fairness and regard for the interests of others has to be balanced with hard, negotiated self-interest. And this has not traditionally been the case in South African contract law. The subdued role of the good faith principle in our law was perpetuated in the *Bank of Lisbon* case. Although Joubert JA conceded in his judgment that all contracts in our law are contracts of good faith,¹⁵⁶ he held that there was no evidence that a general substantive defence based on equity and good faith had developed to replace the *exceptio doli generalis* in Roman-Dutch law, nor had this occurred in South African law.¹⁵⁷ The principle of good faith may, over the years, have provided the impetus for the development (in the law) of recognised substantive defences which were grounded on equitable considerations. But equity as a concept remained subordinate to the substantive law, and he held that the courts had no generalised wide-ranging powers to override established rules of the law of contract, nor to modulate the rights and duties of contracting parties by invoking a vague precept like “good faith”.¹⁵⁸

5.4.2.4 Good faith re-prioritised

However, since *Sasfin*’s case, there has been renewed interest expressed in the principle of good faith in academic writing, stoked in turn by a number of notable decisions in the courts that have paved the way for a re-examination and re-prioritisation of this principle in South African law. Initially the most significant of these was the minority opinion delivered by Olivier JA in *Eerste Nasionale Bank van*

¹⁵⁵ See Cockrell “Substance and Form in the South African Law of Contract” (1992) 109 *SALJ* 40 at 55; Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 214.

¹⁵⁶ At 605 and 609-10.

¹⁵⁷ At 605I-606B and 610B.

¹⁵⁸ At 606A and 610. Cf the statement of Innes CJ in *Burger v Central Africa Railways* 1903 TS 571 at 576 that “our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable”.

Suidelike Afrika Bpk v Saayman.¹⁵⁹ In his judgment, the learned judge conducted a thorough analysis of the importance and value of the principle of good faith in the South African law of contract, the role of which he defined as being “simply to actualise the convictions of the community with regard to decency, reasonableness and fairness”.¹⁶⁰ His lordship held that there is a close connection between the principle of *bona fides*, and the doctrines of public policy, public interest, and *iusta causa*.¹⁶¹ In law, the relationship between such concepts, and the differences (if any) between them are not always clear.¹⁶² Olivier JA submitted that the *bona fides* principle forms an element of the umbrella concept that is public policy. Courts should apply the notion of good faith to all contracts because public policy demands that this should be so.¹⁶³

For the purposes of comparison, as well as reinforcement, Olivier JA showed that the good faith principle forms one of the cornerstones of the law of contract in European civilian jurisdictions. In France, §1134(3) of the Code Civil stipulates that all contracts are predicated upon good faith, and s1135 specifies that residual principles of fairness attach to all contracts, over and above the express terms of the contract.¹⁶⁴ In Germany, the principle of good faith is articulated in §157 and §242 of the BGB,¹⁶⁵ and has become so important that it has been said that “the doctrine of good faith has ripened into a judicial oak that overshadows the contractual relationship of private parties”.¹⁶⁶ The principle of

¹⁵⁹ 1997 (4) SA 302 (SCA). The case concerned the validity of a suretyship agreement signed in favour of First National Bank by Mrs Malherbe, in order to secure the debts of her son. At the time, Mrs Malherbe was 85 years, partially blind and hard of hearing, and suffered from a number of neurological afflictions. The majority of the court found that Mrs Malherbe was mentally ill, and had not had the requisite contractual capacity to conclude the suretyship agreement, which was declared a nullity. Olivier JA preferred to deal with the case by invoking the principle of *bona fides*. For a full analysis of the case, see my note “Good Faith and Procedural Unfairness in Contract” (1998) 61 *THRHR* 328.

¹⁶⁰ At 319B. This is a translation of the original Afrikaans: “eenvoudig om gemeenskapsopvatting ten aansien van behoorlikheid, redelikheid en billikheid te verwesenlik”.

¹⁶¹ At 322C.

¹⁶² For comment on this issue, see Zimmermann and Visser *Southern Cross* 259n326; Lubbe “*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontrakereg” (1990) 1 *Stellenbosch LR* 7; Van der Merwe and Lubbe “*Bona Fides* and Public Policy in Contract” (1991) 2 *Stellenbosch LR* 91; Van der Merwe *et al Contract: General Principles* 139.

¹⁶³ At 322E.

¹⁶⁴ At 326J.

¹⁶⁵ §157 of the BGB states: “Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.” §242 states: “The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration.”

¹⁶⁶ Ebke and Steinhauer “The Doctrine of Good Faith in German Contract Law” in Beatson and Friedmann *Good Faith and Fault in Contract Law* 171. See also Reifner “Good Faith: Interpretation or Limitation of Contracts?” in Brownsword *et al Good Faith in Contract* 269. Both these articles provide a thorough analysis of the concept of good faith in German law.

good faith, embodying precepts of reasonableness and fairness, is also essential to the law of contract in the Netherlands¹⁶⁷ and in Italy.¹⁶⁸

Although Olivier JA did not raise the point, the principle of good faith also plays a role in contract law in the United States. In §205 of the American *Restatement, Second, Contracts*, it is stated: “Every contract imposes upon each party the duty of good faith and fair dealing in its performance and its enforcement.” §1-203 of the Uniform Commercial Code (UCC) provides that “[e]very contract within this Act imposes an obligation of good faith in its performance or enforcement”.¹⁶⁹ A common law good faith principle does exist in American law, but it has been proposed that Karl Llewellyn, who was mainly responsible for drafting the UCC, was influenced in his research by the role played by §242 of the BGB in German law, and this was the main reason for him incorporating the good faith principle into the UCC.¹⁷⁰ Furthermore, it should be noted that the good faith principle is a key feature of the UNIDROIT principles,¹⁷¹ and has also been adopted as a cornerstone of the Lando Commission’s proposals for a unified system of European contract law.¹⁷²

After conducting such a thorough investigation of the concept of good faith, and having emphasised the value of this principle as a keystone of our contractual system, Olivier JA summed up his thesis

¹⁶⁷ At 327D-I. §1374(3) of the old *Burgelijk Wetboek* required good faith in all contractual dealings. This has been replaced in the *Nieuwe Burgelijk Wetboek* by §6.1.1.2(1), which substitutes the concept “good faith” with the terms “reasonableness and fairness”. The understanding is that the two phrases are synonymous. §6.1.1.2(1) states: “Schuldeiser en schuldenaar zijn verplicht zich jegens elkaar te gedragen overeenkomstig de eisen van redelijkheid en billijkheid.” For comment on the role of the good faith principle in Dutch law, see Asser-Serie *Verbintenissenrecht Deel I* 42-44. Olivier JA cites two cases where the good faith principle formed the basis of decisions to overturn a suretyship agreement in circumstances similar to those in *Saayman*’s case. These were: *Hajziani v Van Woerden* HR 14 Januarie 1983; NJ 1983: 457 and *Hajjout v Ijmah Metaalwarenfabriek* HR 15 April 1983; NJ 1983: 458.

¹⁶⁸ The Italian Civil Code requires good faith in negotiation (art 1337), interpretation (art 1366) and performance (art 1375). See Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 240.

¹⁶⁹ These sections deal specifically with good faith with regard to the substantive terms of contracts. However it should not be inferred that good faith is therefore irrelevant in the bargaining process. In §205(c) of the *Restatement, Second, Contracts* the compilers make it clear that bad faith in contractual negotiation is dealt with via specific common law doctrines like fraud and duress.

¹⁷⁰ See Nehf “Bad Faith Breach of Contract in Consumer Transactions” in Brownsword *et al Good Faith in Contract* 115 at 120; Dawson “Unconscionable Coercion: The German Version” (1976) 89 *Harvard LR* 1041 at 1044.

¹⁷¹ Article 2.15 of the UNIDROIT principles. See on this Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 238.

¹⁷² Article 1.106 of the Lando Commission’s Principles of European Contract Law provides: “In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing.” There is also a pre-contractual duty to negotiate in good faith in terms of Article 2.301. See Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 238.

succinctly as follows:¹⁷³

“I am convinced that the principles of good faith, grounded in public opinion, continue to play an important role in our law of contract, and must do so, like in any system of law that is sensitive to the convictions of the community, which is the ultimate creator and beneficiary of moral and ethical values of reasonableness, fairness and decency.”

Olivier JA’s judgment in *Saayman* was a bold attempt to clarify the role the principle of good faith plays when a court has to assess the validity or otherwise of a contract on grounds of public policy. His lordship saw the good faith principle as playing a very simple role in this process: it is a balancing policy factor (sometimes described as an oppositional principle)¹⁷⁴ that is designed to promote the importance society places on the parties conducting themselves in a decent, reasonable and fair manner in the process of contracting.¹⁷⁵ Society expects that parties should negotiate and act honestly and openly in commercial dealings, and show at least some respect for the needs and desires of the other party. Where one contracting party shows a blatant disregard for the other party, or exploits that person in some unconscionable way, this reprehensible behaviour would infringe the principle of good faith, and trump any attempt to rely on the polar “sanctity of contract” principle. In Hutchison’s words:¹⁷⁶

“Whilst the principle of good faith is still uncertain in content it at least requires, apart from honesty, that a contracting party should show a minimum level of respect for the interests that the other party seeks to advance by means of the contract. It follows that the unreasonable and one-sided promotion of one’s own interest at the expense of another might in extreme cases infringe the principle of good faith so as to outweigh the public interest in the strict enforcement of contracts.”

¹⁷³ At 326G. This is a translation of the original Afrikaans: “Ek hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrond op openbare beleid, steeds in ons kontraktereg ’n belangrike rol speel en moet speel, soos in enige regstelsel wat gevoelig is vir die opvattinge van die gemeenskap, wat die uiteindelijke skepper en gebruiker is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoorlikheid.”

¹⁷⁴ Cf Jonker “Critical Legal Economics — How Freedom of Contract Requires its Own Limitation” 2001 *Responsa Meridiana* 52.

¹⁷⁵ At 319A. Cf the majority in *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at 15I-16A where they say: “The job of the courts in general, and this court in particular, is to balance out these fundamental values, which occasionally conflict with each other.” This is a translation of the original Afrikaans: “Die taak van howe in die algemeen en van hierdie Hof in besonder is om hierdie grondliggende waardes wat soms met mekaar in botsing kom teen mekaar op te weeg.”

¹⁷⁶ Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 225. For a similar approach, see Lubbe “*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg” (1990) 1 *Stellenbosch LR* 7 at 20; Zimmermann and Visser *Southern Cross* 259-60.

5.4.2.5 Theories of good faith

In the aftermath of the *Saayman* decision, the importance of the principle of good faith as a balancing policy factor in our law of contract has been emphasised in a number of cases.¹⁷⁷ But the nature and role of the good faith principle continued to be rather vague. Thus the next crucial question: is it possible to identify a more precise function for the principle of good faith in the law of contract, that takes our understanding of the concept beyond that of a mere policy factor to be taken into account in assessing the suitability of a contractual arrangement?

In any given legal system the principle of good faith (should it be considered part of that legal system)¹⁷⁸ can operate according to one of three potential models. First, the legal system can embrace what Brownsword describes as a “good faith requirement”,¹⁷⁹ or what Wightman calls a “contextual meaning of good faith”.¹⁸⁰ Viewed in this sense, the principle of good faith operates as a controlling principle that is designed to promote fair dealing, but which usually operates through more concrete and defined doctrines, and in particular contexts. The content of good faith is initially determined by having recourse to the reasonable or legitimate expectations of the parties to the contract. These

¹⁷⁷ *NBS Boland Bank Ltd v One Berg River Drive CC* 1999 (4) SA 928 (SCA) at 937F-G; *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) at 326I-327D; *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 475C-D; *Miller and another NNO v Dannecker* 2001 (1) SA 928 (C) at 938. It should be pointed out, however, that Ntsebeza AJ’s opinion in that case that “[t]he principle of good faith is then a wider notion of public policy...” (at 938D-E) could, with respect, have been better described.

¹⁷⁸ In English law, there is some debate about whether that system ought to recognise a principle of good faith as forming part of their law of contract. Much of the sentiment in that country is negative, and many decisions still reflect a classical approach to contracting. In *Walford v Miles* [1992] AC 128 at 138, it was held that: “[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating party.” For similar comments, see *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952 (CA) at 1013; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd: The Good Luck* [1989] 3 All ER 628 (CA) at 667. The English tend to feel that the doctrine of good faith is a civilian legal tradition that has no place in English law, and that the English system has happily managed to achieve similar results by “developing piecemeal solutions in response to demonstrated problems of unfairness” (per Sir Thomas Bingham in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439). See too the slightly negative comments of Lord Steyn “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997) 113 *LQR* 433 at 439. For a full analysis of the English position, see Brownsword “Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law” in Brownsword *et al Good Faith in Contract* 13 and Brownsword *Contract Law: Themes for the Twenty-First Century* 98ff.

¹⁷⁹ Brownsword “‘Good Faith in Contracts’ Revisited” (1996) 49 *Current Legal Problems* 111; Brownsword “Two Concepts of Good Faith” (1994) 7 *Journal of Contract Law* 197; Brownsword “Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law” in Brownsword *et al Good Faith in Contract* 13 at 33. Wilhelmsson “Good Faith and the Duty of Disclosure in Commercial Contracting — The Nordic Experience” in Brownsword *et al Good Faith in Contract* 165 at 178 describes this approach as the “private autonomy model of good faith”.

¹⁸⁰ Wightman “Good Faith and Pluralism in the Law of Contract” in Brownsword *et al Good Faith in Contract* 41 at 42.

expectations are based upon standards of fair dealing that are widely accepted and applied in a particular contracting context (be it sales, leases, shipping contracts, and so forth). The parties are expected to live up to the norms and standards of contracting parties in that particular “contractual community”. The test is thus one dictated by positive or accepted moral standards. The requirements of good faith will differ from context to context, and are not universal: in some cases (eg employment contracts) a contracting party may be expected to act in a more altruistic and co-operative fashion than someone who operates in the cut-throat world of the financial trader on the Securities Exchange. In many instances (although not all) these standards of fair dealing will be articulated through more precise doctrines. One thinks particularly of the multitude of residual terms imposed upon various types of contracts by operation of law; and concepts like the doctrine of notice and the doctrine of estoppel. All these find their inspiration in broader notions of good faith that are considered appropriate in a particular contractual milieu.¹⁸¹

The second approach a legal system could adopt is what Brownsword has described as a “good faith regime”,¹⁸² or what Wightman has described as a “normative version of good faith”.¹⁸³ This is a more radical view of good faith, in that the principle derives its content not from the common standards of the parties in a particular contractual community, but from a ubiquitous moral form of contractual justice imposed by the legal system. It reflects a test of critical, rather than accepted, morality. Good faith is defined by general moral or normative standards of fairness and reasonableness that exist globally in that particular society. In bargaining terms, “the morality of co-operation” is the key: this model, in an effort to ensure contracting occurs in a just way, prescribes the standards with which the law of contract must comply. It is therefore up to the courts, as arbiters of public morality, to determine

¹⁸¹ This approach is the one that is generally advocated in American law. §1-203(1)(b) of the Uniform Commercial Code refers to “the observance of reasonable standards of fair dealing in the trade” (my emphasis). In §205 of the *American Restatement, Second, Contracts*, it is stated: “Every contract imposes upon each party the duty of good faith and fair dealing in its performance and its enforcement.” While this looks at first glance like a broader approach to good faith, the comment upon this section clarifies the position. The comment reads: “The phrase ‘good faith’ is used in a variety of contexts and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasises faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” (My emphasis). See too Burton “Breach of Contract and the Common Law Duty to Perform in Good Faith” (1980) 94 *Harvard LR* 369.

¹⁸² Brownsword “‘Good Faith in Contracts’ Revisited” (1996) 49 *Current Legal Problems* 111; Brownsword “Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law” in Brownsword *et al Good Faith in Contract* 13 at 34. Wilhelmsson “Good Faith and the Duty of Disclosure in Commercial Contracting — The Nordic Experience” in Brownsword *et al Good Faith in Contract* 165 at 179 describes this approach as the “moral model of good faith”.

¹⁸³ Wightman “Good Faith and Pluralism in the Law of Contract” in Brownsword *et al Good Faith in Contract* 41 at 44. In America, the leading proponent of this view of good faith has been Summers. See his “‘Good Faith’ in General Contract Law and the Sale Provisions of the Uniform Commercial Code” (1968) 54 *Virginia LR* 195 and “The General Duty of Good Faith — Its Recognition and Conceptualisation” (1982) 67 *Cornell LR* 810.

what is and what is not in good faith, and to impose this universally upon contracting parties. The recognised customs and standards of the particular contracting community, or the common understanding of contractants in a particular market environment, are not relevant to the enquiry. In fact, in many circumstances, this model would allow the normative concept of good faith to be used to override widely recognised and supported trade practices in a particular contractual milieu.

The third potential approach can be disposed of relatively swiftly. This is the approach which allows judges a licence to invoke the concept of good faith to dispense “visceral justice”,¹⁸⁴ in the words of Bridge. Here a judge is entitled to make a decision based purely on his or her perceived notions of fairness, and unconstrained by other rules and conventions applicable to the law of contract. A perception of “bad faith” justifies interference, and trumps any other possible argument. This approach to good faith renders decision-making a completely free-floating exercise, uninhibited by any substantive or formal constraints. This cannot be an acceptable approach to the concept of good faith. Indeed, this sort of approach was exposed in a broader jurisprudential sense by Fuller in his famous allegory about Rex the King.¹⁸⁵ Decision-making requires, as a fundamental, the consistent application of general rules and standards to like cases. The approach of visceral justice would reduce the judicial process to one of piecemeal act utilitarianism, where judges attempt eclectically to do justice on the facts of each case, and do not endeavour to conform with rules and principles of general application. Too much power is left in the hands of the individual judge,¹⁸⁶ decision-making becomes uncertain and unpredictable, and the legitimate interests of the contracting parties can far too easily be overridden.¹⁸⁷ Ultimately such an approach cannot be acceptable in a legal system predicated upon the idea of judicial

¹⁸⁴ Bridge “Good Faith in Commercial Contracts” in Brownsword *et al Good Faith in Contract* 139 at 140. See too Brownsword “Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law” in Brownsword *et al Good Faith in Contract* 13 at 33.

¹⁸⁵ Fuller *The Morality of Law* 33-38.

¹⁸⁶ In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 16C the majority said: “Indeed, the result will be that the principle of *pacta sunt servanda* will for the most part be marginalised, because the enforceability of contractual terms will depend on what the particular judge in the circumstances believes is fair and just. The measure is no longer the law, but the judge.” (My emphasis). This is a translation of the original Afrikaans: “Die gevolg sal immers wees dat die beginsel van *pacta sunt servanda* grootendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat ’n bepaalde regter in die omstandighede as redelik en billik beskou. Die maatstaf is nie meer die reg nie maar die regter.”

¹⁸⁷ I share the views of both Bridge and Brownsword, who reject this approach to good faith as being unsuitable. A similar point was made by Nicholas J in *Fisheries Development Corporation of SA Ltd v Jorgensen and another* 1979 (3) SA 1331 (W) at 1340A where he said: “The Courts do not however act on abstract ideas of justice and equity. They must act on principle.” An example of a judgment that could be construed as invoking this sort of approach to good faith is that in *Strydom v Afrox Healthcare Ltd* [2001] 4 All SA 618 (T). Mavundla AJ chose to decide this case on vague notions of good faith, supported by constitutional considerations, while ignoring the substantial corpus of law on exemption clauses, about which the case really turned. The decision was clearly not a good one, and was indeed criticised and overturned by the Supreme Court of Appeal in *Afrox Healthcare Ltd v Strydom* [2002] 4 All SA 125 (SCA).

precedent.¹⁸⁸

Having rejected this option, which of the remaining two approaches to good faith applies in the South African legal system? While the matter remains a source of debate in other jurisdictions, particularly the United States,¹⁸⁹ it is evident that in South African law we have a good faith requirement, or a contextual approach to good faith, and do not adopt the model of a good faith regime, or the normative approach to good faith.¹⁹⁰ In this country the principle of good faith operates as an “informing basis”¹⁹¹ to the substantive law of contract. The principle of good faith provides a moral, or principle-based jurisprudential justification for the existence of the many so-called black-letter rules and doctrines that exist in contract law, and which are designed to promote fair dealing and ensure the legitimate expectations of contracting parties are met:

“It [good faith] finds its expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative and a legitimating or explanatory function.”¹⁹²

The fact that the principle of good faith operates in this way reflects a practical application of Summers’s negative or “excluder” definition of good faith. Summers has argued that the term “good faith” really has no self-standing meaning and content at all; rather it can only be understood negatively, as a number of specific instances of bad faith conduct.¹⁹³

¹⁸⁸ The argument that such an approach would fall foul of the *stare decisis* rule was expressed by the majority in *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at 13D-E.

¹⁸⁹ Nehf “Bad Faith Breach of Contract in Consumer Transactions” in Brownsword *et al Good Faith in Contract* 121-127 provides a careful review of the polemic in the United States about what good faith means, citing conflicting academic and judicial pronouncements.

¹⁹⁰ Cf the views of Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 232; Neels “Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg” 1999 *TSAR* 684 at 699-701.

¹⁹¹ Cockrell “Second-Guessing the Exercise of Contractual Power on Rationality Grounds” 1997 *Acta Juridica* 26 at 41.

¹⁹² Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 230. He repeats his views in “Non-Variation Clauses in Contract: Any Escape from the *Shifren* Straitjacket?” (2001) 118 *SALJ* 720 at 744-5. For a similar view, see Van der Merwe, Lubbe and Van Huyssteen “The Exceptio Doli Generalis: Requiescat in Pace — Vivat Aequitas” (1989) 106 *SALJ* 235 at 243; Cockrell “Second-Guessing the Exercise of Contractual Power on Rationality Grounds” 1997 *Acta Juridica* 26 at 41 and “Substance and Form in the South African Law of Contract” (1992) 109 *SALJ* 40 at 55; Farlam and Hathaway 391.

¹⁹³ Summers “‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code” (1968) 54 *Virginia Law Review* 195 at 198. Cf the view of Hillman “Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress” (1979) 64 *Iowa LR* 849 at 877.

This contextual role of the good faith principle in our law of contract has recently been confirmed by the Supreme Court of Appeal in *Brisley v Drotsky*¹⁹⁴ and *Afrox Healthcare Ltd v Strydom*.¹⁹⁵ In *Brisley*'s case the nature and role of the good faith principle in our law was thoroughly explored in a number of separate judgments. The majority (Harms, Streicher and Brand JJA) held that the judgment of Olivier JA in the *Saayman* case must be restrictively interpreted. In particular they made it clear that the principle of good faith is not an independent, free-floating principle that justifies the setting aside of contracts on its own.¹⁹⁶ While it is a foundational principle of our law of contract, it finds expression in specific rules and doctrines of the law of contract. Olivier JA, in a separate judgment in the *Brisley* case, seems to agree with this view.¹⁹⁷ In the *Afrox Healthcare* case Brand JA (on behalf of all the members of the court) summarised the findings of the majority in *Brisley* succinctly as follows:¹⁹⁸

“With regard to the place and role of abstract idea like good faith, fairness and reasonableness, the majority in *Brisley* decided that, even though these considerations are foundational to our law of contract, they do not provide an independent, or a “free-floating’ justification for the setting aside or the non-enforcement of contractual terms; put in another way, although these abstract considerations represent the reasons for the existence of rules of law, and can also lead to the development and change of rules of law, they are not rules of law on their own.”

In addition, the method by which we in South Africa determine what is and what is not in good faith is the standards of fair dealing that are generally accepted in that particular contractual context, and not by way of some uniform normative concept of contractual honesty or justice that is imposed by the courts. In the words of Van Dijkhorst J in *Atlas Organic Fertilisers(Pty) Ltd v Pikkewyn Ghwano (Pty)*

¹⁹⁴ 2002 (4) SA 1 (SCA).

¹⁹⁵ [2002] 4 All SA 125 (SCA). This approach to the principle of good faith was also endorsed by a full bench of the Cape High Court in the duress case of *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at 182-3.

¹⁹⁶ 2002 (4) SA 1 (SCA) at 15E.

¹⁹⁷ Olivier JA cites Hutchison's views that I have quoted above in his judgment at 28G-29A. At 30I he also cites Neels “Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg” 1999 *TSAR* 684 at 700 to the effect that the courts should apply the principle cautiously, in a principled fashion, and any correction must occur through refined rules and principles.

¹⁹⁸ [2002] 4 All SA 125 (SCA) at 136d-g. This is a translation of the original Afrikaans: “Aangaande die plek en rol van abstrakte idees soos goeie trou, billikheid en geregtigheid het die meerderheid in die *Brisley*-saak beslis dat, ofskoon hierdie oorwegings onderliggend is tot ons kontraktereg, die nie 'n onafhanklike, oftewel 'n ‘free floating’ grondslag vir die tersydestelling of die nie-afdwinging van kontraktuele bepalings daarstel nie; anders gestel, alhoewel hierdie abstrakte oorwegings die grondslag en bestaansreg van regsreëls verteenwoordig en ook tot die vorming en die verandering van regsreëls kan lei, hulle op sigself geen regsreëls is nie.”

“As this norm [good faith] cannot exist *in vacuo*, the morals of the marketplace, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination.”

The principle of good faith is thus neither homogenous nor absolute; it varies from time to time and from context to context.²⁰⁰ Even in Olivier JA’s minority opinion in *Saayman*, his lordship invoked the principle of good faith not in an independent fashion, but to justify the creation of a particular rule (that a creditor bank is required to explain to a person standing surety for a debtor the full implications of the agreement, and to ensure that the surety understands these implications), in a particular context (the law of suretyship).²⁰¹ It is submitted that this approach to good faith is one which is principled, reflects societal values, and which provides the contextual certainty (through doctrinal rules and concepts) that an unconstrained principle of good faith could not.²⁰² Indeed, it is also the approach that is advocated (from a wider philosophical perspective) by Dworkin with regard to the adoption and efficacy of any legal principle.²⁰³

“The origin of ... legal principles lies not in the particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained.”

¹⁹⁹ 1981 (2) SA 173 (T) at 188-9. Zimmermann takes the same approach: “[W]hilst resting ultimately on an ethical basis, good faith does not require the evaluation of business transactions according to abstract ethical ideals but with a view to ordinary business decency.” See Zimmermann and Visser *Southern Cross* 248.

²⁰⁰ It is “a concept of variable content in the light of changing *mores* and circumstances” (per Jansen J in *Meskin v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W) at 804D). In both *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) at 651 and *A Becker and Co Ltd v Becker* 1981 (3) SA 406 (A) the Appellate Division held that the residual terms imposed upon parties by operation of law in various contractual contexts are not cast in stone, and the courts have the power to add new rights and duties, when the time is right. Jansen JA in the *Tuckers* case expressly stated (when grafting the doctrine of anticipatory breach onto our law) that this occurred because the underlying principle of good faith necessitated the legal development. See too the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (as amended), which sets in place mechanisms to control and prevent unfair practices in the particular area of consumer contracts.

²⁰¹ See Glover “Good Faith and Procedural Unfairness in Contract” (1998) 61 *THRHR* 328 at 334.

²⁰² Compare the views of Lord Browne-Wilkinson in *Barclays Bank plc v O’Brien* [1993] 4 All ER 417 (HL) at 428d. Cockrell “Second-Guessing the Exercise of Contractual Power on Rationality Grounds” 1997 *Acta Juridica* 26 at 41, who states that the principle of good faith will be valueless if it is allowed to “collapse into a malleable notion of reasonableness”. Other adherents of this view are Christie “The Law of Contract and the Bill of Rights” *Bill of Rights Compendium* §3H-8; Neels “Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg” 1999 *TSAR* 684.

²⁰³ Dworkin *Taking Rights Seriously* 40 (my emphasis).

5.4.2.6 Constitutional considerations

In a short space of ten years or so, the ideological face of South African contract law has changed significantly, with the re-analysis of the role of public policy in contract, and the re-prioritisation of the once-neglected good faith principle as a balancing factor that is designed to promote greater contractual fairness. But a further critical question needs to be asked at this juncture, since it is no longer acceptable simply to discuss legal institutions in a traditional common law paradigm. In any situation where a common law doctrine or principle is under review, one must also consider the potential impact of the constitutional imperatives laid down in the Bill of Rights with regard to the evaluation and development of the common law.²⁰⁴ In the words of Olivier JA in *Brisley v Drotsky*:²⁰⁵

“It is clear that our law is in a developmental phase, where *contractual justice* is being emphasised more than ever before as a moral *and* juridical norm of great importance. This tendency will, in all likelihood be strengthened by Constitutional values....”

Since 1994, the power to develop a particular rule or principle of the common law by reference to the Bill of Rights has only rarely been exercised by the courts in disputes concerning the general principles of the law of contract.²⁰⁶ The trend has been for our courts to make reference to the Constitution in order to confirm that certain specific rules and principles of contract law, and even common forms of

²⁰⁴ Cf Cockrell “Private law and the Bill of Rights: A Threshold Issue of ‘Horizontality’” *Bill of Rights Compendium* §3A-10.

²⁰⁵ 2002 (4) SA 1 (SCA) at 29E (emphasis in the original). This is a translation of the original Afrikaans: “Dit is duidelik dat ons reg in ’n ontwikkelingsfase is waar *kontraktuele geregtigheid* meer as ooit tevore ’n morele *en* juridiese norm van groot belang op die voorgrond tree. Hierdie tendens sal na alle waarskynlikheid ... deur Grondwetlike waardes versterk word.”

²⁰⁶ As far as the development of the law of contract is concerned, only a few significant cases come to mind. First, in *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) Van Zyl J developed the common law to allow for an extended application of the aedilician actions to sellers who accept a trade-in as part of the purchase price of a new vehicle, by invoking the right to equality contained in s9 of the Bill of Rights. For more on this case, see my note “The Aediles Curules and the Constitution” (2001) 64 *THRHR* 156. Secondly, in *Ryland v Edros* 1997 (2) SA 690 (C), Farlam J utilised the radiating powers granted by the interpretation clause of the Constitution to carry out a re-interpretation of public policy with regard to Muslim marriages. His lordship held that a Muslim marriage contract, for a long time considered to be contrary to public policy and therefore unenforceable for being potentially polygamous, ought no longer to be considered contrary to public policy in the light of the values of equality and the need for protection against unfair discrimination recognised in the Constitution. Thirdly, in *Ndlovu v Ngcobo; Bekker v Jika* [2002] 4 All SA 384 (SCA) the Supreme Court of Appeal held by a simple majority that the requirements of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 applies to evictions of those who were lawfully in possession of a property under a contract, but whose possession has become unlawful either due to the termination of the contract or the calling-up of a mortgage bond. This decision, based upon s26(3) of the Constitution, is designed to inject a degree of justice and equity into eviction proceedings where contracts are terminated, rather than simply allowing for immediate, unopposed evictions that were the norm under the common law.

contractual clauses, are constitutionally sound as they stand.²⁰⁷ But while the Constitution has not had a significant instrumental effect on the law of contract, Olivier JA correctly points out that its impact will certainly be felt in an ideological sense. Since the Bill of Rights articulates a number of key societal values, these values must by definition be considered in the on-going analysis of public policy and good faith in contract.²⁰⁸

“The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual ‘freedom’ and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity.”

A leading analysis of the role public policy plays in the law of contract in the new legal dispensation was penned by Cameron JA in *Brisley v Drotsky*. It is necessary to quote extensively from his judgment in that case:²⁰⁹

“In its modern guise, ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.

It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights....

What is evident is that neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness.... On the contrary, the Constitution’s values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the

²⁰⁷ This has occurred particularly in regard to the law of mistake (*Goldberg v Carstens* 1997 (2) SA 854 (C)); covenants in restraint of trade (*Knox d’Arcy Ltd v Shaw* 1996 (2) SA 651 (W) and *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Permain* [1997] 4 All SA 650 (SE)), and certain standard types of contractual clauses like exemption clauses (*Afrox Healthcare Ltd v Strydom* [2002] 4 All SA 125 (SCA)), “no variation without writing” clauses (*Brisley v Drotsky* 2002 (4) SA 1 (SCA)), nuisance clauses (*Garden Cities Inc Association Not for Gain v Northpine Islamic Society* (1999) 2 SA 268 (C)) and even clauses allowing office telephones to be tapped during working hours (*Pretoria Technology Ltd v Wainer* [1997] 3 All SA 594 (W)).

²⁰⁸ Per Cameron JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 36A-B.

²⁰⁹ 2002 (4) SA 1 (SCA) at 34-35. These views were endorsed by the Supreme Court of Appeal in *Afrox Healthcare Ltd v Strydom* [2002] 4 All SA 125 (SCA) at paras [18] to [22].

reasons, as Davis J has pointed out,²¹⁰ is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.”

In this passage Cameron JA makes an number of very important points. First, the role of the values contained in the Bill of Rights in the public policy enquiry is established. It is apparent that the Bill of Rights ought not to be considered an exclusive embodiment of what is in accordance with public policy in the law of contract. The values that the Bill of Rights espouses are naturally of paramount importance to our society, and therefore what is contained in the Bill of Rights obviously constitutes what Christie has described as “an exceptionally reliable statement of seriously considered public opinion”.²¹¹ But the Bill of Rights does not articulate all the very important policy factors that are relevant to the law of contract. For example, nowhere in the Bill of Rights is the fundamentally important *pacta sunt servanda* principle represented or articulated. Therefore relevant constitutional values will only be one of a number of factors to be taken into account, where the facts make it necessary, in determining what is public policy with respect to contract. But where a constitutional value is unduly limited, the learned judge makes it clear that it will be difficult to imagine that other factors will easily override the constitutional value.

Secondly, Cameron JA²¹² points out that the values of freedom of contract and the sanctity of promises once deliberately made, remain foundationally important policy factors in our law of contract, and their importance cannot be underestimated. Indeed, s39(1) of the Constitution itself makes it clear that the value of freedom is a very important one in our society, and must be promoted. Contractual freedom is one contextualised sort of freedom that has a voice in the Bill of Rights: as both Davis J and Cameron JA have pointed out, “contractual autonomy is part of freedom”. However, Cameron JA affirms that these values are not absolute, and that our courts will be prepared, when it is necessary, to find that the nature of the contract is such that other policy factors (including other competing constitutional values) trump the values of freedom of contract and *pacta sunt servanda*. But in the end, Cameron JA echoed the words of caution of Smalberger JA in the *Sasfin* case: even under a constitutional dispensation, and a system based intrinsically on equity, a litigant will not be entitled to escape his or her obligations under a contract simply on the grounds of “judicially perceived notions of unjustness”. To tip the scales against the traditional contractual values will require clear legal and

²¹⁰ For similar views with regard to the nature and role of the public policy rule under the Constitution, see *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 474-5. Davis J’s views were also cited with approval by Olivier JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 28A-E.

²¹¹ Christie “The Law of Contract and the Bill of Rights” *The Bill of Rights Compendium* §3H-6. See too Hopkins “The Common Law is Indeed a Living Creature: A Noteworthy Decision is Handed Down in the Cape High Court” (2001) 118 *SALJ* 149 at 153.

²¹² As well as Harms, Streicher and Brand JJA: see the judgment at 16.

factual justification, not mere indignant foot-stamping. The interests of the parties will have to be proportionally balanced, and the arguments in favour of intervention will have to be rationally articulated. This provides explicit constitutional reinforcement for the application of the contextualised principle of good faith in South African law. But more than that, it is certain to strengthen and give greater credence to the role of the good faith principle in the law of contract. A consideration of certain constitutional values can contribute towards improving our understanding of the equitable principle of good faith and the application thereof through its contextualised doctrines and rules.

What constitutional values are likely to be relevant balancing factors that could be taken into consideration in this process of refining our understanding the various doctrines that contextualise the principle of good faith? From Cameron JA's judgment it can be seen that there are three fundamental constitutional values that might be relevant. The first is the value of freedom. Freedom has already been mentioned in the previous paragraph, referring to the importance of the classical concept of freedom of contract. But in its negative guise, there are times where full and unfettered contractual freedom must be curtailed. The question of how the common law of contract currently deals with the limitation of contractual freedom may have to be considered afresh in the light of this important constitutional value. Secondly, there is the value of equality. Since s9 of the Constitution now entrenches the right to equality in our law, the need to re-examine the question of how the law deals with contractual inequality, or, more specifically, the perennial difficulty of inequalities in bargaining power between contractual parties, has gained a new constitutional impetus.²¹³ Thirdly, and residually, Cameron JA refers specifically to the constitutional value of dignity in his judgment.²¹⁴ In situations where people abuse their powers in the contractual context, this would prima facie constitute a violation of our dignity as individuals. He acknowledges the intrinsic connection between this value and the first two values of freedom and equality by making the point that the exercise of contractual freedom contributes to, and bolsters our dignity only in situations where there are no "obscene excesses" or gross inequalities attached to that contractual relationship.

5.2.4.7 Concluding remarks

The problem of how to deal with matters such as the extent of contractual freedom and the inequality

²¹³ The most thorough analysis of the question of equality in the context of the law of contract is that of Hawthorne "The principle of equality in the law of contract" (1995) 58 *THRHR* 157. See also Christie *Contract* 16-7 and 21-2; Christie "The Law of Contract and the Bill of Rights" *Bill of Rights Compendium* §3H-13; Van Aswegen "The implications of a bill of rights for the law of contract and delict" (1995) 11 *SAJHR* 50; Neels "Regsekerheid en die korrigerende werking van redelikheid en billikheid (deel 3)" 1999 *TSAR* 477 at 489.

²¹⁴ Section 10 of the Bill of Rights states: "Everyone has inherent dignity and the right to have their dignity respected and protected."

of bargaining power in the light of public policy and the dictates of good faith abound in any system of contract, and have done for centuries, as has already been discussed. The Constitution merely reinforces how important it is to continue, with renewed vigour, the quest to find solutions to these fundamental problems. But the task is an enormous one. These are issues that concern both the negotiation phase and the performance phase of the contract. They go to the heart of matters like standard-form contracts, exemption clauses, indeed all aspects of both commercial and consumer contracting. But it is not the stated aim of this thesis to attempt to propose an all-embracing solution to these dilemmas in the law of contract generally. The goal is more modest: to attempt to provide a more coherent understanding of the doctrine of duress, in the light of the principle of good faith and other relevant policy considerations and constitutional values, and to assess and determine whether the doctrine of duress can be refined and developed to allow it to play a more significant and useful role in the South African legal system.

5.4.3 Good faith and the doctrine of duress

5.4.3.1 The relationship between principle and doctrine

The real polemic surrounding the principle of good faith in the South African law of contract has tended to lie in its role in regulating substantive unfairness in contract. The debate about how the good faith requirement could most effectively be defined and put to work to marshal and regulate substantive unfairness in contract is heated and ongoing. However, this thesis is not concerned with substantive contractual unfairness, but concerns a particular problem (duress) during the phase when a contract is negotiated and concluded (an example of what is commonly known as procedural unfairness).²¹⁵

The question of the role that good faith has to play in the bargaining process is far less controversial. There is widespread recognition in South African law (like in most systems of European law²¹⁶) that there is a duty imposed upon contracting parties to negotiate in good faith at the pre-contractual stage.²¹⁷ In *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd*,²¹⁸

²¹⁵ The difference between substantive and procedural unfairness is discussed by Lubbe “*Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontrakereg*” (1990) 1 *Stellenbosch LR* 7 at 22-3.

²¹⁶ See Article 2.301 of the Principles of European Contract Law; Article 2.15 of the UNIDROIT principles; Article 1337 of the Italian code. Although the French, Dutch and German codes do not prescribe pre-contractual good faith in so many words, the relevant sections concerning good faith in those jurisdictions have generally been interpreted extensively to cover pre-contractual good faith. For a full discussion of pre-contractual good faith in European jurisdictions, see Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 237-293.

²¹⁷ See Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 236; Zimmermann and Visser *Southern Cross* 246; Grové “Kontraktuele gebondenheid, die vereistes

Stegmann J stated:²¹⁹ “The proposition that by our law all contracts are *bonae fidei* is not confined to matters that arise after *consensus* has been reached; it applies to the very process of reaching *consensus*.”

But since South Africa has a good faith requirement, or takes a contextual approach to good faith, the principle of good faith does not operate as a free-floating principle with regard to contractual negotiations. It finds its expression in certain technical doctrines and rules, and regulates the content of these doctrines and rules. Undoubtedly the most famous of these are the doctrines of misrepresentation, duress and undue influence, which constitute formal examples of conduct that can be considered to be contrary to the dictates of good faith. This approach allows cases of bad faith *in contrahendo* can be dealt with logically, in a particular context, according to established rules. To adopt the metaphor of Visser²²⁰ (which he uses in a different context) accepting that we espouse a contextual version of good faith in South African contract law allows us not only to “lump” certain related concepts under one umbrella principle (the principle of good faith) for general theoretical or jurisprudential purposes, but also, in a taxonomic sense, to “split” these concepts into appropriately defined categories (ie misrepresentation, or duress), to aid practical understanding, and to ensure that different factual problems can be dealt with in a focused and disciplined manner. This has in fact been the position since Roman times, when there was a clear connection drawn between the umbrella standard of *bona fides* and the doctrines of fraud and duress.²²¹ To hark back to the question posed right at the beginning of this chapter, this, it is submitted, provides another argument as to why the doctrine of duress ought not to be subsumed under a wider doctrine of “improperly obtained consensus”: there is already one guiding principle that informs and underpins the way in which contractual negotiations should be carried out in our legal system — the principle of good faith. To say that unreasonable conduct *in contrahendo* equals “improperly obtained consensus” equals a violation of good faith is a circular argument, and would simply create two general principles operating according to similar precepts.

van die goeie trou, redelikheid en billikheid” (1998) 61 *THRHR* 687 at 691-3. Lubbe “*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg” (1990) 1 *Stellenbosch LR* 7.

²¹⁸ 1987 (2) SA 149 (W).

²¹⁹ At 198A-B. See too *Meskin NO v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W) at 804; *Neugebauer & Co v Hermann* 1923 AD 564 at 573-4; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA) at 322.

²²⁰ Visser “Rethinking Unjustified Enrichment: A Perspective of the Competition Between Contractual and Enrichment Remedies” 1992 *Acta Juridica* 203.

²²¹ In addition to the reference to *bona fides* in *D 50.17.116.pr*, there is a similar reference in *D 4.2.3.1*. The importance of the *boni mores* underpinning the doctrine of *metus* is discussed by Mayer-Maly “The *boni mores* in historical perspective” (1987) 50 *THRHR* 60 at 67-8.

Defining the principle of good faith at the negotiation stage contextually by reference to specific doctrines like duress is not unique to civilian-based systems: in the United States it has also been argued that the requirement of good faith establishes the broad theoretical framework with which the common law doctrine of duress does its work.²²² Under the Uniform Commercial Code contract modifications engineered by economic duress (the most common form of duress in modern American law) are explicitly equated with a breach of the principle of good faith. Section 2-209(2) of the UCC stipulates that a contract modification “must meet the test of good faith ... and the extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith.” This view is reinforced in the American *Restatement, Second, Contracts*, where it is stated in section 176(1)(d) that a contract can be voidable for duress if it is induced by a threat that constitutes “a breach of the duty of good faith and fair dealing under a contract with the recipient”.

5.4.3.2 Values jeopardised in cases of duress

An act of duress violates the fundamental contractual principle of good faith for a number of reasons. Principal amongst these is that an act of duress, amounting as it does to a coercive act, impinges upon certain core common law, and now constitutional, values; values that are sacred to any workable system of contract.

5.4.3.2.1 Freedom

When speaking of duress, the first, and certainly the most important value that is affected is that of freedom. As has been discussed above, the value of freedom is generally considered to lie at the heart of the law of contract. And there can surely be no more definitive an example of interference with contractual freedom, or a person’s private autonomy in the contracting context, than an act of duress. The fact that the overborne will theory has been thoroughly exploded as a theoretical basis for the existence of the doctrine of duress must certainly not be interpreted to mean that the question of freedom is irrelevant to our understanding of the doctrine and its place in the law of contract — far from it, in fact. The problem with the overborne will theory is that it completely misconstrued the impact of an act of coercion on the concept of freedom: the suggestion was that the coercive act destroyed the will of the aggrieved party, and rendered that person’s “consent” completely involuntary. As has been shown above, this theory is fallacious. Rather, the act of duress amounts to an unacceptable limitation

²²² The leading work in this regard is that of Hillman “Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress” (1979) 64 *Iowa LR* 849. See also Mather “Contract Modification Under Duress” (1982) 33 *South Carolina LR* 615 at 617 and *Restatement, Second, Contracts* §205(d).

of, or constraint upon, a person's ordinary contractual freedom. As Zimmerman says, the act of coercion may not eradicate consent, but it certainly "undermines freedom".²²³ Both Wertheimer and Trebilcock suggest that where a person acts in some way as a result of duress, their act is one of "constrained volition":²²⁴ a choice is made, and consent is given, but the decision to act is not completely free, since it is taken under pressure. In the German legal system, the term that is used is "willensmangel", which means that the aggrieved party's will is impaired. Mackie proposes, as a result, that one should rather refer to an act done under duress as a "voluntary complex act", rather than conceiving of it colloquially, and inaccurately, as an "involuntary simple act".²²⁵

The point that needs to be gleaned from these views is that where a contract is coerced, the aggrieved party's ordinary contractual freedom, although not eliminated completely, is negatively affected. The way in which the value of freedom is offended in duress cases does require some consideration, though. As Dworkin correctly points out, a generic normative "concept" like freedom can have a number of divergent "conceptions".²²⁶ Traditionally, the conception of freedom most closely associated with contract is that of "freedom of contract": the power that people in society have to choose with whom, and, more importantly, on what terms, they wish to create legal obligations. In a constitutional sense, it is the s18 right to freedom of association²²⁷ that explains the fundamental nature of this sort of freedom. This conception of freedom, which is most closely associated with the classical liberal theory of contract, was defined by Berlin as "positive freedom" in his famous lecture on liberty.²²⁸ Of course, as Atiyah²²⁹ has shown, the idea of complete freedom of contract has progressively been whittled away in modern times, and the law provides a number of mechanisms that restrict people's full and unfettered powers in this regard, in the interests of protecting people from the regrettable consequences of this sort of unscrupulous exercising of contractual freedom. In a sense, the

²²³ Zimmerman "Coercive Wage Offers" (1981) 10 *Philosophy and Public Affairs* 121 at 122. Cf Philips "Are Coerced Agreements Involuntary?" (1984) 3 *Law and Philosophy* 133.

²²⁴ Wertheimer *Coercion* 10; Trebilcock *The Limits of Freedom of Contract* 79. Cf Hill "A Utilitarian View of Duress" (1999) 84 *Iowa LR* 275 at 286.

²²⁵ Mackie "The Grounds of Responsibility" in Hacker and Raz (eds) *Law, Morality and Society: Essays in Honour of HLA Hart* 181.

²²⁶ Dworkin *Taking Rights Seriously* 134. He gives the example of the concept of fairness, which is something we generally value. However, there may be different views (or, in his terminology, conceptions) of what fairness entails. Westen "'Freedom' and 'Coercion' — Virtue Words and Vice Words" 1985 *Duke LJ* 541 at 543 gives the example of the concept of equality, and how Aristotle might have had an entirely different conception of equality to Karl Marx.

²²⁷ Section 18 of the Bill of Rights reads: "Everyone has the right to freedom of association."

²²⁸ Berlin "Two Concepts of Liberty" in *Four Essays on Liberty* 118 at 121.

²²⁹ *The Rise and Fall of Freedom of Contract* 571ff.

doctrine of duress can be understood as one mechanism that fulfils this sort of function, like other common law and statutory mechanisms that provide for the protection of weak or vulnerable contracting parties. Where a contract is induced by duress, the one party has taken his powers to contract with another too far by coercing the arrangement by threats, and has violated the other party's autonomy in the process. The exercise of the freedom to contract with another has therefore been abused.

But probably the better way to understand how an act of duress impacts upon freedom is to view the intrusion not from the point of view of the conduct of the aggressor, but in a "negative" sense from the point of view of the aggrieved party.²³⁰ As Kimel points out, it is occasionally overlooked that our law not only supports the conception of freedom of contract, but also the conception of freedom from contract.²³¹ The emphasis of this conception of freedom is on the fact that people are entitled to be free not to have others interfere with their activities, or to be free not to be obliged to associate contractually with another.²³² In the context of the duress enquiry, the key issue with regard to freedom from contract is the problem of an inappropriate limitation of choice: the aggrieved party should not be put in a position where their normal array of contractual choice is inhibited by an act of coercion. An act of duress places the aggrieved party in just such a dilemma situation, resulting in that person's ordinary freedom to refuse to contract being improperly restricted.

5.4.3.2.2 Equality

The second value that can be compromised in cases where a contract is induced by duress is that of equality. Now since the doctrine of duress is traditionally understood in terms of the issue of freedom, it is not automatically associated with the issue of contractual equality. However, the doctrine of duress can and does play an important role in this respect. The duress scenario is one characterised by the bad faith exploitation of a weaker party by a stronger party. Where a contract is induced by duress, the aggrieved party's ordinary powers of contracting are affected: the contractual relationship is imposed and hierarchical, rather than one that was negotiated on equal terms. The results for the aggrieved party are more often than not onerous and unwanted. The problem of inequality, and the exploitation of that

²³⁰ Berlin "Two Concepts of Liberty" in *Four Essays on Liberty* 118 at 122.

²³¹ Kimel *From Promise to Contract: Towards a Liberal Theory of Contract* 135.

²³² If one wanted to put it in constitutional terms. Cf the views of Christie "The Law of Contract and the Bill of Rights" in *The Bill of Rights Compendium* para 3H22, and *Oostelike Gauteng Diensteraad v Transvaalse Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T); *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T).

inequality, is thus foundational to any discussion about the common law doctrine of duress.²³³ This fact has always been recognised in the common law, but the importance of these considerations to the existence of the doctrine of duress has now acquired constitutional reinforcement, by virtue of the existence of the equality clause in South Africa's Bill of Rights. Section 9(1) and (2) of the Constitution read as follows:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.”

The discretion granted to the legislature to put in place measures designed to promote equality has been exercised with the passing of the Promotion of Equality and Prevention of Unfair Discrimination Act.²³⁴ This Act makes it clear that the existence of a right to equality is not in itself a panacea for the problem of inequality; equality must actively be promoted and effected where possible. Section 1(1)(ix) of the Act reads as follows: “‘equality’ includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.” The purpose of the Act is explained in s2:

“The objects of this Act are —

- (a) to enact legislation required by section 9 of the Constitution;
- (b) to give effect to the letter and spirit of the Constitution, in particular —
- (i) the equal enjoyment of rights and freedoms by every person;
- (ii) the promotion of equality;”

²³³ See Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253 at 289; “Duress through Civil Litigation II” (1947) 45 *Michigan LR* 679 at 715. The learned author points out that the problem of inequality of bargaining power lies at the heart of the duress doctrine in both common law and civilian systems. See “Economic Duress and the Fair Exchange in French and German Law” (1937) 11 *Tulane LR* 345, (1938) 12 *Tulane LR* 42. For support for this view, see Note “Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis” (1968) 53 *Iowa LR* 892 at 899. The importance of “power” to the doctrine of duress is discussed from a critical perspective by Dalton “An Essay in the Deconstruction of Contract Doctrine” (1985) 94 *Yale LJ* 997 from 1024. In England, see Adams “Contract Law at Sea?” (1979) 42 *MLR* 557. In Canada, see Sutton “Duress by Threatened Breach of Contract” (1974) 20 *McGill LJ* 554 at 556; Ogilvie “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 *McGill LJ* 289 at 314. For a South African viewpoint, see Hawthorne “The principle of equality in the law of contract” (1995) 58 *THRHR* 157 at 169-70.

²³⁴ Act 4 of 2000.

The constitutional right of equality by definition lies at the heart of the debate about what to do about the perennial and ongoing problem of inequality of bargaining power in contract law. What is inequality of bargaining power? Before this question can be answered, one needs to define what bargaining power is.²³⁵ This is not easy, but it really boils down to the hand the party brings into the negotiation process, to use a gaming analogy. Key factors would seem to be things like knowledge of the subject matter of the potential contract; skill and experience in negotiation; financial or institutional backing that one might have; any previous relationship between the parties; and especially the need for the commodity (whether it be goods, services or money respectively). Common sense tells one that assessing whether there is an inequality in bargaining power that is unacceptable, and that cannot be condoned by the law, requires a factual analysis of two issues. First there is the relative bargaining strength of the parties. Very seldom, if ever, will both parties to contractual negotiations be in a position of equal strength. That is the very nature of commerce.²³⁶ As such, it is only in situations where the relative bargaining strength of the parties is significantly different that the law is going to become interested; where the respective strength and weakness of the parties is marked.²³⁷ But the second issue is perhaps the most pivotal. For while a court may become interested when it sees a significant disparity in the relative bargaining strength of the parties, it is likely to take the step of actually intervening only once it becomes clear that the party in the stronger position actually took unfair advantage of the situation and, to put it in its theoretical context, acted contrary to the dictates of good faith. In *Afrox Healthcare Ltd v Strydom*²³⁸ Brand JA said:²³⁹

“It goes without saying that an inequality in the bargaining power of the parties to a contract does not, by itself, justify the conclusion that a contract which is to the advantage of the ‘stronger’ party will necessarily be contrary to public policy.”

How ought the legal system to deal with inequality in bargaining power? This question is by no means

²³⁵ This point is made by Beale “Inequality of Bargaining Power” (1986) 6 *OJLS* 123 at 125.

²³⁶ In *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303 (CA) at 313 Dillon LJ said: “Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal.”

²³⁷ This is of course, a matter of degree. For an analysis of this issue, see Thal “The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness” (1988) 8 *OJLS* 17 at 29. See also Brownsword *Contract Law: Themes for the Twenty-First Century* 64-68.

²³⁸ [2002] 4 All SA 125 (SCA).

²³⁹ At 130h. This is a translation of the original Afrikaans: “[Dit spreek] eintlik vanself dat ’n ongelykheid in die bedingingsmag van die partye tot ’n kontrak opsigself nie die afleiding regverdig dat ’n kontrakbeding wat tot voordeel van die ‘sterker’ party is, noodwendig teen die openbare belang sal wees nie.”

easy to resolve, for the right to equality is not absolute and all-embracing. It has been recognised for centuries by moral and political philosophers that it is impossible for everyone in society to be treated equally.²⁴⁰ The right to equality thus operates in a substantive, rather than a formal, sense, and in some circumstances inequalities have to be accepted. The applicability of a right to equality is thus a matter of context.²⁴¹ This has been made very clear by the Constitutional Court in *President of the Republic of South Africa v Hugo*:²⁴²

“We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.”

Secondly, the right to equality cannot be imposed in an entirely binary fashion. Of course, it must be remembered from the outset that coercion is a natural feature of life in general, and the law in particular. In the realm of contractual negotiation this is especially so: a degree of pressure is present in most contractual contexts, due to natural differences and inequalities in social and commercial position, wealth and resources. Without such factors, the bargaining process that is grounded in basic Western capitalist economic fundamentals of supply and demand would not operate as we know it.²⁴³ The key question then is one of degree. In what situations will the law declare that the negotiations between the parties crossed the line from hard (but fair) commercial bargaining to unfair exploitation, and come to the aid of the unhappy party? Once again, this precept is emphasised in the *Hugo* case:²⁴⁴

“Each case ... will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be

²⁴⁰ See, for example, Plato *The Laws* vi 757-8; Aristotle *Nicomachean Ethics* v 1131; Note “Developments in the Law: Equal Protection” (1969) 82 *Harvard LR* 1065 at 1165.

²⁴¹ An excellent 20th century articulation of this principle came in the *South West Africa* case (second phase) in the International Court of Justice ((1968) 37 ILR 463), where Tanaka J said: “We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of all men without regard to individual, concrete circumstances, but it means relative equality, namely the principle to treat equally what is equal and unequally what are unequal.”

²⁴² 1997 (4) SA 1 (CC) at 22-3. See De Waal *et al The Bill of Rights Handbook* 200-1; Rautenbach “General Introduction to the Bill of Rights” *Bill of Rights Compendium* §1A-57.

²⁴³ For discussion of this matter see Sobel “The Need for Coercion” in Pennock and Chapman (eds) *Coercion: Nomos XIV* 148; Norton “Bargaining and the Ethic of Process” 1989 *New York University LR* 493. Philips “Are Coerced Agreements Involuntary?” (1984) 3 *Law and Philosophy* 133; *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50 at 106.

²⁴⁴ At 23.

unfair in a different context.”

It has been shown already that courts will not relieve contracting parties of the responsibility for performing contracts that were the result of “hard-but-fair bargaining”, or mere “commercial pressure”, as it is often called.²⁴⁵ This is a reflection of the importance of the contractual value of freedom. But of course, there are limits to how far this can stretch. For without checks and balances, hard-but-fair bargaining would soon turn into abuse of power and exploitation. In the words of Lord Wilberforce and Lord Simon in *Barton v Armstrong*:²⁴⁶

“[I]n life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can [colloquially] say that the actor had ‘no choice’ but to act. ‘Absence of choice’ in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained — advice, persuasion, influence, inducement, representation, commercial pressure, the law has come to select some which it will not accept ...: fraud, abuse of relation of confidence, undue influence, duress or coercion.”

In short, the doctrine of duress has an important role to play as one of the key mechanisms in the ongoing crusade to prevent potential abuse, and to provide remedies for actual abuse, where a contract is negotiated and induced by threats in a situation where the parties are in an unequal bargaining position. Although this matter is of concern in any situation where a contract is induced by duress, certainly in modern times the question of commercial exploitation and inequality of bargaining power comes most strongly to the fore where a contract is induced by threats of economic consequences — or in the realm of the so-called economic duress cases.²⁴⁷

5.4.3.2.3 Dignity

Finally, the last residual value that is compromised where a contract is induced by duress is that of dignity. Not too much needs to be made of this matter, over and above seeing it in the light of Cameron JA’s statement in *Brisley v Drotzky*²⁴⁸ that this value is commonly infringed within the context of the

²⁴⁵ Cf the views of Lord Diplock in *Universe Tankships Inc of Monrovia v ITWF* [1983] AC 366 at 384D and, in South Africa, *Afrox Healthcare Ltd v Strydom* [2002] 4 All SA 125 (SCA) at 130h.

²⁴⁶ [1976] AC 104 at 121D-E.

²⁴⁷ This issue will be discussed fully at 6.4.4 below.

²⁴⁸ 2002 (4) SA 1 (SCA) at 34-5.

infringement of other rights. Where a person's freedom is curtailed, or one party abuses a position of unequal power to coerce another into contracting, a further consequence is that the aggrieved party's dignity as a human being with full contractual capacity, and the liberty to enter into and create beneficial legal obligations, is infringed. The act of duress is, to use Cameron JA's words, "obscene" in a contracting context: the aggrieved party has been subjected to form of improper contractual abuse that the law will not countenance.

5.5 The re-analysis of the duress doctrine

Much time has been spent conducting a thorough analysis of the background theoretical basis for the existence of the doctrine of duress, and the sort of legal values that are imperilled by an act of duress. The doctrine of duress is a classical equitable feature of most systems of contract around the world. Stripped to its bare essentials, it is the task of the doctrine of duress to draw the line between what is legitimate commercial pressure on the one hand, and what is unacceptable coercion on the other hand. To this end, there is a need to ensure that the doctrine is both rational, and proportionately balances the values of freedom to contract and the sanctity of promises with oppositional values of good faith, freedom from improper coercion, equality and dignity. In this sense, the way the doctrine is currently understood and applied in South African law leaves a lot to be desired. From a commercial perspective, the attitude to duress remains primitive, and it does not sufficiently consider nor deal with critical problems relating to freedom, inequality of bargaining power and contractual fairness in the marketplace of today. Secondly, from a doctrinal perspective, there is evidence that the traditional formulation of the elements necessary to support a cause of action in duress is problematic.

That being the case, the question that lies at the heart of this study is the following: how should the common law doctrine of duress as it stands be developed to ensure that its conceptual framework is coherently and rationally formulated, so that ultimately the doctrine can constitute a mechanism that will be of practical assistance in fairly regulating the good faith conduct of contracting parties in the marketplace of the 21st century? In the rest of this chapter, and the two that follow, I shall examine how the common law of duress ought to be interpreted, developed and applied in this regard, with particular emphasis on developing a mechanism to deal with the problem of economic duress in the South African legal system.

5.5.1 The two-pronged theory of duress

Internationally, the demise of the overborne will test has meant that a different test for duress has had to be developed. Modern philosophers and lawyers now concede that coercion does not demolish one's

will or negative consent. It is now understood that the aggrieved party did make a choice. But the key question is: were the circumstances such that the aggrieved party is entitled to be relieved of the normal moral and legal consequences of his or her actions?²⁴⁹ And if this is the key question, then the test for duress in law must, it is submitted, be moralised:²⁵⁰ it must involve normative judgments about the conduct of both the party exerting the pressure and the party who chose to succumb to the pressure and contract. Bigwood puts it succinctly:²⁵¹ “the emphasis of *legally cognizable* coercion — duress — appears today to have less to do with questions of ‘freedom’ or ‘voluntariness’ than with questions of propriety.” Numerous attempts have been made by leading jurists and philosophers to develop a structured analysis of coercion that is philosophically defensible.²⁵² The philosophical merits and demerits of these theories will not be debated, since my task is to discuss the solution of duress claims in the law, rather than to discuss in detail the wider philosophical meaning and implications of freedom

²⁴⁹ Wertheimer *Coercion* 305 says: “the moral question is whether [the aggrieved party] is responsible for his action.” (My emphasis) See also Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 204; Fingarette “Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape” (1985) 42 *Washington & Lee LR* 65 at 105.

²⁵⁰ I agree with those philosophers and jurists who believe that the test for duress must be moralised. A selection of those who do believe this are: Wertheimer *Coercion* 173; Ryan “The Normative Concept of Coercion” (1980) 89 *Mind* 481; Murphy “Consent, Coercion, and Hard Choices” (1981) 67 *Virginia LR* 79; Fingarette “Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape” (1985) 42 *Washington & Lee LR* 65 at 87ff; Westen “‘Freedom’ and ‘Coercion’ — Virtue Words and Vice Words” 1985 *Duke LJ* 541 at 545. For criticism of a moralised theory of coercion on philosophical grounds, see Dworkin “Compulsion and Moral Concepts” (1968) 78 *Ethics* 227; Honoré “A Theory of Coercion” (1990) 10 *OJLS* 94; Provost “A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law” (1995) 73 *Texas LR* 629 at 650.

²⁵¹ Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 206.

²⁵² Perhaps the most famous attempt to define coercion from an analytical/philosophical perspective was that made by Robert Nozick “Coercion” in S Morgenbesser, P Suppes and M White (eds) *Philosophy, Science and Method: Essays in Honour of Ernest Nagel* at 441. He says that coercion is present if (1) P threatens to bring about some consequence if Q does A (and knows he is threatening to do this); (2) A with this threatened consequence is rendered substantially less eligible as a course of conduct for Q than A without this threatened consequence; (3) (Part of) P’s reason for deciding to bring about the consequence, or to have it brought about, if Q does A, is that P believes this consequence worsens Q’s alternative of doing A; (4) Q does not do A; (5) (Part of) Q’s reason for not doing A is to avoid (or lessen the likelihood of) the consequence which P has threatened to bring about; (6) Q knows that P has threatened to do something mentioned in (1) if he, Q, does A; (7) Q believes that, and P believes Q believes that, P’s threatened consequence would leave Q worse off, having done A, than if Q didn’t do A and P didn’t bring about the consequence. For other similar attempts see Bayles “A Concept of Coercion” in Pennock and Chapman (eds) *Coercion: Nomos XIV* 16 at 24; Held “Coercion and Coercive Offers” in Pennock and Chapman (eds) *Coercion: Nomos XIV* 49 at 52; Gorr “Toward a Theory of Coercion” (1986) 16 *Canadian Journal of Philosophy* 383 at 488. A very detailed philosophical critique of the inter-relationship between coercion in philosophy and duress in the law may be found in Stewart “A Formal Approach to Contractual Duress” (1997) 67 *University of Toronto LJ* 175.

and coercion.²⁵³ It is submitted that, from a legal perspective, the most attractive theoretical approach to determining whether a contract has been affected by duress, and indeed the approach which I will argue is most appropriate for adoption in South Africa, is what is commonly known as the “two-pronged” theory of duress.

In simple terms, the theory may be explained as follows: a contract will be voidable for duress when one party makes an improper or illegitimate threat that leaves the other party with no reasonable alternative but to submit, and enter into the contract. This simple formulation of the theory has been widely endorsed in Anglo-American law following the demise of the overborne will theory.²⁵⁴ For example, it is stated in the American *Restatement, Second, Contracts* that “[i]f a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim”.²⁵⁵ The pioneering work on this modernised theory of duress, that is designed to cover all forms of duress, whether physical or economic, was done by the American Professors Dalzell and Dawson, who deserve the title of the founding fathers of the modern doctrine.²⁵⁶ The modern test has also been adopted in English law in the case of *Universe Tankships Inc of Monrovia v International Transport Workers Federation*,²⁵⁷ a decision that has been

²⁵³ For example Ryan “The Normative Concept of Coercion” (1980) 89 *Mind* 481 at 493ff criticises Nozick’s definition for failing to include in the definition an analysis of whether the aggressor (P, in the definition) has a right to make the proposal. This criticism is justified in my opinion, although interestingly in *Anarchy State and Utopia* 263 Nozick specifically refers to this issue as a critical feature of the test for coercion. Others debate the question whether coercion is a moral/ethical issue or not. For a review of this philosophical question see Gerald Dworkin “Compulsion and Moral Concepts” (1968) 78 *Ethics* 227. Others discuss the potential philosophical differences between occurrent coercion (equating roughly to physical coercion) and dispositional coercion (roughly equating to coercion through direct and indirect threats of harm). See on this matter Gunderson “Threats and Coercion” (1979) 9 *Canadian Journal of Philosophy* 247 at 249ff.

²⁵⁴ Possibly the two leading papers on the application of this theory of duress in Anglo-American law in recent times are those of Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201ff and Stewart “A Formal Approach to Contractual Duress” (1997) 67 *University of Toronto LR* 175.

²⁵⁵ *Restatement, Second, Contracts* §175(1). For a succinct analysis of the modern test for duress embodied in the *Restatement*, see Farnsworth “Coercion in Contract Law” (1982) 5 *University of Arkansas at Little Rock LJ* 329. Farnsworth was the Reporter in charge of the *Restatement* when it was published, and so it can be inferred that his personal impact on the development of the modern test for duress is highly significant.

²⁵⁶ See Dalzell “Duress by Economic Pressure I” (1942) 20 *North Carolina LR* 237 and “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341; Dawson “Economic Duress—An Essay in Perspective” (1947) 45 *Michigan LR* 253, “Duress Through Civil Litigation I” (1947) 45 *Michigan LR* 571 and “Duress Through Civil Litigation II” (1947) 45 *Michigan LR* 679.

²⁵⁷ [1983] 1 AC 366 at 400, where Lord Scarman said: “The authorities ... reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will; and (2) the illegitimacy of the pressure exerted.” The only problem with this articulation of the test is the continued use of “overborne will” terminology. Cf too *Alec Lobb (Garages) Ltd and others v Total Oil GB Ltd* [1983] 1 All ER 944 (CA) at 960f, where a similar test is set out.

instrumental in shaping the approach to duress in other commonwealth jurisdictions.²⁵⁸ This approach is not exclusive to Anglo-American law, though. In the Continental systems of Europe the test for duress also turns on the existence of an unlawful threat that leaves the aggrieved party no reasonable alternative. Article 4:108 of the Principles of European Contract Law reads as follows:

“A party may avoid a contract when it has been led to conclude it by the other party’s imminent and serious threat of an act: (a) which is wrongful in itself, or (b) which it is wrongful to use as a means to obtain the conclusion of the contract, unless in the circumstances the first party had a reasonable alternative.”²⁵⁹

Perhaps the most comprehensive theoretical analysis of the modern approach may be found in the work of the American political philosopher Alan Wertheimer. Wertheimer does seek to examine the concept of “coercion” in a broad moral and philosophical sense, but his work remains very influential in the analysis of the more narrow legal concept of duress. In his book *Coercion*, Wertheimer says:²⁶⁰

“A coerces B to do X if and only if (1) A’s proposal creates a choice situation for B such that B has no reasonable alternative but to do X and (2) it is *wrong* for A to make such a proposal to B.”

Two requirements must therefore be satisfied before a duress claim will succeed. It is preferable in logic to invert the order of the requirements as articulated by Wertheimer in the above quote.²⁶¹ First, it must be proved that one party made (a) a threat that was (b) illegitimate or improper. This

²⁵⁸ See *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 44-5 in Australia and *Gordon v Roebuck* (1989) 64 DLR (4th) 568 at 572-3 in Canada.

²⁵⁹ The articulation of the test in under the UNIDROIT Principles art 3.9 is virtually identical. Elements of the test derive their origins from the continental codes of the European countries like Germany (§123 BGB), France (Art 1109 Code Civil), and the Netherlands (Art 3.44 BW). For a discussion of the position with regard to duress in contract on the continent generally, see Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 430ff; Kötz and Flessner *European Contract Law Vol 1* 209ff. The relevant sections of the specific codes of European countries will be discussed at the relevant sections in the next two chapters.

²⁶⁰ Wertheimer *Coercion* 172.

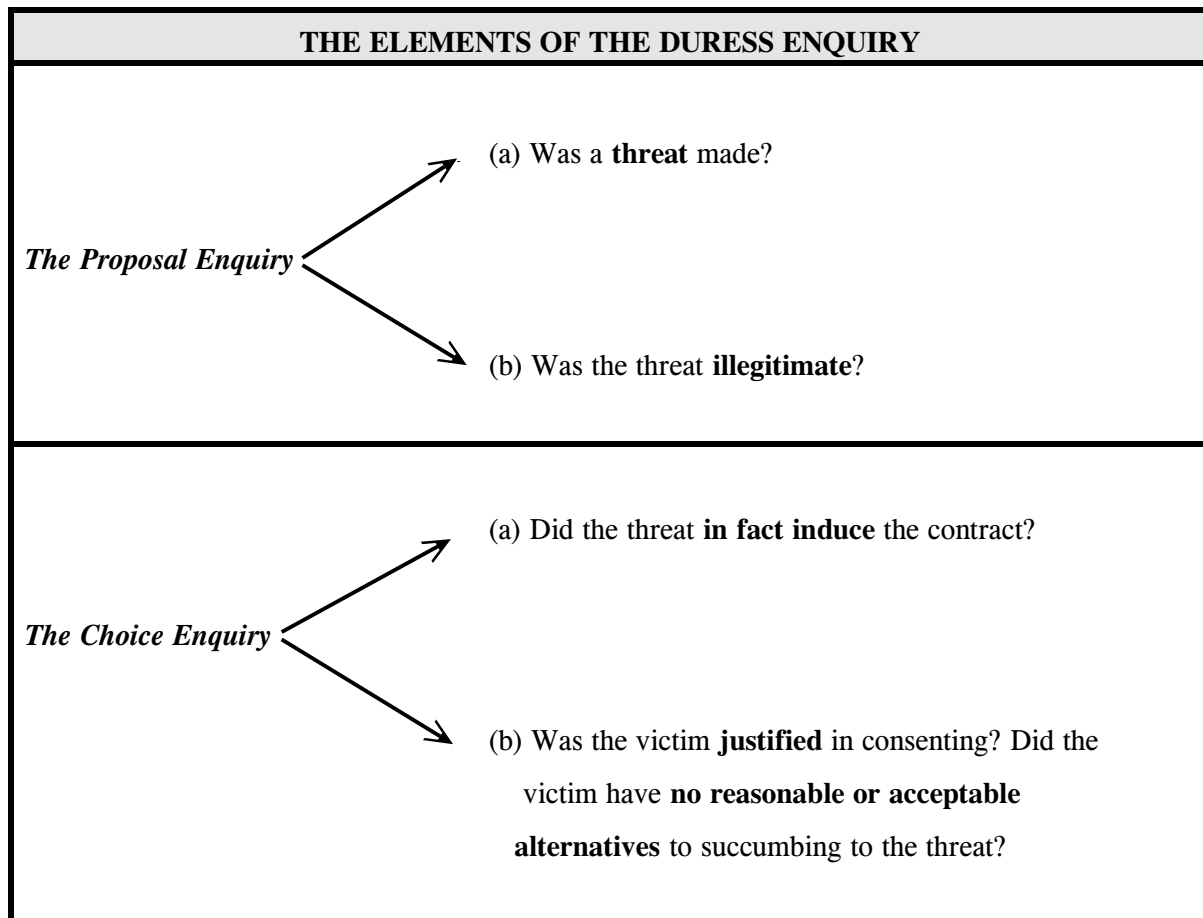
²⁶¹ Honoré, in his review of Wertheimer’s book, entitled “A Theory of Coercion” (1990) 10 *OJLS* 94 takes this approach, as does Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 214. See too the approach of Lord Simon and Lord Wilberforce in *Barton v Armstrong* [1976] AC 104 at 121. Their Lordships say: “[T]he first step required of the plaintiff is to show that some illegitimate means of persuasion was used.... The next necessary step would be to establish the relationship between the illegitimate means used and the action taken [by the plaintiff].” Another review of Wertheimer’s book is that of Hill “Moralized Theories of Coercion: A Critical Analysis” (1997) 74 *Denver University LR* 907.

Wertheimer describes as the “proposal” prong of the enquiry.²⁶² Secondly, the threat must have in fact induced the contract, and must have left the other party with no reasonable choice, or no acceptable alternative but to succumb to the threat and enter into the contract. This Wertheimer describes as the “choice” prong of the enquiry.²⁶³ Both elements must be proved before a court can find that the agreement was induced by duress.

This test for duress may be illustrated, I suggest, in the following way (see over):

²⁶² Wertheimer *Coercion* 30.

²⁶³ Wertheimer *Coercion* 30.



Certain features of this test for duress strike one immediately. The test is logically ordered, in that it represents accurately how a duress scenario would play itself out in real life. This was, of course, a problem of Wessels's formulation, where the elements were arranged in such a way that they were disorganised and confusing. In the enquiry, the conduct of the aggressor is assessed, and, thereafter, the conduct of the victim. So, significantly, the two-pronged test for duress is neither wholly plaintiff nor wholly defendant oriented; rather, the conduct of both the aggressor and the victim must come under the microscope before a court may find that a case of duress has been established. In this sense, the test satisfies the need, under the common law, to balance the interests of the two parties to the contract, a need that is emphasised by the equivalent constitutional requirement of proportionality. The test is designed to allow the judicial officer to marshal the material facts found proved in an ordered, common-sense fashion, minimising the possibility of duplication or confusion. The structured nature of the test, if applied consistently, will hopefully allow for greater legal certainty and stability as far

as judicial decision-making in duress cases is concerned. The final point that should be made about this test is that it does not limit the doctrine of duress to a specific set or type of threat, nor does it distinguish between the nature of the potential harmful occurrence. The test does not apply only to threats to the person; there is no differentiation between threats to person and threats to property; and the test opens the way for the development of a doctrine incorporating economic duress.

Each of these two legs of the test for duress will be examined in detail in the two chapters that follow.

Chapter Six

The Proposal Enquiry

“Wicked meaning in a lawful deed.”

William Shakespeare *All's Well that Ends Well* III vii 45

6.1 Outline

In this chapter the first leg of the test for establishing duress as a cause of action will be discussed.¹ This first stage is known as the proposal enquiry. The spotlight falls on the proposal that one party puts to the other at the pre-contractual stage. Two requirements need to be proved here. First, there must be proof that a threat was made. A threat will be defined, and distinguished from other forms of proposal, such as requests, warnings and offers. The debate concerning the identity of the party who makes the threat will be discussed. Secondly, it must be shown that the threat was illegitimate or improper. The nature of the test of illegitimacy in the contractual sphere will be discussed in a general sense. The relevance of the doctrine of abuse of rights to the enquiry will also be considered. Several common forms of threat will then be analysed in the light of the general test, to contextualise the application of the test. These are threats to the person, threats to property, threats of civil and criminal process, and threats to economic interests.

6.2 A threat

6.2.1 Introductory definition

The defining feature of a cause of action in duress is the fact that one party to the contract made a threat during the negotiations leading up to the conclusion of the contract. In the first place, the existence of a threat distinguishes duress from other forms of commercial pressure. In the marketplace there are innumerable forms of pressure (eg the relative positions and powers of the parties; the principles of supply and demand) that have an important bearing upon contractual arrangements. But contracts concluded as a result of such pressures are not normally voidable: commercial actors are fully entitled

¹ For the full test, see the diagram at 5.5.1 above.

to drive a hard bargain, and “[n]o bargain will be upset which is the result of the ordinary interplay of market forces”.² Secondly, it is the existence of a threat that distinguishes duress from fraud, undue influence, or any other form of bad faith conduct *in contrahendo*. That being the case, it is important to try to define what a threat is. Although the word “threat” is widely used and vaguely understood in common speech, giving the word a precise technical meaning is by no means easy. There are a number of ways in which the term “threat” is used in ordinary social discourse.³ We can talk about an animal or the weather “posing a threat” to our interests. A person can pose a threat to us, even though that person has no intention of harming us at all (for example, an inexperienced driver may pose a threat to other road users). But for the purposes of this discussion, I am not referring to the term “threat” in this broader colloquial sense. In the context of this study, it is necessary to analyse the narrower situation where someone intentionally threatens another in order to achieve certain ends. A useful starting point is the definition given by Smith:⁴

“A threat is a proposal to bring about an unwelcome event unless the recipient of the proposal does something (eg enter a contract), where the proposal is made because the event is unwelcome and in order to induce the recipient to do the thing requested.”

The first thing one gleans from this definition is that a threat is a type of “proposal”: one party proposes something to the other. The definition then goes on to identify certain characteristics that make a “threat” a unique or particular type of proposal. First of all, a person making a threat proposes to bring about a certain state of affairs if the recipient fails to conduct him or herself in a particular way (for example, a certain event will occur if the recipient fails to sign a contract). The recipient is therefore faced with a choice: either sign the contract, or face the consequences. But (significantly) the choice is not a palatable one, in that the consequences of the refusal (here, choosing not to sign) will be unwelcome or harmful in some way. Furthermore, the person making the proposal (a) intentionally makes the potential consequences of refusal unwelcome (b) in order to induce the recipient to choose

² *Lloyd’s Bank Ltd v Bundy* [1975] QB 326 at 336. Cf the views of Lord Diplock in *Universe Tankships Inc of Monrovia v ITWF* [1983] AC 366 at 384D that ordinary commercial pressure is an accepted feature of the law of contract.

³ For a discussion of this point see Gunderson “Threats and Coercion” (1979) 9 *Canadian Journal of Philosophy* 247 at 256.

⁴ “Contracting Under Pressure: A Theory of Duress” (1997) 56 *Cambridge LJ* 343 at 346. Another definition is that given by the German Federal Supreme Court or Bundesgerichtshof (BGH 7 June 1988, NJW 1988, 2599 at 2600-1): “Threat is the announcement of future harm, on the occurrence or non-occurrence of which the person making the threat asserts to have influence, and which is to be realized unless the person subjected to the threat makes the declaration of intention which is desired by the person making the threat.” The translation is that of Markesinis *The German Law of Obligations Vol 1* 209-10.

the option that the proposer wishes (in our example, to induce the recipient of the proposal to sign a contract). Classic examples of a threat would be: “Unless you sign this document I will get you killed”,⁵ or a threat to have one’s house burnt down or a valuable picture slashed if one does not sign a contract of lease.⁶ Although a threat will usually be explicit, it need not be made expressly: in certain circumstances it may be implied from words, silence or conduct.⁷

6.2.2 Threats distinguished from other types of proposal

Perhaps the best way to refine our understanding of a threat is to contrast it with other types of proposal. First, a threat can be distinguished from a request. A request involves one party simply asking another whether that person might consider performing some act. A request is often cast in the form of a question, rather than a statement. There is no pressure to perform, and there are no unwelcome consequences that may flow from a rejection of the request. Requests are usually welcome, rather than menacing proposals. It is a well-known principle that a request has no legal standing in the law of contract.⁸

Secondly, a threat may be distinguished from a warning. A warning is designed to notify or alert a person that an unwelcome event will occur if a particular course of conduct is (a) obstinately pursued or (b) not pursued. While it postulates unwelcome consequences, it differs from a threat in a number of ways.⁹ A warning is not conditional in the binary sense that a threat is conditional; it has more the character of a prediction. Giving a warning could also be an admirable thing to do: it gives the other

⁵ This was in fact one of the threats allegedly made in the remarkable case of *Barton v Armstrong* [1976] AC 104. See the majority judgment at 115D. Another threat allegedly made was: “Unless Landmark buys my interest in Paradise Waters (Sales) Pty Ltd for 100,000 dollars and the company repays 400,000 dollars owing to me and you buy my shares for 60 cents each I will have you fixed.” (At 114F). Barton is also alleged to have said: “I am of German origin and Germans fight to the death. I will show you what I can do against you and you had better watch out. You can get killed.” (At 114A).

⁶ Both examples were specifically used by Kerr J in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti (The Siboen and the Sibotre)* [1976] 1 Lloyd’s Rep 293 at 336.

⁷ In South Africa see *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 828H; *Hotz v Standard Bank* 1907 Buch AC 53 at 64; *R v Zonele and others* 1959 (3) SA 319 (A) at 329; *S v Mbele* 1963 (1) SA 257 (N) at 260; *S v Gokool* 1965 (3) SA 461 (N) at 464-5. In other jurisdictions see *Williams v Bayley* (1866) LR 1 HL 200; *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 at 395; *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; *Restatement, Second, Contracts* §175(a); Gorr “Toward a Theory of Coercion” (1986) 16 *Canadian Journal of Philosophy* 383 at 389; Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 210.

⁸ See *Efroiken v Simon* 1921 CPD 367; *Driftwood Properties (Pty) Ltd v Maclean* 1971 (3) SA 591 (A).

⁹ For a fuller discussion, see Smith “Contracting Under Pressure: A Theory of Duress” (1997) 56 *Cambridge LJ* 343 at 346-7. See also Beatson *The Use and Abuse of Unjust Enrichment* 118. For an example of a warning, rather than a threat, see *Sievers v Bonthuys* 1911 EDLD 525.

person an opportunity to remedy their situation. It is meant positively, in that it gives the other person a second chance. But the most important difference between a threat and a warning is the key player, or the driving force in each scenario. Where a threat is made, the key player is the person making the threat. That person directs the process; the power to bring about the unwelcome consequence where a threat is made lies in the hands of the person making the threat. But where a warning is made, the person giving the warning does not intend to be in control of the situation, nor does that party take effective responsibility for the potential consequence. (For example your financial adviser might warn: “If you don’t pay your mortgage, the bank is going to foreclose.”) Once a warning is given, it is incumbent upon the person who has received the warning to rectify the situation. If the person fails to take corrective action in response to a warning, and the inevitable consequence ensues, he or she will only have him or herself to blame.

Thirdly, a threat can be distinguished from an offer. The difference between threats and offers is the subject of a great deal of philosophical literature, for the underlying philosophical difference between a threat and an offer is that a threat is potentially coercive, whereas an offer is not.¹⁰ There are two principal differences between a threat and a “normal” contractual offer. For a start, a threat is unwelcome, and puts the other person in a dilemma situation, whereas an offer is usually welcome. “[O]ffers *augment* a party’s alternatives, whereas threats *reduce* them.”¹¹ An offer is therefore a positive thing that increases one’s options, and provides the potential for one to improve one’s position, whereas a threat is negative, in that it limits one’s options, and provides the potential for a deterioration of one’s position. Offers are usually made in the context of a genuine negotiation process, whereas threats limit or even destroy the possibility of negotiation. The usual litmus test to determine whether the proposal is unwelcome or not is if it promises to leave someone worse-off relative to some baseline. Wertheimer states:¹² “A *threatens* B by proposing to make B *worse off* relative to some baseline; A makes an *offer* to B by proposing to make B *better off* relative to some baseline.” Although there is

¹⁰ Some of the significant philosophical discussions on the relationship between threats, offers and the concept of coercion are: Held “Coercion and Coercive Offers” in Pennock and Chapman (eds) *Coercion: Nomos XIV* 49 at 51ff; Frankfurt “Coercion and Moral Responsibility” in Honderich (ed) *Essays on Freedom of Action* 65ff; Bayles “Coercive Offers and Public Benefits” (1974) 55 *The Personalist* 139; Lyons “Welcome Threats and Coercive Offers” (1975) 50 *Philosophy* 425 at 429ff; Haksar “Coercive Proposals” (1976) 4 *Political Theory* 65; Benditt “Threats and Offers” (1977) 58 *The Personalist* 382; Gunderson “Threats and Coercion” (1979) 9 *Canadian Journal of Philosophy* 247; Zimmerman “Coercive Wage Offers” (1981) 10 *Philosophy and Public Affairs* 121 at 125; Wertheimer *Coercion* 202ff.

¹¹ Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 212. Others who take this view are Bayles “Coercive Offers and Public Benefits” (1974) 55 *The Personalist* 139; Benditt “Threats and Offers” (1977) 58 *The Personalist* 382; Gunderson “Threats and Coercion” (1979) 9 *Canadian Journal of Philosophy* 247 at 257; Smith “Contracting Under Pressure: A Theory of Duress” (1997) 56 *Cambridge LJ* 343 at 347.

¹² Wertheimer *Coercion* 204.

much polemic in philosophical circles about what test should be used to determine the baseline as far as the broad philosophical concept of coercion is concerned,¹³ these debates need not detain us here, since we are interested in the narrower question of establishing what constitutes a threat for the purposes of the legal doctrine of duress. In its simplest form, the baseline calculation here involves comparing the situation that the victim is in now that the proposal has been made, with the situation in which the victim could have expected to find him or herself in had the proposal not been made. This is known as an expectation baseline.¹⁴ Bayles formulates the test in the following way:¹⁵

“First, one compares the desirability of the decision-maker’s choice situation before and after a proposal has been made to him. If the proposal makes it more desirable, an offer has been made. If the proposal makes it less desirable, a threat has been made.”

Although the matter is controversial in philosophical circles, it is submitted that this test is a moralised or normative test, in that it requires the court to evaluate the desirability of the choice situation of the recipient of the proposal against the backdrop of accepted moral, legal and commercial standards, rather than simply relying on the subjective or phenomenological perceptions of the recipient of the proposal, or on a totally binary or objective test that does not take into account relevant facts and circumstances.¹⁶ The test therefore does give the recipient an opportunity to have his or her say, but at the end of the day the decision will be based upon what a person in that position’s reasonable expectations would be upon receiving such a proposal, taking any relevant standards of positive morality into account.

The second (related) difference between a threat and an offer is that a threat is bi-conditional.¹⁷ Whereas both threats and offers are designed to induce the other party to do something (eg enter a

¹³ Some important contributions to the philosophical debate are Nozick “Coercion” in Morgenbesser, Suppes and White (eds) *Philosophy, Science and Method: Essays in Honour of Ernest Nagel* 440; Westen “‘Freedom’ and ‘Coercion’ — Virtue Words and Vice Words” 1985 *Duke LJ* 541; Wertheimer *Coercion* 204-221; Bayles “Coercive Offers and Public Benefits” (1974) 55 *The Personalist* 139; Trebilcock *The Limits of Freedom of Contract* 79ff.

¹⁴ Westen “‘Freedom’ and ‘Coercion’ — Virtue Words and Vice Words” 1985 *Duke LJ* 541 at 581. Cf the view of Stewart “A Formal Approach to Contractual Duress” (1997) 67 *University of Toronto LR* 175 at 183, who writes from the perspective of the law of contract, rather than from a purely philosophical perspective.

¹⁵ Bayles “Coercive Offers and Public Benefits” (1974) 55 *The Personalist* 139 at 141.

¹⁶ The debate about the whether the test ought to be moralised or non-moralised is reviewed in Wertheimer *Coercion* 204ff; in Westen “‘Freedom’ and ‘Coercion’ — Virtue Words and Vice Words” 1985 *Duke LJ* 541 at 569ff; and in Stewart “A Formal Approach to Contractual Duress” (1997) 67 *University of Toronto LJ* 175 at 214ff. All three advocate a moralised approach.

¹⁷ See Frankfurt “Coercion and Moral Responsibility” in Honderich (ed) *Essays on Freedom of Action* 66; Haksar “Coercive Proposals” (1976) 4 *Political Theory* 65 at 66; Wertheimer *Coercion* 202; Gorr “Toward a Theory of Coercion” (1986) 16 *Canadian Journal of Philosophy* 383 at 391.

contract) an offer is usually unconditional¹⁸ in the sense that no factual consequence or alteration of state will flow from the election to reject the offer. The recipient has simply elected not to exercise his or her power to create a legal relationship with another, and the two parties go their separate ways. But where a threat is made, a refusal will not mean the end of the relationship. A condition is attached to the proposal — a failure to agree will mean the imposition of a sanction.¹⁹

Upon reading these descriptions, these tests and exercises might sound rather complicated, but they are really just attempts to give some structure to the intellectual process of determining what is a threat and what is an offer. At the end of the day it is submitted that the test is really a pragmatic one, and an experienced judicial officer who is used to evaluating matters of fact and evidence will not, generally speaking, have too much difficulty in determining whether or not a threat has been made.²⁰ To sum up: in simple terms, a threat is an unwelcome proposal that is intentionally made to coerce the recipient to choose a course of action that the proposer desires.

6.3 The nature of the threat

6.3.1 The threat must be illegitimate or improper

Determining whether or not a threat has been made will not be sufficient to satisfy the first enquiry of the test for duress. This is so because only a specific type of threat will satisfy the proposal enquiry. The nature of the threat therefore becomes fundamentally important. The second requirement of the proposal enquiry is that the threat must also be one which is illegitimate or improper. This requirement has been emphasised in South Africa as well as other jurisdictions. For example, in the South African case of *Malilang v MV Houdda Pearl*²¹ Corbett JA referred to the concept of “improper pressure”.²² In England, in *Barton v Armstrong*²³ Lords Wilberforce and Simon said that “the pressure must be one of

¹⁸ The term “unconditional” was used in connection with a contractual offer in *Hayter v Ford* (1895) 10 EDC 61 at 69. See Christie *Contract* 32ff.

¹⁹ Westen “‘Freedom’ and ‘Coercion’ — Virtue Words and Vice Words” 1985 *Duke LJ* 541 at 576 says simply: “A ‘threat’ is a conditional promise to leave the recipient worse off than he ought to be left under the circumstances.”

²⁰ See, for example, *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC) at 440.

²¹ 1986 (2) SA 714 (A).

²² At 730E. His lordship had used the same term previously in *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305H. See also Selke J in *Smith v Smith* 1948 (4) SA 61 (N) at 66; Kerr *Contract* 318.

²³ [1976] AC 105.

a kind which the law does not regard as legitimate”,²⁴ and in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*²⁵ Lord Scarman referred to the need to prove “the illegitimacy of the pressure exerted”.²⁶ The American *Restatement, Second, Contracts* requires proof of an “improper threat”.²⁷ Both the German BGB and the NBW of the Netherlands require that the threat be “unlawful”.²⁸ Consequently, there is a need to distinguish between illegitimate and acceptable forms of pressure for the purposes of determining whether the threat could provide the genesis for a duress claim.

6.3.2 Defining the terms “illegitimate” and “improper”: a general theory

If the terms “illegitimate” or “improper” are commonly used to describe the types of threat that are relevant to the doctrine of duress by both the courts and academic commentators around the world, then a critical question that must be investigated is how (in general terms) we determine that a threat is “illegitimate”? Or: what do we mean by the term “improper”?

It has already been shown in Chapter 4 that in South African law, following the lead of both the Roman and Roman-Dutch authorities, the illegitimacy or impropriety of a threat is assessed by measuring the conduct of the aggressor in making the threat up against the *boni mores*. In both Wessels’s treatise and in *Broodryk*’s case, it is stated unequivocally that “the threat or intimidation must be *contra bonos mores*”.²⁹ The importance of this general test to the duress enquiry was reinforced in the recent case of *BOE Bank Bpk v Van Zyl*,³⁰ where Brand J, on behalf of a full bench of the Cape Provincial Division of the High Court, said:³¹

²⁴ At 121F.

²⁵ [1983] AC 366.

²⁶ At 400C. See also *Dimskal Shipping Co SA v International Transport Worker’s Federation* [1992] 2 AC 152 at 168C (per Lord Goff). The same is required in Canadian law (see *Gordon v Roebuck* (1990) 64 DLR (4th) 568 at 572-3) and in Australian law (see *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46).

²⁷ *Restatement, Second, Contracts* §175(1).

²⁸ §123(1) BGB: “Where a person has been induced by ... unlawful threat to make a declaration of intent, that person may avoid the statement in question.” The original German term is “widerrechtlich”. Art 3.44(2) NBW: “A person who induces another to execute a certain juridical act by unlawfully threatening him....”

²⁹ Wessels *Contract* §1167 and 1186; *Broodryk v Smuts NO* 1942 TPD 47 at 52.

³⁰ 2002 (5) SA 165 (C).

³¹ At 180D (my emphasis). This is a translation of the original Afrikaans: “Soos ek die regsposisie verstaan bly die vraag ... of die bedreiger se optrede, alles inaggenome, *contra bonos mores* was. Anders gestel, bly die vraag steeds of die bedreiger se optrede in die omstandighede ... volgens die regsgevoel van die gemeenskap.”

“As I understand the legal position the question remains whether the behaviour of the person making the threat, all things considered, was *contra bonos mores*. Put in another way, the question remains whether, in the circumstances, the conduct of the person making the threat is unacceptable according to the legal convictions of the community.”

The references to concepts like the *boni mores* and “the legal convictions of the community” have led some commentators to suggest that the terms “illegitimate” and “improper” mean no more than that the threat must be wrongful, in the sense of the doctrine of wrongfulness that is well-known in South African private law. This submission reflects the arguments to this effect made by Olivier in the 1960s,³² as well as Van der Merwe and Van Huyssteen in the 1980s.³³ In other words, according to this view, unless the aggrieved party can show that the threat was wrongful, that party will fail to satisfy the first enquiry of the test for duress. The first question that needs to be investigated is whether or not it is appropriate to have recourse to the doctrine of wrongfulness, as it is known in South African law, to define what sort of threats may be actionable for duress in this country. (It is worth noting that the use of the term wrongfulness has also occasionally been used by certain authorities in other jurisdictions, although it must be pointed out that the term has been used in a more neutral terminological sense by them, as a synonym for illegitimacy, rather than as an invocation of the doctrine of wrongfulness that we know and apply in South African law.³⁴)

onaanvaardbaar was.”

³² See Olivier “Onregmatige Vreesaanjaging” (1965) 28 *THRHR* 187 at 188ff. See also Glover “The Theoretical Basis for the Existence of Remedies for Contractual Duress” 1997 *Responsa Meridiana* 46; *LAWSA* Vol 5(1) §152(b); Van der Merwe *et al Contract* 87.

³³ Van der Merwe and Van Huyssteen “Improperly obtained consensus” (1987) 50 *THRHR* 78 at 79. I have however already argued at 5.2.1 above that I do not believe their view that wrongfulness forms the entire theoretical basis of the duress doctrine, and other doctrines of bad faith conduct *in contrahendo*, is correct. For a dedicated analysis of the wrongfulness principle in South African private law, see Van der Merwe and Olivier *Die Onregmatige Daad*. For comments about the potential relevance of delictual principles to cases of duress, misrepresentation and undue influence, see Van der Merwe “Aspects of the Law of Contractual Torts” (1978) 85 *SALJ* 317.

³⁴ Any references in quotes to the term “wrongfulness”, particularly by common law writers, must be understood in this way, rather than as an invocation of the classic delictual test of wrongfulness known in South African law. For examples, see Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 354-355; Rafferty “The Element of Wrongful Pressure in a Finding of Duress” (1980) 17 *Alberta LR* 431; Ogilvie “Wrongfulness, Rights and Economic Duress” (1984) 16 *Ottawa LR* 1. Wertheimer *Coercion* 172 states that the threat must be “wrong”, and Smith “Contracting under Pressure: A Theory of Duress” (1997) 56 *Cambridge LR* 343 at 345 refers to the “wrongdoing principle”. The term wrongfulness has also been utilised by the compilers of the Principles of European Contract Law, in preference to the term unlawful. See Article 4:108 of the Principles, and Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 432.

6.3.2.1 Excursus: the test for wrongfulness

6.3.2.1.1 The test generally

The test for wrongfulness has been articulated and refined most thoroughly in the law of delict.³⁵ Wrongfulness is determined by measuring the conduct against the general criterion or norm of objective reasonableness.³⁶ The decision whether conduct is objectively unreasonable or not is taken by measuring the conduct against the standards set by the *boni mores*,³⁷ or the “legal convictions of the community”,³⁸ the term *boni mores* being synonymous with the term “the legal convictions of the community”. This general test for wrongfulness developed under the common law has been endorsed by the Constitutional Court in *Carmichele v Minister of Safety and Security*.³⁹

Of course, a test of reasonableness without more is rather vague. As a result, the law has developed a particular framework within which the wrongfulness enquiry usually plays itself out, in order to refine

³⁵ The law of delict equates to the law of tort in Anglo-American law. We take a generalised approach to the law of delict in South Africa, where all forms of delictual liability are determined according to a number of general elements. This approach is different to Anglo-American law, which is casuistic, and where each tort has its own unique elements and rules. For comment on this distinction see Neethling *et al Delict* 4-5; Van der Walt and Midgley *Delict* 18; *Perlman v Zoutendyk* 1934 CPD 151 at 155ff. The relevance of the test of wrongfulness to the question of duress in contract will be discussed in 6.3.3.2 below.

³⁶ In *Marais v Richard* 1981 (1) SA 1157 (A) at 1168 it was held: “Today the boundaries of wrongfulness are sought in the application of what can be called the test of ‘general reasonableness’.” This is a translation of: “Vandag word die grense van onregmatigheid by ons gesoek in die toepassing as grondnorm van wat die ‘algemene redelikhedsmaatstaf’ genoem kan word.” Other leading cases are: *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596-7; *Schultz v Butt* 1986 (3) SA 667 (A) at 679; *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1053; *SM Goldstein and Co (Pty) Ltd v Cathkin Park Hotel* 2000 (4) SA 1019 (SCA) at 1024. For comment on the element of wrongfulness in general see Neethling *et al Delict* 37ff; Van der Walt and Midgley *Delict* 54ff; Boberg *The Law of Delict* 30ff. For a recent analysis see Du Bois “Getting wrongfulness right: A Ciceronian attempt” in Scott and Visser (eds) *Developing Delict: Essay in Honour of Robert Feenstra* 1.

³⁷ In *Universiteit van Pretoria v Tommie Meyer Films (Bpk)* 1977 (4) SA 376 (T) at 387 it was held: “Wrongfulness is basically determined in the light of the *boni mores*.” This is a translation of: “Onregmatigheid word basies aan die hand van die *boni mores* bepaal.”

³⁸ In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 380 it was held: “[I]n any given situation the question is asked whether the defendant’s conduct was reasonable according to the legal convictions or feelings of the community.” In Afrikaans the term “regsoortuiging van die gemeenskap” was used by Rumpff CJ in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597B. The linguistic criticisms of the term “the legal convictions of the community” by Marais JA in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1053n3 will not be discussed in this work.

³⁹ 2001 (4) SA 938 (CC) at 956-7. As such, Cameron JA’s obiter comments in the Supreme Court of Appeal in *Brisley v Drotosky* 2002 (4) SA 1 (A) at 35 that “[t]he ‘legal convictions of the community’ — a concept open to misinterpretation and application — is better replaced, as the Constitutional Court itself has suggested, by the ‘appropriate norms of the objective value system embodied in the Constitution’” appear, with respect, to misinterpret the Constitutional Court’s submissions on the general test for wrongfulness. Constitutional values do not “replace” society’s legal convictions; they are an important ingredient of society’s legal convictions.

and direct the decision-making process. A court will usually find that conduct was objectively unreasonable (and therefore wrongful) if either (a) the conduct infringed a subjective right of the aggrieved party in some legally reprehensible way, or (b) the conduct constituted a breach of a legal duty owed by the one party to the other that is recognised by law.⁴⁰

The investigation as to whether either a subjective right was infringed or a legal duty was breached in any particular case charges a court with balancing out a number of factors such as the interests of the parties, the relationship between the parties, the circumstances of the case, and any relevant social policy considerations.⁴¹ Ultimately, the decision must reflect public and legal policy, in that it must constitute a value judgment about what justice demands in our society. This is a proportionality exercise that has received the support of the Constitutional Court,⁴² with one important rider to the common law position: the exercise of balancing out the relevant factors must take into account the “spirit, purport and objects of the Bill of Rights”.⁴³ In other words, all the relevant factual issues must be weighed in the light of the fact that South Africa is now a constitutional state, and that the values contained in the Bill of Rights in the Constitution must be considered and promoted as a key factor in the assessment of whether the conduct was wrongful, where these values are relevant to the particular factual enquiry. In the *Carmichele* case Ackermann and Goldstone JJ said:⁴⁴

“Under s39(2) of the Constitution concepts such as ‘policy decisions and value judgements’ reflecting ‘the wishes ... and the perceptions ... of the people’ and ‘society’s notions of what justice demands’ might well have to be *replaced, supplemented or enriched* by the appropriate norms of the objective value system embodied in the Constitution.”

This makes it clear that the Bill of Rights is not solely determinative of the legal convictions of the

⁴⁰ See *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1075; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 380. A full discussion of these tests may be found in Neethling *et al Delict* 47; Van der Walt and Midgley *Delict* 55.

⁴¹ In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 384 it was said: “In determining whether conduct is of such a nature as to be determined unlawful, the Court must carefully balance and evaluate the interests of the concerned parties, the relationship of the parties and the social consequences of the imposition of liability in that particular situation.” See also *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318; Neethling *et al Delict* 39; Van der Walt and Midgley *Delict* 55; Van der Merwe and Olivier *Die Onregmatige Daad* 57ff.

⁴² *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at 957B.

⁴³ In *Faircape Property Development (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C) at 65E Davis J said: “In my view, the determination of the legal convictions of the community on which the test for wrongfulness is based must take account of the spirit, purport and objects of the Constitution.”

⁴⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at 962D (my emphasis).

community.⁴⁵ The values that it espouses are only one category of a set of factors to be taken into account, where necessary, in determining whether conduct accords with the *boni mores*, or is wrongful. Of course, the constitutional values are (where they are relevant) of primary importance to the enquiry. And so if the picture of the *boni mores* developed under the common law now conflicts with Constitutional values, the old will have to be “replaced”. But in all other cases, the values contained in the Bill of Rights will have a “radiating effect”⁴⁶ on the *boni mores*, and will “supplement” and “enrich” our task of assessing what is wrongful and what is objectively reasonable.

6.3.2.2 The relevance of the wrongfulness test for the doctrine of duress in contract?

As stated above, it has been suggested that it might be possible to use the term wrongfulness, and the tests of wrongfulness developed in delict, to define in a more concrete and principled fashion what is meant by the requirement that for the purposes of duress, a threat must be illegitimate or improper. References to the *boni mores* and the legal convictions of the community in the duress cases suggest that this view could potentially be supportable.

However, there are a number of reasons why it is submitted that it is better not to resort to the term wrongfulness in the context of the duress enquiry, and that the terms illegitimate and improper ought to be preferred, and defined on their own terms. First, the term wrongfulness is intrinsically linked with the law of delict, and situations where an aggrieved party is claiming damages for harm suffered as a result of a delictual act. The doctrine of duress, on the other hand, generally concerns the contractual remedy of rescission. It would seem that it would not significantly aid the duress enquiry to have recourse to the particular policy factors or convictions of the community that are generally relevant to determining whether damages should be paid.⁴⁷ Here, the enquiry is slightly different: in what circumstances is an aggrieved party entitled to have a contractual obligation rescinded? Answering this question necessitates examining different policy issues, in a different legal paradigm from delict. This very fact was pointed out by the Supreme Court of Appeal in the recent case of *Brisley v Drotsky*:⁴⁸

⁴⁵ Cf the views of Van der Walt and Midgley *Delict* 59.

⁴⁶ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at 905.

⁴⁷ Of course, the matter will be significant where delictual damages are claimed in circumstances where the aggrieved party has suffered damage as a result of the contractual relationship. But here the remedy is delictual, and so the elements of a delict have to be proved in any event. For example, by way of comparison, see *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 570. See further 10.2.4 below.

⁴⁸ 2002 (4) SA 1 (SCA) at 15A-D (per Harms, Streicher and Brand JJA). This is a translation of the original Afrikaans: “Daar bestaan wesenlike beleidsverskille in die benadering tot kontrakte en dié wat op delikte van toepassing is. In eersgenoemde geval reël die partye hulle regsverhouding vrywilliglik en ag hulle hulself gebonde aan hulle wilsuittinge. Hulle bepaal die aard en omvang van hulle regsverhouding. In die geval van delikte het die partye geen seggenskap in die skep van hulle regsverhoudinge nie en bepaal die gemeenskapsoortuiging of ’n

“There are significant differences between the policy considerations that apply to contract and those which apply to delict. In the former case, the parties establish their legal relationship freely, and consider themselves bound by their declarations of will. They determine the nature and scope of their legal relationship. In the case of delict, the parties have no say in the creation of their legal relationship, and the convictions of the community determine whether a legal relationship exists, and the content thereof.”

For example, as far as the law of delict is concerned, a threat is traditionally considered to be wrongful in very limited circumstances: usually only where the threat is one of serious violence, which could induce significant fear in a person.⁴⁹ On the other hand, where rescission of a contract is concerned, there are numerous other forms of threat that may be considered *contra bonos mores*. A point that must be made at this juncture, but which will be discussed in more detail below, is that it is not only threats that would amount to crimes or delicts that will be considered unlawful for the purposes of rescinding a contract: the nature of the enquiry with regard to the rescission of contracts is different, and goes beyond a test of delictual wrongfulness. While the *boni mores* or the legal convictions of the community remain fundamental to the proposal enquiry in duress cases, the enquiry needs to be based in another guise. In Chapter 5 it was shown that one of the key elements of a contractual arrangement is that it must accord with public policy, and that courts are entitled to assess contracts and contractual negotiations against basic precepts of positive morality.⁵⁰ Most specifically, the contractual principle of good faith is the vehicle through which the *boni mores* are articulated and contextualised in various forms in the law of contract. In fact, in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*⁵¹ Olivier JA stated that the good faith principle is grounded in values of reasonableness, fairness and decency to be found in “the convictions of the community”.⁵² This view was echoed by Davis J in *Mort NO v Henry Shields-Chiat*,⁵³ where his lordship said:⁵⁴ “Like the concept of *boni mores* in the law of delict, the concept of good faith is shaped by the legal convictions of the community.”

To conclude: since the vast majority of duress cases concern the question of rescission, and the

regsverhouding moet bestaan en wat die inhoud daarvan moet wees.”

⁴⁹ See *R v Umfaan* 1098 TS 62 at 67-8; Neethling *et al Delict* 332.

⁵⁰ Over and above the general texts and the discussion in Chapter 5, see Aquilius “Immorality and Illegality in Contract” Part I (1941) 58 *SALJ* 337; Part II (1942) 59 *SALJ* 333; Part III (1943) 60 *SALJ* 468.

⁵¹ 1997 (4) SA 302 (SCA).

⁵² At 319B and 321J. See too *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) at 528 where Van Zyl J said that the *boni mores* concept “is closely linked to the concept of good faith in community relations.”

⁵³ 2001 (1) SA 464 (C).

⁵⁴ At 474J (my emphasis).

nature of the threat must be examined in the light of the contractual principle of good faith, rather than a delictual test, it is submitted that it is preferable to continue to say, generally, that the threat must have been *contra bonos mores*, or illegitimate, or improper, rather than to use the term wrongful. But the more important question remains — how can we more precisely ascertain when a threat is illegitimate or *contra bonos mores*?

6.3.3. Factors to be taken into account in assessing whether a threat is illegitimate or *contra bonos mores*

A number of factors will be relevant to determining whether the threat is *contra bonos mores*. A court might consider: the fact that the threat was made intentionally; the relationship between the parties; any relevant facts and circumstances that put the one party in a position to threaten and intimidate the other party; the nature of the result that flowed from the making of the threat, and any prejudice attached thereto; and the purpose behind the statement. Out of this list of factors, a number of key principles have developed in most developed jurisdictions, which have crystallised and refined the enquiry for courts. These principles were succinctly articulated by Lord Scarman in the *Universe Tankships* case:⁵⁵

“In determining what is legitimate two matters 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.”

First, there is the nature of the threat. It has become settled law that a threat to commit an act that would, if it were to be carried out, constitute a crime or an independent delict will amount to an improper threat for the purposes of the proposal prong. Again, in Lord Scarman’s words, “the law regards the threat of unlawful action as illegitimate, whatever the demand”.⁵⁶ The position is the same in Germany: the Germans use the term “Widerrechtlichkeit des Mittels” to describe this type of improper threat.⁵⁷

On the other side of the spectrum, threatening to do something that one is perfectly entitled to do will not normally constitute an improper threat. There may be situations where one will have a legally

⁵⁵ *Universe Tankships of Monrovia v International Transport Workers Federation* 1983 AC 366 at 401A-B. The test is articulated in Note “Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis” (1968) 53 *Iowa LR* 892 at 914 where it is stated that there is “the necessity for a test which focuses on the relationship between the contractual demand and the threatened action.”

⁵⁶ At 401B-C.

⁵⁷ See Markesinis *The German Law of Obligations Vol I* 210.

recognised right to make a threat. For example, if a debtor has defaulted on payment, one is entirely within one's rights to threaten the debtor with court action unless he or she pays up. But does this mean that if one has a right to make a threat, one's threat can never be *contra bonos mores*? As was shown in Chapter 4, some South African authorities thought so.⁵⁸ However, this is too limited a view of what constitutes an illegitimate threat. In Dawson's famous words:⁵⁹ "No single formula has achieved so wide a circulation in the duress cases as the statement that 'It is not duress to do what there is a legal right to do.' Certainly no other formula is anything like so misleading." It has now become a settled principle in all advanced systems of law, that in some occasional⁶⁰ circumstances a threat of lawful action may constitute an illegitimate threat for the purposes of the duress doctrine. This will be so where the threat was made for an illegitimate purpose.⁶¹ It is here that the nature of the demand, or the end that the aggressor is seeking to achieve, becomes a critical factor in the enquiry. In the words of Justice Holmes: "When it comes to the question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat."⁶² This category of wrongdoing has been described by the name "lawful act duress" in English law,⁶³ and is defined as "Widerrechtlichkeit des Zweckes" in German law, which translates as "illegitimacy of purpose".⁶⁴

The notion that exercising a right for a *mala fide* purpose is illegitimate constitutes a clear invocation of what is traditionally known as the doctrine of abuse of rights. This doctrine stipulates that

⁵⁸ See *Steiger v Union Government* (1919) 40 NLR 75 at 81; Wessels *Contract* §1186; De Wet and Van Wyk *Kontraktereg* 49. This narrow view continues to apply in the American State of Michigan, where the precedent to this effect established in the 19th century case of *Hackley v Headley* 8 NW 511 (1881) retains the support of the State judiciary. See *Myers v United States* 943 F Supp 815 (1996) at 819. This narrow view is criticised by Sarafa "Sign! Or Else: Threats, Economic Duress, and the Voidability of Contracts" (1997) 76 *Michigan Bar Journal* 1084.

⁵⁹ Dawson "Economic Duress — An Essay in Perspective" (1947) 45 *Michigan LR* 253 at 287.

⁶⁰ Beatson *The Use and Abuse of Unjust Enrichment* 134 has stated that the situations in which a threat of lawful action will be considered illegitimate will be "extremely limited".

⁶¹ See Dalzell "Duress by Economic Pressure I" (1942) 20 *North Carolina LR* 237 at 240; Hale "Bargaining, Duress and Economic Liberty" (1943) 43 *Columbia LR* 603 at 618ff; Dawson "Economic Duress — An Essay in Perspective" (1947) 45 *Michigan LR* 253 at 287; Sutton "Duress by Threatened Breach of Contract" (1974) 20 *McGill LJ* 554 at 583 and 586; Rafferty "The Element of Wrongful Pressure in a Finding of Duress" (1980) 17 *Alberta LR* 431 at 432, 449 and 456; Ogilvie "Wrongfulness, Rights and Economic Duress" (1984) 16 *Ottawa LR* 1 at 20; Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto LJ* 201 at 215.

⁶² *Silsbee v Webber* 50 NE 555 (1898).

⁶³ See Beatson *The Use and Abuse of Unjust Enrichment* 133; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 at 719a.

⁶⁴ See Markesinis *The German Law of Obligations Vol 1* 210; Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 443.

if a right is exercised for an improper motive or purpose, then that act will be considered unlawful.⁶⁵ Exercising one's prima facie right for an improper purpose is conduct that offends the legal convictions of the community, and is therefore *contra bonos mores*.⁶⁶ In simple terms, the rationale behind the doctrine is the common-sense view that not all rights are absolute, and that those who are entitled to exercise rights have a duty to exercise them responsibly. As Hohfeld has shown, the word "right" is a "chameleon-hued word"⁶⁷ — it is frequently used in a rather untidy sense to refer to a whole conglomeration of divergent jural precepts.⁶⁸ Hohfeld recognised that it is a fundamental misconception that all jural relations can be described simply in terms of rights and duties. This view detracts from the complex system of legal relationships that have developed in modern society. Some so-called rights have the character of a power, which Hohfeld defines to be the ability a person has to change his or her legal relationships with others.⁶⁹ Such a power is not absolute, but limited: Hohfeld makes it clear that the fact that a person has a power to act (for example, to dam a stream on property that he or she owns) does not necessarily mean that that person will have a legally protected privilege or liberty to exercise the power in every single situation. In some situations that person will have a duty not to exercise that power.⁷⁰ In particular, a person has a duty not to exercise a power that he or she has in situations where the motive behind exercising the power is improper. To continue the example, if the motive behind damming the stream is to prevent the water flowing onto a neighbour's property, thus jeopardising the neighbour's agricultural operations, and compelling the neighbour to sell the farm, this would be an

⁶⁵ For general discussions see *Neethling et al Delict* 112ff; Van der Walt and Midgley *Delict* 92ff; Boberg *Delict* 206ff; Van der Merwe and Olivier *Die Onregmatige Daad* 64ff. The leading analysis of the doctrine is that of Neels "Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskryding van regte en bevoegdhede" Part 1 — 1999 *TSAR* 63; Part 2 — 2000 *TSAR* 317; Part 3 — 2000 *TSAR* 469; Part 4 — 2000 *TSAR* 643, a series based upon Neels's Dr Jur thesis from Leiden entitled *Tussen regmatigheid en onregmatigheid: 'n Ondersoek na die leerstuk van oorskryding van regte en bevoegdhede as uitvloeisel van die korrigerende werking van redelikheid en billikheid in die reg met besondere verwysing na die oorskryding van eiendomsreg en onroerende goedere* (1998). The original thesis was unavailable to me.

⁶⁶ Van der Walt and Midgley *Delict* 93; Neels "Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskryding van regte en bevoegdhede" Part 2 — 2000 *TSAR* 317 at 318.

⁶⁷ To borrow the phrase of Stone *The Province and Function of Law* 116.

⁶⁸ See Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale LJ* 16 and (1917) 26 *Yale LJ* 710. For analysis and comment on Hohfeld's system see Harris *Legal Philosophies* 83; *Lloyd's Introduction to Jurisprudence* 355-358. For indirect use of this approach in the duress context, see Dalzell "Duress by Economic Pressure II" (1942) 20 *North Carolina Law Review* 341 at 364.

⁶⁹ Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale LJ* 16 at 44ff.

⁷⁰ Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale LJ* 16 at 52-3. Corbin "Legal Analysis and Terminology" (1919) 29 *Yale LJ* 163 at 169 adopts the same view.

improper use of the power.⁷¹ In situations where a person acts beyond his or her powers in this fashion, such conduct is not in the interests of society as a whole, and may be considered unlawful. This is the quintessence of the doctrine of abuse of rights, as it is popularly known, or the doctrine of exceeding one's rights, to use what is now considered to be the more accurate description.⁷²

The doctrine that exceeding one's rights can be unlawful has a long history that stretches back to Roman times.⁷³ Although there are passages in the *Digest* that state that exercising a right cannot be unlawful,⁷⁴ these passages are qualified by others that state that anyone that exercises a right for an improper motive will be deemed to have acted unlawfully.⁷⁵ The majority of the leading Roman-Dutch authorities accepted the idea that the power to exercise a right had limits, and these powers could be exceeded in an improper fashion.⁷⁶ Although the matter has never expressly been decided by the Supreme Court of Appeal,⁷⁷ the doctrine appears to have been received into South Africa: there are at least a number of cases where the doctrine appears to have been accepted and applied,⁷⁸ and

⁷¹ The example draws its inspiration from perhaps the most famous "abuse of rights" case: *The Mayor, Aldermen and Burgesses of the Borough of Bradford v Edward Pickles* [1895] AC 587. Hale "Bargaining, Duress and Economic Liberty" (1943) 43 *Columbia LR* 603 at 620 cites the *Pickles* case in discussing the question of unlawfulness in duress cases.

⁷² The majority of authorities in this field now argue that the term "abuse of rights" is a contradiction in terms, for it postulates the unlawful exercise of a right, which makes no sense. One cannot have a right (in any sense of the term) to act unlawfully. The term "excess of right" is preferable, since the doctrine deals with situations where the person has a *prima facie* right, but exercises it for a purpose that is not contemplated by law, and thus acts in excess of his or her right or entitlement, and therefore unlawfully. In continental systems the term "abuse of rights" is used. See Neels "Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskryding van regte en bevoegdhede" Part 3 — 2000 *TSAR* 469 at 487. But this is more because the term has become entrenched than because it is considered to be accurate. In South Africa a fierce debate arose about the suitability of the term in the 1950s and 1960s. Scholtens "Abuse of Rights" (1958) 75 *SALJ* 39 and (later) Van der Merwe and Olivier *Die Onregmatige Daad* 71 rejected the term "abuse of rights", but Devine 1964 *Acta Juridica* 148 argued that the term was acceptable. The common opinion today is that the term "excess of rights" is more accurate, despite the fact that many continue to use the term "abuse of rights". See Neethling *et al Delict* 112n437; Van der Walt and Midgley *Delict* 93; Neels "Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskryding van regte en bevoegdhede" Part 3 — 2000 *TSAR* 469 at 486-8.

⁷³ For a full discussion of the Roman law, see Neels "Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskryding van regte en bevoegdhede" Part 1 — 1999 *TSAR* 63 at 68ff.

⁷⁴ *D* 50.17.55; 39.2.24.12. 43.29.3.2; 50.17.151.

⁷⁵ *D* 39.3.1.12; 6.1.38; 7.1.17.1; 9.2.39.pr. See also Gaius *Institutes* 1.53.

⁷⁶ Voet 39.3.4; Huber *HR* 2.42.21; Schorer ad *Grotius* 2.1.23. The only critic of the doctrine was Groenewegen ad *D* 39.3.1.12. The development of the doctrine in the Middle Ages by (amongst others) the Glossators and Commentators, is traced by Scholtens "Abuse of Rights" (1958) 75 *SALJ* 39 at 40ff.

⁷⁷ Van der Walt and Midgley *Delict* 93; Neethling *et al Delict* 113.

⁷⁸ The most important of these is *Gien v Gien* 1979 (2) SA 1113 (T) at 1121, but see also *Van Eck and Van Rensburg v Etna Stores* 1947 (2) SA 984 (A) at 999; *Herschel v Mrupe* 1954 (3) SA 464 (A) at 485; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 107-8. For a full discussion of the case law, see Neels "Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskryding van regte en bevoegdhede" Part 1 — 1999

commentators are universally of the opinion that the doctrine has a role to play in our legal system.

The one question-mark about the doctrine is the extent of its application in South Africa law. Traditionally the doctrine has been applied almost exclusively to neighbour or nuisance law, where the improper exercise of proprietary rights has been at issue. However, Neels's comprehensive study has shown that although the doctrine is traditionally associated with this branch of the law, it has in fact been employed in a whole host of other areas of private and public law to draw conclusions about the lawfulness of conduct.⁷⁹ It is therefore not accurate to say that the doctrine applies specifically to nuisance law alone.⁸⁰ It is submitted that one can add to the list of areas where the doctrine is relevant, the test for determining when a threat is illegitimate for the purposes of the doctrine of duress.⁸¹ The terminology of the doctrine of abuse of rights is implicit in Bigwood's description of so-called lawful act duress:⁸²

"[I]t is possible to recast the principle applying to so-called 'lawful' threats thus: it is ordinarily not illegitimate, for the purposes of the proposal prong, if a party proposes to do what he or she has an independent legal right or power to do, so long as that right or power is not exercised for a purpose that the law regards as improper, or to extract a benefit which is otherwise ... 'exploitative' in the circumstances."

One can now summarise the position with regard to assessing the illegitimacy or otherwise of threats: (a) a threat to commit an act that would be criminal or delictual were it to be carried out is clearly improper, or *contra bonos mores*. But in addition (b) a *prima facie* lawful threat may also be adjudged

TSAR 63 at 76n96.

⁷⁹ Neels "Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskryding van regte en bevoegdhe" Part 1 — 1999 TSAR 63 at 76-8. A few (of the many) areas that he mentions are unlawful competition; defamation (where it has been used to determine the boundaries of defences like privilege and fair comment); malicious prosecution; the exercise of public powers; corporate law (especially the "piercing the veil" doctrine) and even in a number of contract cases. As far as contract cases are concerned, see *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) at 215; *FW Knowles (Pty) Ltd v Cash-In (Pty) Ltd* 1986 (4) SA 641 (C) at 657-8; *LTA Engineering Co v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 770B-C. Christie *Contract* 442-5 may be consulted on the question of illegality of purpose in South African contract law generally.

⁸⁰ This view is also held by Neethling *et al Delict* 113n449; Van der Walt and Midgley *Delict* 94. Contra Boberg *The Law of Delict* 206.

⁸¹ In fact, Olivier "Onregmatige Vreesaanjaging" (1965) 28 *THRHR* 187 has shown that the doctrine has been applied to this area since Roman times, even if this fact has not been coupled, in a terminological or principled sense, with the doctrine of abuse of rights. The importance of the doctrine of abuse of rights to the duress enquiry has been highlighted by Litvinoff "Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion" (1989) 50 *Louisiana LR* 1 at 93. The French courts have specifically referred to the doctrine to resolve questions of illegitimacy. See Cass.civ.3e, 17 January 1984, Bull.civ III no.13, cited by Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 439.

⁸² Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto LJ* 201 at 217.

to be illegitimate if the goal that the person making the threat seeks to achieve (i) bears no relationship at all to the true goal which the exercise of that right or power is designed to achieve; or (ii) is an excessive use of that right or power; or (iii) is designed deliberately and maliciously to exploit a desperate situation in which the other party finds him or herself.⁸³

This extended approach to determining whether a threat is *contra bonos mores* for the purposes of the duress enquiry appears to have become the popular one in South Africa in recent times. It was referred to with approval by Myburgh AJ in the case of *Savvides v Savvides and others*,⁸⁴ and has won the support of several academic authorities.⁸⁵ The most obvious factual example of a situation where a prima facie legitimate threat was declared to be *contra bonos mores* because it was invoked for an illegitimate purpose was the threat in *Broodryk v Smuts*. To refresh the memory, in that case the threat was one made to Broodryk by two military officials during World War Two that he would be interned unless he agreed to sign up for the army. Whilst it was entirely possible in terms of statute for citizens to be interned during the war (and thus, the threat was valid on the face of it), the purpose of the relevant legislation was to have enemies of the State imprisoned. To wield the threat not because the individual concerned was a danger to the State, but as a tool for conscription, was an improper exercise of a legal power, which rendered the threat *contra bonos mores*.⁸⁶

6.4 Species of threat

Thus far I have attempted to develop and discuss in a general sense what it means to make a threat that is illegitimate for the purposes of the duress enquiry in contract. Although this provides a useful overview of what must be taken into account before a threat will be deemed to be improper, the nature of the enquiry is such that each case depends to a large degree on its own facts. That being the case, it is submitted that the best way to refine our understanding of this matter is to investigate a number of classical situations where aggrieved parties have alleged that they have been induced to contract by an improper threat, and to see how the general principles apply to such situations. The species of threat that will be examined are: threats of physical harm, threats to property, threats to institute legal proceedings, and threats of economic harm. These are the most common sorts of threat in duress cases,

⁸³ Cf Wertheimer *Coercion* 268. This third situation is very common in economic duress cases, as will be seen below. See too the salvage cases like *Blackburn v Mitchell* (1897) 14 SC 338.

⁸⁴ 1986 (2) SA 325 (T) at 329I. This test was also cited with approval in the award handed down in *NUM/CSO Valuations (Pty) Ltd* [1999] 2 BALR 168 (CCMA) at 173F-G.

⁸⁵ Van der Merwe *et al Contract* 87; *LAWSA* Vol 5(1) §152(b); Bloch “Duress — Threats of Civil and Criminal Prosecution” 1974 *Responsa Meridiana* 42 at 45.

⁸⁶ *Broodryk v Smuts NO* 1942 TPD 47 at 52-3.

although it should be made clear that this is by no means a *numerus clausus*.⁸⁷

6.4.1 Threats of physical harm

Traditionally, threats of physical harm or violence have been the true province of the doctrine of duress. The fact that threats of physical harm are *contra bonos mores* has been recognised since the days of the Romans. The history here has already been discussed at length, and need not be repeated. Such cases very rarely come to light from a legal perspective, not only because they do not occur very often, but also (if one is realistic) because the person faced with this sort of threat is seldom in a position to litigate and have any resulting agreement struck down. Yet there have been a few cases around the world where this sort of threat has been made, and in each and every case, the relevant court has had no trouble in declaring this sort of threat to be improper.⁸⁸ This fact is further strengthened by s12 of the Constitution, which states that every person has the right to freedom and security of the person, including the right to physical and psychological integrity.⁸⁹

It is not only a threat of physical violence to oneself that is illegitimate; in South African law, a threat to a close relative or family member is also considered to be *contra bonos mores*.⁹⁰ This much is recognised in other jurisdictions as well.⁹¹ With respect, however, there appears to be no justification for suggesting that threats directed against other people, be they friends or even strangers, should be

⁸⁷ In *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 165 Lord Goff said: “I would not think it right, bearing in mind the development of the concept of economic duress, to regard the categories of compulsion for present purposes as closed.”

⁸⁸ The most famous is the Privy Council case of *Barton v Armstrong* [1976] AC 104, which concerned threats to murder the aggrieved party. I have already given examples of the threats made in that case above. In England, see *Scott v Sebright* (1886) 12 PD 21; *Hussein v Hussein* 1938 P 159. The American case of *Rubenstein v Rubenstein* 120 A 2d 11 (1956) involved threats of arsenic poisoning and physical assault by a gang of thugs. In Canada see *Byle v Byle* (1990) 65 DLR (4th) 641 (a son threatened to kill his brother unless his parents agreed to sign over land to him). In South Africa see *Dhlamini v Dhlamini* 1953 NAC 266.

⁸⁹ Section 12 reads: “(1) Everyone has the right to freedom and security of the person, which includes the right — (a) not to be deprived of freedom arbitrarily and without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way. (2) Everyone has the right to bodily and psychological integrity, which includes the right — (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.”

⁹⁰ See *Els E v Bruce, Els J v Bruce* 1922 EDL 295 at 298.

⁹¹ In England see *Williams v Bayley* 1866 LR 1 HL 200 and *Kaufman v Gerson* [1904] 1 KB 591. In Canada see *Saxon v Saxon* [1976] 4 WWR 300, where a threat to kill the aggrieved party’s children was made, and *Byle v Byle* (1990) 65 DLR (4th) 641, where the aggrieved party’s son was threatened with physical violence.

considered any less improper.⁹² The question whether such threats should be considered to be as coercive as threats made to close relatives is a different question that is relevant to the choice enquiry, and so comment on that issue is deferred until the next chapter.

6.4.2 Threats to property

Since the general rule is that a threat to carry out an act that would be criminal or delictual if it were to be committed is *contra bonos mores*, it stands to reason that a threat to harm, destroy or illegally detain one's property should be considered illegitimate for the purposes of the doctrine of duress. The fact that such threats to property are illegitimate is now accepted in all the jurisdictions that have been analysed in this thesis, even if it was not always the case.⁹³ South African law has also apparently reached this point.⁹⁴ The enquiry as to whether the threat is illegitimate in such cases is thus not problematic.⁹⁵ Again, such threats are not terribly common in the contractual context,⁹⁶ although they do appear in the courts occasionally.⁹⁷

An interesting modern example is that which occurred in *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials LLC (The Alev)*.⁹⁸ Vantage Navigation had chartered a ship (the Alev) to a German company (Alsa Schiffahrts GmbH). On board was a consignment of 14500 tonnes of steel, destined for delivery to Suhail and Saud in Muscat in the Arabian Gulf. During the journey the German company Alsa went bankrupt, meaning that company was no longer able to pay the hire costs of the chartered ship. In terms of maritime law, Vantage Navigation as owners were expected to

⁹² Cf the view of Chitty §7-008; Goff and Jones 311.

⁹³ For a long time English law refused to allow a remedy for duress to a party who had been coerced into contracting as a result of threats to property. The leading case was *Skeate v Beale* (1841) 11 Ad & El 983; 113 ER 688. See Beatson "Duress as a Vitiating Feature in Contract" (1974) 33 *Cambridge LJ* 97.

⁹⁴ See *Hendricks v Barnett* 1975 (1) SA 765 (W); Kerr *Contract* 320; *Wille's Principles* 446-7; *LAWSA* Vol 5(1) §152(a).

⁹⁵ What is problematic is to what extent threats of this kind have a coercive effect upon the recipient. Currently the courts in South Africa do not believe that such threats are as coercive as physical threats, and thus require proof of protest in addition to the threat. This controversial matter concerns the choice enquiry, and will be discussed at 7.4.5.3 below.

⁹⁶ They are far more important cases where some non-contractual transfer has occurred under duress. See Chapters 8 and 9 below.

⁹⁷ In Australia see *Hawker Pacific (Pty) Ltd v Helicopter Charter (Pty) Ltd* (1991) 22 NSWLR 289, which concerned a threat unlawfully to detain a helicopter to induce a deal. In the USA see *Murphy v Brilliant Co* 83 NE 2d 166 (1948), which concerned a threat unlawfully to detain a boat.

⁹⁸ [1989] 1 Lloyd's Rep 138 (QB). See Chandler "Economic Duress: Clarity or Confusion?" (1989) 2 *Lloyd's Maritime and Commercial Law Quarterly* 270; Phang "Whither Economic Duress?" (1990) 53 *MLR* 107.

bear the risk of the charter failing, and were bound by maritime law to deliver the consignment to the innocent party that held the bill of lading for the steel, Suhail and Saud. The financial implications were obviously significant for Vantage Navigation. As a result, Vantage Navigation threatened either to delay delivery of the cargo, or even dump it at the closest port, unless Suhail and Saud waived its claims against Vantage Navigation for the demurrage, promised not to arrest the ship, and agreed to pay the port expenses for the ship and discharge costs of the cargo. An agreement to this effect was reached and signed, as Suhail and Saud was desperate to get the steel, and could not afford to wait or take any other time-consuming legal action. After the cargo was discharged, Suhail and Saud repudiated the agreement, alleging it was entered into under duress. As far as the threat was concerned, Hobhouse J held that the threat was clearly an improper one: in terms of maritime law Vantage Navigation was required to deliver the cargo to the holder of the bill of lading at its own expense in such circumstances, and threatening to dump the cargo or demur was therefore an illegitimate threat.⁹⁹

6.4.3 Threats to institute legal proceedings

6.4.3.1 Threats of civil action

As a general rule, threats to litigate or to sue will not be considered illegitimate. This is so for a number of reasons. First, the courts exist precisely to adjudicate upon disputes between private parties where they cannot resolve their own disputes *inter partes*. In terms of s34 of the Constitution, everyone has the right to litigate before a court.¹⁰⁰ So threatening to sue is, in the ordinary course, only a threat to exercise one's civic rights.¹⁰¹ As Sampson AJ said in *Sievers v Bonthuys*:¹⁰² "No person is liable in damages for bringing a civil action against another. The courts are free to all; the only penalty for rash litigation is costs." Secondly, this sort of threat is usually designed to provoke an agreement that will settle a dispute, or will inspire a compromise concerning some debt that is owed. Agreements of this kind, which are usually concluded after a threat to sue is made in a letter of demand, are incredibly common, and are an accepted feature of the practice of law (and indeed, the world of commerce in

⁹⁹ At 146.

¹⁰⁰ Section 34 reads: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

¹⁰¹ See also Chitty §7-035; Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto LJ* 201 at 218.

¹⁰² 1911 EDLD 525 at 532.

general).¹⁰³ Such arrangements are essential in order to ensure the civil system of justice operates effectively. If all civil disputes were to end up in court, the court system would collapse. Furthermore, such compromises could never work if they could too easily be reversed *ex post facto* by simply alleging the impetus for the arrangement had been a threat to sue. Such settlements need to be taken seriously, and need to be enforced. There are thus clear policy reasons that support the general rule that threats to sue are not *prima facie* improper.

But this is certainly not the end of the matter. A threat to sue is a powerful form of threat that could have serious consequences for the recipient, and ought not to be wielded irresponsibly. As a result, it is submitted that this is a situation that is ripe for the application of the doctrine of abuse of rights. If it can be shown that the threat to sue was made for a *bona fide* reason (the person is entitled to claim what is being claimed, or honestly believes that his or her claim is justifiable) then the threat will usually not be illegitimate. But in exceptional cases, where the motive behind making the threat and inducing a compromise is improper or *mala fide*, then a threat to sue may be deemed illegitimate.¹⁰⁴ Dalzell states the general test in the following way:¹⁰⁵

“It should be recognized that the ability which a member of an organized society has to start a lawsuit is not a right, but a power, which is capable of being put to improper ends; and that any abuse of that power is a wrong.... So where a lawsuit is threatened in bad faith by one who is quite conscious that his position is insupportable, there is a deliberate use of the power to initiate litigation for a purpose quite foreign to its proper end; hence the courts here find a wrongful threat.”

This would usually apply in cases where the person making the proposal knows that his or her claim is false,¹⁰⁶ or even worse, extortionate (as in the case of blackmail,¹⁰⁷ where there is usually knowledge that the other party fears negative publicity of sensitive information). It is submitted that if one analyses

¹⁰³ For a recent Australian case where an attempt to have a compromise of this nature rescinded for duress failed, see *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 (FCA).

¹⁰⁴ The leading work on the questions of duress, illegitimacy and threats of civil action is Dawson's series “Duress through Civil Litigation I” (1947) 45 *Michigan LR* 571 and “Duress through Civil Litigation II” (1947) 45 *Michigan LR* 679. See too Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 344ff; *Restatement, Second, Contracts* §176(1)(c). For the English position, see Chitty §7-035.

¹⁰⁵ Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 354-355.

¹⁰⁶ See *Leeper v Beltrami* 347 P 2d 12 (1959).

¹⁰⁷ For a discussion of blackmail, which is a fascinating and complex topic in its own right, see Rafferty “The Element of Wrongful Pressure in a Finding of Duress” (1980) 18 *Alberta LR* 431 at 448ff; Lindgren “Unravelling the Paradox of Blackmail” (1984) 84 *Columbia LR* 670; Wertheimer *Coercion* 90-103.

the South African cases carefully, especially *Salter v Haskins*¹⁰⁸ and *Houtappel v Kersten*,¹⁰⁹ it is evident that the South African courts have been prepared to adopt such a test in cases concerning threats of civil action.¹¹⁰ Those authorities who have suggested that threats to sue are never improper,¹¹¹ must, with respect, not be followed.

6.4.3.2 Threats of criminal prosecution

It was shown in Chapter 4 that the position with regard to threats of criminal prosecution is a matter of some polemic in South African law. It is submitted that there appears to be no good reason why threats of criminal prosecution should be treated any differently from threats of civil action. The general test for determining whether the threat is *contra bonos mores* should apply. Once again, s34 of the Constitution gives people in society the right to have disputes referred to a court for resolution. This includes the power to press charges in criminal cases. The police service and the criminal justice system are put in place precisely to fulfil the constitutional function of investigating and dealing with matters of a criminal nature. This being the case, it seems fair to suggest that threats to invoke one's legal rights, and to have a person prosecuted will not, in the ordinary course of events, be considered illegitimate. Similar policy reasons to those listed in the previous section support this conclusion. From a pragmatic perspective, the criminal justice system would be swamped if there was no mechanism for "settling" at least some criminal disputes privately. If the matter can be dealt with privately and quickly without draining the resources of the state, then this seems sensible, even if the impetus for the settlement comes via a threat that the person may be prosecuted if that person is not prepared to come to some form of arrangement. The fact is that criminal cases are the subject of negotiation all the time: charges are made and then withdrawn; prosecuting authorities decide not to prosecute for various reasons; there is now even a process for the plea-bargaining of criminal matters in South Africa. In the words of D'Oliveira, now Deputy National Director of Public Prosecutions for the Republic of South Africa:¹¹² "In view of the social effects of a public prosecution on a man, his family and his reputation, society may not only regard the action of the creditor as lawful; it may even commend him."

¹⁰⁸ 1914 TPD 264.

¹⁰⁹ 1940 EDL 221. Both these cases were dissected at length at 4.3.4.2.1 above.

¹¹⁰ See Olivier "Onregmatige Vreesaanjaging" (1965) 28 *THRHR* 187 at 201; Bloch "Duress — Threats of Civil and Criminal Prosecution" 1974 *Responsa Meridiana* 42 at 49-50; Glover "The Theoretical Basis for the Existence of Remedies for Contractual Duress" 1997 *Responsa Meridiana* 46 at 58.

¹¹¹ Wessels *Contract* §1186; Christie *Contract* 355-6 and fn30; De Wet and Van Wyk *Kontraktereg* 49.

¹¹² D'Oliveira "Caught Redhanded: Metus and Compounding" (1974) 91 *SALJ* 284 at 289.

But this should not be taken to mean that all threats of criminal prosecution will automatically be lawful. What has been said above will, it is submitted, only apply to those threats that are made in good faith, and are designed simply to ensure that the aggrieved party is compensated for his or her quantifiable losses occasioned by the commission of the crime.¹¹³ Again, invoking the doctrine of abuse of rights, where the person making the threat does so for an improper purpose, then the threat will usually be considered illegitimate. This will occur in situations where the person making the threat either does not know whether a crime has in fact been committed at all, or where there is such evidence, but what is claimed in the settlement is extortionate, in that it exceeds the amount owed, or what the thief stipulates to pay is merely an “indignant guess”¹¹⁴ as to what might have been stolen.¹¹⁵ This is the approach to threats of criminal prosecution that is followed in German law.¹¹⁶ One may draw an analogy here with the doctrine of malicious prosecution in the law of delict.¹¹⁷ According to this doctrine, while it is not generally improper to press criminal charges, it will be *contra bonos mores* where the charge is actuated by malice — ie the person had no reasonable grounds for instituting proceedings.

By taking this view of what constitutes an improper threat of criminal prosecution, I am therefore supporting the approach to the matter that has generally followed in the Transvaal and Natal Divisions of the High Court,¹¹⁸ and which is also adopted by a number of eminent commentators.¹¹⁹ Furthermore, it is worthwhile remembering that this is the approach that has been adopted in the latest reported duress

¹¹³ An early endorsement of this approach in the context of American law may be found in Durfee “Recovery of Money Paid Under Duress of Legal Proceedings in Michigan” (1917) 15 *Michigan LR* 228 at 232 and 235.

¹¹⁴ Per Milne J in *Ilanga Wholesalers v Ebrahim and others* 1974 (2) SA 292 (D) at 297A.

¹¹⁵ Cf the view of Olivier “Onregmatige Vreesaanjaging” (1965) 28 *THRHR* 187 at 202-3; D’Oliveira “Caught Redhanded: Metus and Compounding” (1974) 91 *SALJ* 284 at 289 holds the same view, stating that it must be shown that the creditor is certain of the amount of money or goods taken, and the creditor’s concern is to regain his property, and not make a profit out of the situation.

¹¹⁶ See Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 443 and Markesinis *The German Law of Obligations Vol 1* 210-11, citing the German Federal Supreme Court decision BGH 7 June 1988, NJW 1988, 2599, the judgment of which is reproduced in translation at 227ff.

¹¹⁷ See Van der Walt and Midgley *Delict* 92.

¹¹⁸ *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 33; *Ilanga Wholesalers v Ebrahim and others* 1974 (2) SA 292 (D) at 297H-298A; *Machanick Steel and Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W) at 272C-D.

¹¹⁹ Academic support for this approach may be found in Kerr *Contract* 322 and n432; Christie *Contract* 356-7; Van der Merwe *et al Contract* 87; Joubert *Contract* 108; D’Oliveira “Caught Redhanded: Metus and Compounding” (1974) 91 *SALJ* 284 at 289.

case in South African law, the full bench appeal in the Cape High Court in *BOE Bank Bpk v Van Zyl*.¹²⁰ Those authorities who argue that contracts induced by threats of criminal prosecution are automatically unlawful, and in fact render the purported agreement void for illegality,¹²¹ ought not to be followed. While it is true to say that any agreement that results in the administration of justice being hampered is contrary to public policy, it cannot be argued that all arrangements inspired by a threat of criminal prosecution hamper the administration of justice. First, such settlements actually smooth the task of the criminal justice system, and prevent court rolls from being overwhelmed. Secondly, the principle is that the administration of “justice” should not be hampered, not the administration of “law and order” in its dogmatic sense. If the parties are able to come to an amicable and fair solution, which allows the aggrieved party to be compensated for the loss that he or she has suffered without placing a drain on the finances and time of the state, and which protects the interests of both parties, then this seems an eminently just way of dealing with the problem. But of course, in terms of the general test, if the threat is used for an improper motive: ie to acquire some benefit to which the creditor knows he or she is not entitled, or where the threat is used to settle the matter on the basis of pure guesswork about the amount stolen, then the threat will be considered *contra bonos mores*. The creditor must *bona fide* seek the return of what he or she is owed (whether it be money or property), not use the position of power that they have to make an unjust profit out of the situation.

The same applies to the argument of Corbett J in *Arend v Astra Furnishers (Pty) Ltd*¹²² that a threat of criminal prosecution may generally speaking be unlawful since this sort of conduct amounts to the commission of the crime of compounding. One of the essential elements of the crime of compounding is that the one party agrees “for reward” not to prosecute a crime. In *Du Plooy NO v National Industrial Credit Corporation Ltd*¹²³ Kuper J held that “reward” means something in addition to that which is owed by the person who has committed the crime. If this is the case,¹²⁴ then the criminal principle dovetails perfectly with the test in private law: it will only be threats made for an improper

¹²⁰ 2002 (5) SA 165 (C) at 180.

¹²¹ See Harker “The Effect of a Threat of Criminal Prosecution on Contract” (1977) 40 *THRHR* 139 at 139ff; *LAWSA* Vol 5(1) §152n10.

¹²² 1974 (1) SA 298 (C).

¹²³ 1961 (3) SA 741 (W) at 745-6. This finding was endorsed in *Bobat’s Shoe-Box v Mohamed* 1993 (1) PH H24 (T).

¹²⁴ I am aware that this finding has been criticised in some quarters. See Milton *Common Law Crimes* 212-4; MacLennan “Extra-judicial Settlement of Criminal Cases – or the Sale of Mercy” (1971) 88 *SALJ* 161; Burchell “Criminal Law” in 1961 *Annual Survey of South African Law* 333. As an aside, it should also be pointed out that there is a relatively strong belief, both in the courts and in academic circles, that the crime of compounding is an historical anomaly that does not deserve a place in South African law in any event. See the strong views to this effect expressed by Van Dijkhorst J in *Bobat’s Shoe-Box v Mohamed* 1993 (1) PH H24 (T), which Milton *Common Law Crimes* 205 and 209 endorses wholeheartedly.

or extortionate purpose that will fall foul of the law. With respect, therefore, Corbett J's suggestion that "generally speaking, an agreement of the type under discussion would constitute an unlawful compounding"¹²⁵ is overstated. Only in circumstances where the motive is improper should the agreement constitute an unlawful compounding.

What is one to make of the suggestions by Corbett J in the *Arend* case that one should not just look at the potential pecuniary advantages of the settlement, but also advantages like the coming into existence of a liquidated debt, and clauses in the deed of settlement concerning payment of interest, penalties and forfeiture?¹²⁶ It is submitted that the general test continues to apply. Such clauses are recognised and accepted features of contracts generally, and grant the creditor powers that most people and organisations who contract over matters concerning credit and indebtedness will incorporate into their contracts. Since this is the case, it is submitted that in the ordinary course of events, the fact that such clauses are incorporated into the settlement ought not to render the agreement voidable.¹²⁷ Only if it can be shown that these clauses were inserted for an improper purpose, or with an improper motive in mind should they constitute grounds for a finding that the proposal was illegitimate.

In a number of cases involving threats of criminal prosecution, the threat was made in order to convince a concerned third party (invariably a family member) to enter into the transaction with the aggrieved party. This has usually occurred in situations where the person who stands accused of criminal conduct does not have the wherewithal to pay back what is owed him or herself. In a string of South African cases on the point, it has been held that agreements induced in this way are contrary to public policy, and are therefore void.¹²⁸ With respect, it is submitted that this approach is unjustified, and that these cases ought not to be followed.¹²⁹ Seeing that the general rule is that a threat of harm to a family member can count as a threat for the purposes of the doctrine of duress, there appears to be no reason why such cases should be dealt with outside the bounds of the doctrine of duress where the threat happens to be one of criminal prosecution. Secondly, why should the agreement concluded with a concerned third party be illegitimate in all circumstances? There appears to be no reason why a concerned third person (be it a brother or a father, for example) should not be entitled to enter into such

¹²⁵ At 311G-H.

¹²⁶ At 309D-F. See also *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C).

¹²⁷ Cf the view of Trengove J in *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 35D and D'Oliveira "Caught Redhanded: Metus and Compounding" (1974) 91 *SALJ* 284 at 289-90.

¹²⁸ See *Harris v Executrix of Krige* (1883) 2 SC 399; *Bezuidenhout v Strydom* (1884) 4 EDC 224; *Hotz v Standard Bank* 1907 Buch AC 53; *Wells v Du Preez* (1906) 23 SC 284 [aka *Van der Poel v Du Preez* (1906) 16 CTR 232]; *Oos-Transvaalse Koöperasie v Heyns* 1986 (4) SA 1059 (O). D'Oliveira "Caught Redhanded: Metus and Compounding" (1974) 91 *SALJ* 284 at 289 supports this view.

¹²⁹ Cf the views of Kerr *Contract* 322n432 (on page 323).

an arrangement to protect the interests of the person who stands accused of committing a crime. Such a magnanimous act should conceivably be applauded, rather than condemned. Who can we turn to legitimately for help, if it is not those closest to us? Once again, it is submitted that the general test ought to apply here. Provided that the threat is *bona fide*, and is designed simply to secure repayment of what was stolen, then there is in principle nothing wrong with the agreement being concluded with a concerned third party. But if the threat is designed to extort something extra that is not due out of the third party, then in that situation, the threat will be *contra bonos mores*. The leading English case of *Williams v Bayley*¹³⁰ serves as a perfect example. In that case a son had defrauded a banking institution. The bank came to an arrangement with the father to repay what had been stolen, under an implied threat that if some settlement could not be reached, the son would be prosecuted and (in all likelihood) transported. However, over and above the repayment of the original debt, the bank also induced the father to mortgage his colliery in its favour. Lord Westbury pointed out that the bankers had used the threat “to extort from the father a security which he was not liable for”.¹³¹ The bank had thus acted beyond its powers, and therefore illegitimately.

6.4.4 Threats to economic interests

6.4.4.1 The need for legal development

The South African legal system has not yet evolved to the extent that it recognises (as a matter of principle) the doctrine of economic duress, and that there may be situations where threats that pose some dire economic or patrimonial consequences for the aggrieved party might be actionable.¹³² The position was extensively reviewed in Chapter 4, and need not be repeated. This constitutes a glaring deficiency.¹³³ By rejecting this tenet, the South African law clings stubbornly to its Roman and Roman-Dutch roots, and lags behind other developed jurisdictions, which have recognised that in the modern commercial world, such threats can be just as illegitimate and potentially coercive as threats directed against one’s person or property. In the English case of *Rookes v Barnard*¹³⁴ Lord Devlin summed up

¹³⁰ (1866) LR 1 HL 200.

¹³¹ At 221.

¹³² See *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 (1) SA 780 (T) at 792I-793A; Farlam and Hathaway 369.

¹³³ See too the views of Price “Possible Bases for the Recognition of Economic Duress in South Africa” 2001 *Responsa Meridiana* 71.

¹³⁴ [1964] AC 1129.

the matter perfectly when he said:¹³⁵

“All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of — whether it is a physical club or an economic club or an otherwise illegal club.”

The reluctance of the South African courts to recognise the concept of economic duress, and to limit duress to threats to person and property reminds one immediately of the debate that raged in South Africa concerning the wisdom or otherwise of imposing liability for pure economic loss in the law of delict.¹³⁶ For much of the 20th century it was not considered possible for a plaintiff to institute an aquilian action for pure economic loss in South Africa, the fear being that this would result in indeterminate liability and an uncontrollable increase in litigation, which would in turn place too heavy and unpredictable a burden on day-to-day commerce.¹³⁷ However, in response to developments in other jurisdictions,¹³⁸ and under pressure from commentators,¹³⁹ the Appellate Division finally accepted that aquilian liability could lie in cases of pure economic loss in *Administrateur, Natal v Trustbank van Afrika Bpk*.¹⁴⁰ This development freed up the aquilian action, and has allowed it to play a more suitable role in regulating and imposing delictual liability in the context of the modern commercial world. The fears of indeterminate liability and commerce being hamstrung by burgeoning litigation have been assuaged by the courts treating such claims with circumspection. Conduct that causes pure economic loss is not considered to be *prima facie* illegitimate,¹⁴¹ and additional policy factors will have to be put before a court before the court will accept that the conduct was unlawful in the circumstances.

If this sort of development has successfully occurred in the law of delict, it seems mystifying that we should continue, over twenty years later, to reject the analogy, and say that threats to economic

¹³⁵ At 1209.

¹³⁶ For a general discussion of how our law has developed in this regard see Neethling *et al Delict* 11-12 and 295ff; Van der Walt and Midgley *Delict* 77; Boberg *The Law of Delict* 103.

¹³⁷ See *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185 (T) at 191-2. This view was vigorously defended by McKerron “The Duty of Care in South African Law” (1952) 69 *SALJ* 189 at 195; *Delict* 32-4; “Negligence in Modern Law” (1968) 85 *SALJ* 94 at 96; “Liability for Mere Pecuniary Loss in an Action under the Lex Aquilia” (1973) 90 *SALJ* 1.

¹³⁸ See especially *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

¹³⁹ Most notably Price “The Duty to Take Care — Return to the Charge” 1959 *Acta Juridica* 120 at 144-5; Scott “Nalatige wanvoorstelling as aksiegrond in die Suid-Afrikaanse reg” (1977) 40 *THRHR* 58 and 165.

¹⁴⁰ 1979 (3) SA 824 (A).

¹⁴¹ *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 (4) SA 553 (ZS) at 563; Van der Walt and Midgley *Delict* 77; Boberg *The Law of Delict* 104.

interests are not relevant to the doctrine of duress in contract. If the doctrine of duress is to continue to be limited to threats to person or property alone, then the doctrine is barely going to have a role to play in the law at all, such is the rarity of cases concerning such threats. What makes this even more strange is that this debate is occurring in a contractual context — the traditional stamping ground of economic liability. It is my submission that South African law needs to modernise and to accept that threats of economic harm can be relevant to the proposal enquiry, and can provide initial grounds for a claim based on duress. In this respect the common law doctrine of duress appears to be ripe for development, particularly when one considers the nature of modern commerce, where matters of finance and profit are often the bottom line, and the statistical potential for inducing agreements improperly by making threats that could have a negative effect on the business is far greater than people inducing agreements by putting guns to other people's heads. The limitations currently imposed on the doctrine of duress mean that the door is simply closed on these problems. This cannot be acceptable. In the words of McCardie J in *Prager v Blatspiel, Stamp and Heacock Ltd*:¹⁴²

“The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of fact abnormal as well as usual. It must grow with the development of a nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law.”

This need for development on public policy grounds is of course encouraged in our relatively new system of constitutional supremacy:¹⁴³

“The common law is not trapped within the limitations of the past. It needs not to be interpreted in conditions of social and constitutional ossification. It needs to be revisited and revitalised with the spirit of the constitutional values defined in Chapter [2] of the Constitution and with due regard to the purport and objects of that chapter.”

In modern commerce, a degree of commercial pressure is a standard feature of bargaining. As a result, commercial pressures are considered to be an accepted feature of the way commercial interaction occurs.¹⁴⁴ But, as was submitted in Chapter 5, the question is where to draw the line between legitimate

¹⁴² [1924] 1 KB 566 at 570.

¹⁴³ Per Mahomed DP in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at 897E-F.

¹⁴⁴ See *Afrox Healthcare Ltd v Strydom* [2002] 4 All SA 125 (SCA) at para [12]. In *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303 (CA) at 313 Dillon LJ said: “Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal.”

commercial pressure and illegitimate coercive conduct. There may be situations where using threats of economic harm will have the effect of creating an unjustifiable imbalance in bargaining power between the parties, and will result in transactions being concluded that are blatantly exploitative, let alone economically inefficient and undesirable. In addition, the fundamental importance of s9 of the Constitution (the equality clause) has given further impetus to the need to address problems concerning inequalities in bargaining power in our law of contract. This provides further support for the view that the time is ripe in our law for the recognition that in certain circumstances, commercial pressure in the form of threats can be *contra bonos mores*. While the doctrine of duress may have a long history as one of the legal institutions that is designed to deal with bargaining inequality, failing to recognise that a threat of economic harm is improper and actionable clearly diminishes the potential effectiveness of the doctrine in this regard, especially since it ignores the interests of those vulnerable to commercial exploitation. As I have intimated before, this fact has been recognised for some time now in other jurisdictions, and in these jurisdictions the majority of litigation concerning duress now involves threats of an economic nature. The doctrine of duress has consequently been liberated to play a far more modern, dynamic and economically efficient role in the context of contract formation and modification, rather than being relegated to the status of an esoteric legal footnote. The fear that a recognition of the doctrine of economic duress in South African law would lead to a flood of litigation and indeterminacy in contractual negotiations is, it is submitted, unfounded. The modern test for duress is designed to circumscribe the limits of the doctrine very carefully, and experience in other jurisdictions has shown that duress cases continue to be quite rare, relatively speaking, in the context of the wider corpus of contract litigation generally.¹⁴⁵

The curious thing about the state of the South African law on this point is that despite dicta in cases like *Van den Berg & Kie Rekenkundige Beampptes v Boomprops 1028 BK*¹⁴⁶ that “the principles of economic duress do not form part of our law”¹⁴⁷ (specifically with reference to threats of patrimonial harm that do not concern physical property), the South African courts have adjudicated such claims in the past. But these cases have not been recognised as cases of “economic duress”; ie cases where the threat was exclusively to economic interests. First of all, both the cases of *Hendricks v Barnett*¹⁴⁸ and

¹⁴⁵ Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 383ff points out that the effect of the recognition of economic duress on litigation in America has been far smaller than some early critics had feared.

¹⁴⁶ 1999 (1) SA 780 (T).

¹⁴⁷ At 792I.

¹⁴⁸ 1975 (1) SA 765 (W).

*Kapp v TC Valuta*¹⁴⁹ are examples of situations where a threat of economic consequences was made, even though both these cases are traditionally (but incorrectly) cited as authority for the view that in South African law threats to property (duress of goods) are illegitimate. The agreement described as a “forced” sale in the insolvency case of *Paterson NO v Trust Bank of Africa Ltd*¹⁵⁰ can also be described as an agreement concluded under threats to patrimonial interests.

Secondly, the view expressed in the *Van den Berg* case fails to take into account developments in the more specialised contractual field of employment law. The problem of duress has raised its head in this area of law, particularly in the context of dismissals. Here the threat is not made in its traditional sense (ie with the aim of inducing a new agreement), but is made to induce a resignation. In s186(e) of the Labour Relations Act,¹⁵¹ one of the categories of dismissal is defined as one where “an employee [has] terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.” Despite the fact that the employee has technically agreed to terminate the contract, such coerced resignations are described as a particular type of dismissal — constructive dismissal. The onus rests on the employee¹⁵² to show, in claiming constructive dismissal, that what has transpired between the two parties makes the prospect of continued employment with the employer “intolerable” — in other words, the employer by its conduct has repudiated the contract, and the conclusion can be drawn that the employee could not reasonably be expected to continue with the relationship.¹⁵³ The dismissal will have to be one which was unfair, either substantively or procedurally.¹⁵⁴ In *Jooste v Transnet Ltd t/a South African Airways*,¹⁵⁵ it was held that:¹⁵⁶

¹⁴⁹ 1975 (3) SA 283 (T). Both these cases were discussed at length at 4.3.4.2.2 above.

¹⁵⁰ 1979 (4) SA 992 (A). In this case Trustbank engineered an agreement whereby the purchaser of an attorney’s practice paid over the purchase price not to the former owner, but directly to Trustbank, to whom the owner of the business was indebted. The court found that this was not a transaction that was concluded “in the ordinary course of business” and as a result, constituted a voidable preference that could be reversed under s29(1) of the Insolvency Act 24 of 1936. Trustbank was found to have used the owner’s financial problems, as well as knowledge that he had stolen from his trust fund, to arrange a contract to its benefit.

¹⁵¹ Act 66 of 1995.

¹⁵² *Halgreen v Natal Building Society* (1986) 7 ILJ 769 (IC); *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC) at 638E; *Old Mutual Group Schemes v Dreyer & another* (1999) 20 ILJ 2030 (LAC).

¹⁵³ *McMillan v ARP & P Noordhoek Development Trust* (1991) 2 (3) SALLR 1; *Dallyn v Woolworths (Pty) Ltd* (1995) 16 ILJ 696 (IC) at 700-1.

¹⁵⁴ See s188 of the Labour Relations Act; Grogan *Workplace Law* 109.

¹⁵⁵ 1994 (5) SALLR 71 (IC).

¹⁵⁶ At 76D. The reference to the overborne will theory is, it is submitted, inappropriate, though. For other authorities see *Dalgleish v Ampar (Pty) Ltd t/a Sol Energy* [1995] 11 BLLR 9 (IC) at 16D; Grogan *Workplace Law* 106-9; Landman “Constructive Dismissal” (1993) 2 *Contemporary Labour Law* 97.

“An employee who resigns can only claim that such action was a case of ‘constructive dismissal’ if he can show that the resignation was not freely made but was caused by duress or some form of coercion or pressure or force or threat thereof.”

There are cases in which an employee has been coerced into submitting his or her resignation, or to accept a voluntary severance package, usually because of a threat that he or she will be summarily dismissed if he or she does not.¹⁵⁷ A threat of dismissal is quite plainly neither a threat of physical harm, a threat to property, nor a threat of litigation, but can only be a threat that proposes dire economic consequences for the recipient. The labour tribunals in South Africa have held that threats of summary dismissal to induce a resignation may be illegitimate,¹⁵⁸ which certainly contradicts the view that threats of economic harm are not relevant to the South African duress doctrine.

Before concluding this section, one additional anomaly must be pointed out. As will be seen in Chapters 8 and 9 below, threats with economic implications have been held to be reversible outside the bounds of the law of contract; that is, where a transfer of money or property is unjustly coerced out of a person. These cases are decided under the auspices of the law of unjustified enrichment. Arguing from general principle, it appears to be illogical that while threats of an economic nature may be *contra bonos mores*, and may provide potential grounds for a duress finding in that branch of private law, we should continue to ignore the possibility that threats of dire economic consequences are relevant in the law of contract. From a practical perspective, there are a number of contractual scenarios that deserve attention in this regard. These are: threats of dismissal, strikes and lock-outs, and threats to breach, coupled with contract modification.

6.4.4.2 Threats to dismiss and constructive dismissal

It has already been shown above that there are cases in South African labour law where a threat of summary dismissal, which is designed to induce an employee to resign, can be improper, and can constitute grounds for an action for constructive dismissal under duress. In ordinary circumstances, a threat to dismiss an employee is not *prima facie* unlawful. The power to dismiss is one of the most

¹⁵⁷ See *Unilong Freight Distributors (Pty) Ltd v Muller* 1998 (1) SA 581 (SCA), also reported in [1997] 11 BLLR 1497 (A) and (1998) 19 ILJ 229 (SCA); *Haupt/Feltz Factoring cc t/a Fashion Sellout & Clothing Warehouse* [2000] 11 BALR 1242 (CCMA).

¹⁵⁸ In some cases the employee has been unable to prove that the threat was made. See *Dalgleish v Ampar (Pty) Ltd t/a Sol Energy* [1995] 11 BLLR 9 (IC) at 16-7; *Frye/Glasshopper* [1999] 4 BALR 406 (CCMA) at 408E-F. The cases also go on to require that the traditional requirements developed by Wessels and adopted in *Broodryk*'s case are present. The following labour decisions cite the *Broodryk* requirements: *Schana v Control Instruments (Pty) Ltd* (1991) 12 ILJ 637 (IC) at 642E-G; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC) at 439D; *Dalgleish v Ampar (Pty) Ltd t/a Sol Energy* [1995] 11 BLLR 9 (IC) at 16H-I. See too *NUM/CSO Valuations (Pty) Ltd* [1999] 2 BALR 168 (CCMA) at 173D-G.

fundamental legal powers an employer possesses. But if an employer wields the threat to dismiss for an improper purpose — for example maliciously to urge the employee to resign, where there are no legal grounds for dismissal, or to allow the employer to evade statutory obligations imposed upon him or her in ordinary dismissal cases — then the threat may be considered illegitimate. An example may be found in the case of *Unilong Freight Distributors (Pty) Ltd v Muller*.¹⁵⁹ In this case, the threat of dismissal was made with the purpose of inducing the employee to accept a voluntary retrenchment package, which would thereby allow the employer to circumvent the corrective procedural requirements that have to be complied with where an employee is accused of poor work performance.¹⁶⁰ The improper motive behind the threat made the threat an improper one.

6.4.4.3 Threats to breach and contract modification

The principal realm of economic duress cases is those situations where a threat to breach an original contract is made, which is designed to induce the other party to agree to some modification to the original contract. After the original contract has been entered into, circumstances can change in such a way that the bargaining power of one party appreciates significantly. That party may be tempted¹⁶¹ to use this new advantage to have the original contract modified to his or her benefit. This would occur by the party in the position of relative power threatening to breach the contract (usually by not performing) unless the contract is modified. To give a hypothetical example: A owes B R30 000 under a commercial lease. B is suddenly faced with serious financial problems, and is desperate to get hold of liquid funds to meet its debts. A finds out about this. A then threatens to breach the lease agreement, and not pay any money at all, unless B agrees to reduce the rental from R30 000 to R18 000. Since B is desperate for the cash, B agrees.¹⁶²

¹⁵⁹ 1998 (1) SA 581 (SCA). The case is also reported in [1997] 11 BLLR 1497 (A) and (1998) 19 ILJ 229 (SCA).

¹⁶⁰ At 592A-B. The case was decided under the old labour law regime, where this conduct was described as an “unfair labour practice”, which constituted a constructive dismissal. This type of situation is now regulated by the Labour Relations Act 66 of 1995. See in particular s8 and 9 of Schedule 8 of the Act.

¹⁶¹ Of course, some serious considerations militate against succumbing to such temptation. These include: the dangers of acquiring a reputation for sharp practice, and the potential effects on one’s goodwill in the marketplace; the danger of destroying a long-term contractual relationship with a lucrative potential future; and the danger of legal action being taken as a result of the breach. See Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 238n174.

¹⁶² It should be made clear from the outset of this discussion that since the South African law of contract does not require consideration as an essential element of a contract, the potential application of the pre-existing duty rule of Anglo-American law to this sort of problem, and the debate about the continued relevance of the pre-existing duty rule in such cases, is not relevant to South African law. For the rejection of the element of consideration in South African contract law, see *Conradie v Rossouw* 1919 AD 279; *Christie Contract* 9-12. The pre-existing duty rule requires that agreements that are varied without the existence of fresh consideration are

Since South Africa has little or no legal history with regard to such claims,¹⁶³ it is necessary to turn to comparative sources. As far as continental European systems are concerned, the very general nature of the codified tests for duress, which requires an unlawful threat, has generally always been considered wide enough to include threats to economic interests.¹⁶⁴ However, interestingly enough, this particular legal problem has had little impact upon these jurisdictions.¹⁶⁵ As a result, the leading authorities on this specific area of law are Anglo-American. As far as common law jurisdictions are concerned, the doctrine of economic duress has the longest history in the United States of America.¹⁶⁶ In that country the principle that threats unassociated with harm to person or property may be illegitimate has been recognised for well over a century. There are a multitude of examples from across the states, but probably the most important early case on economic duress, decided by the United States Supreme Court in the 1870s, is *Radich v Hutchins*.¹⁶⁷ Leading cases where the United States Supreme Court

invalid. The origin of this rule may be found in *Stilk v Myrick* (1809) 6 Esp 129; 170 ER 851. In America the pre-existing duty rule has been departed from for some time now. See *Restatement, Second, Contracts* §176 for examples, and for criticism of the rule from an American perspective, see Crocker “Contracts—Modification Agreements: Need for New Consideration; Economic Duress—*Rosellini v Banchemo*” (1975) 50 *Washington LR* 960 and Hillman “Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress” (1979) 64 *Iowa LR* 849 at 851ff. But in England until recently the rule was quite strictly applied, which limited the scope and application of the duress doctrine in such cases. The usefulness of the pre-existing duty rule in English law was questioned in *Williams v Roffey Brothers and Nicholls (Contractors) Ltd* [1991] 1 QB 1. For a discussion of this matter in English law, see Phang “Consideration at the Crossroads” (1991) 107 *LQR* 21; Carter, Phang and Poole “Reactions to Williams v Roffey” (1995) 8 *Journal of Contract Law* 248.

¹⁶³ *Hendricks v Barnett* 1975 (1) SA 765 (W) was a case of economic duress by threatened breach of contract, designed to induce a contractual modification. But it is not recognised as such at the moment.

¹⁶⁴ For confirmation of this fact see Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 437 and the authorities cited there; Kötz and Flessner *European Contract Law Vol 1* 209; Dawson “Economic Duress and the Fair Exchange in French and German Law” (1937) 11 *Tulane LR* 343. In Comment A to Article 4:108 of the Principles of European Contract Law it is stated: “It is not only threats of physical violence or damage to property which constitute wrongful threats. A threat to inflict economic loss wrongfully, eg by breaking a contract, can equally constitute duress.”

¹⁶⁵ For example, Markesinis *The German Law of Obligations Vol 1* 210 states that German law “offers nothing in this area which is such a major topic in English law”. Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 437n328 refer in passing only to one French and one Dutch case.

¹⁶⁶ The Americans initially adopted the English approach to duress, but moved far more quickly to the recognition of economic duress in contract than the English ultimately did. For a discussion of the historical development of the doctrine of duress from its English roots in America, see Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253 at 254ff. Dawson’s leading discussion on economic duress in American law was inspired by the widely and generally framed sections on duress in the codified French and German legal systems, and the experiences of these legal systems with a more broadly framed and general test for duress. Evidence of this continental influence on Dawson’s thinking may be found in his article “Economic Duress and the Fair Exchange in French and German Law” (1937) 11 *Tulane LR* 343, written 10 years before his article on economic duress in America cited above.

¹⁶⁷ 95 US 210 (1877). This case is, strictly speaking, a case of duress in the law of unjustified enrichment. But the principles established in that case had a significant bearing on the development of the law of duress in

adjudicated matters concerning duress by threatened breach of contract in the early part of the 20th century are *Snyder v Rosenbaum*,¹⁶⁸ *Hartsville Oil Mill v United States*¹⁶⁹ and *United States v Bethlehem Steel Corporation*.¹⁷⁰

The other significant jurisdiction that has embraced the doctrine of economic duress is England. The leading English cases on contract modification and economic duress are useful sources to consult, and not only because South African law has an historical affinity with English law. The English cases provide useful illustrations of the scope and application of the basic principles of the modern doctrine of duress. In addition, the modern English cases are also the authorities that, by a process of cross-pollination, have motivated other Commonwealth jurisdictions like Australia¹⁷¹ and Canada¹⁷² to recognise the doctrine of economic duress. Up until the 1960s the English doctrine of duress was as rudimentary as the South African doctrine is today.¹⁷³ The test for duress was undeveloped, and the doctrine was restricted largely to traditional forms of threat to the person.¹⁷⁴ It was only in the 1970s that the courts in England came to adopt the principle that threats with economic consequences may be

contract. This case will be discussed in Chapter 9, where I shall submit there should be no difference between the test for duress in contract and unjustified enrichment in South Africa. The same test is used in both areas of law in America and the Commonwealth nations.

¹⁶⁸ 215 US 261 (1909).

¹⁶⁹ 271 US 44 (1925).

¹⁷⁰ 315 US 289 (1941).

¹⁷¹ See *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323; *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40; *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50; *Musumeci v Winadell (Pty) Ltd* (1994) 34 NSWLR 723; *Deemcope Pty Ltd v Cantown Pty Ltd* [1995] 2 VR 44.

¹⁷² The roots of the concept of duress by threatened breach of contract in Canada lie in what was originally termed the doctrine of “practical compulsion”. See *Knutson v Bourke’s Syndicate* (1940) 4 DLR 641 and *Pieter Kiewit Sons’ Co v Eatkins Construction Ltd* [1960] SCR 361. See Ogilvie “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 *McGill LJ* 289 at 306. This doctrine flowered into a doctrine of economic duress by threatened breach of contract under the influence of the leading English cases. See *Ronald Elwyn Lister Ltd v Dunlop Canada Ltd* (1979) 105 DLR (3d) 684; *Stott v Merit Investment Corp* (1988) 48 DLR (4th) 288; *Gordon v Roebuck* (1990) 64 DLR (4th) 568.

¹⁷³ For a thorough and detailed analysis of the development of the doctrine of duress (especially economic duress) in English law from its early roots to modern times, see Beatson *The Use and Abuse of Unjust Enrichment* Chapter 5. The roots of the doctrine in other Commonwealth jurisdictions are embedded in the English law. For an analysis of the historical development of the doctrine from English roots in Canada, see Ogilvie “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 *McGill LJ* 289 at 290ff.

¹⁷⁴ For an analysis of the traditional position, see Treitel 375; Anson 270; Winder “Undue Influence and Coercion” (1939) 2 *MLR* 97 at 108; Beatson *The Use and Abuse of Unjust Enrichment* 97ff. The leading case was *Skeate v Beale* (1841) 11 Ad & El 983. Suggestions that the traditional approach to duress needed to be reassessed came from Cornish “Economic Duress” (1966) 29 *MLR* 428; Beatson “Duress as a Vitiating Feature in Contract” (1974) 33 *Cambridge LJ* 97.

illegitimate. The doctrine of economic duress was first recognised in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti (The Siboen and the Sibotre)*,¹⁷⁵ a finding that was endorsed by the Queen’s Bench Division in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*,¹⁷⁶ by the Privy Council in *Pao On v Lau Yiu Long*,¹⁷⁷ and by the House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*.¹⁷⁸ The principle that threats to economic interests may be improper has been applied in a number of high-profile cases since then.¹⁷⁹

Economic duress cases are tricky ones, for a number of reasons. First, parties to a contract are fully entitled to vary their original agreement. It is considered to be one of the most fundamental freedoms that contracting parties have. A contractual variation or modification may be desirable for both the parties, as well as being entirely reasonable (even recognised as a practice)¹⁸⁰ in that particular commercial context. Some forms of contract, particularly long-standing contracts like those concerning the performance of work (*locatio conductio operis*), commonly have clauses allowing for re-negotiation and modification of *essentialia*, due to changes in the cost of labour, materials and suchlike. Courts are thus loath to interfere with the exercise of the freedom to vary a contract. Secondly, since it is accepted that in almost every contractual relationship there is some form of inequality, and that some degree of commercial pressure is a natural characteristic of contractual bargaining, the authorities make it clear that for reasons of policy as well as principle, the courts will not easily find that a modification was entered into under economic duress. In fact, cases of economic duress go to the heart of the debate about the substance and the form of the law of contract. The difficulty of adjudicating such cases is eloquently articulated by Bigwood, and I can do no better than quote his analysis:¹⁸¹

¹⁷⁵ [1976] 1 Lloyd’s Rep 293 at 337.

¹⁷⁶ [1979] 1 QB 705 at 719E.

¹⁷⁷ [1980] AC 614 at 636.

¹⁷⁸ [1983] AC 366 at 383E-H (per Lord Diplock) and 400B (per Lord Scarman).

¹⁷⁹ Some of the important cases are *B&S Contracts & Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* 1989 (1) All ER 641 (QB); *Dimskal Shipping Co Ltd v ITWF* [1992] 2 AC 152; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714; *Huyton SA v Peter Cremer GmbH & Co* 1999 (1) Lloyd’s Rep 620; *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] Build LR 530 (QB, Technology and Construction Court).

¹⁸⁰ See *B&S Contracts & Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, where the original contract contained a clause specifically allowing for modification to the cost of a construction contract, and even allowing for cancellation of the contract, in the event of *vis maior* or *casus fortuitus*. The case is discussed at 6.4.4.3.3 below.

¹⁸¹ Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 242. For another insightful analysis of the difficult policy choices faced by judges in such cases, see Ogilvie “Wrongfulness, Rights and Economic Duress” (1984) 16 *Ottawa LR* 1-4.

“[C]ases of economic duress by threatened breach of contract also engage the courts in confronting some of the most basic policy concerns of our law. For it seems that the courts are particularly charged in this context with having to resolve many of the various tensions, competing priorities and dichotomous value choices which are endemic in our modern law of contract: the tension (for example) between the absolute nature of contractual obligations and the need to provide relief in certain circumstances of hardship; the competition (for example) between the priority of promoting responsibility or discipline in the formation of a contract and that of respecting an accommodation which realizes benefits for both contracting parties; and the dichotomy (for example) between certainty in commercial transactions and flexibility. Both can be virtue and vice.”

In economic duress cases, courts accordingly face the very difficult task of balancing out all these policy demands in a suitable fashion. Due to the labyrinthian complexities of modern commerce, as well as the difficult policy choices that are faced by courts in economic duress cases, it is impossible to conceive one binary test for determining when the conduct of the one contracting party in motivating for the modification is illegitimate or not. Each case will invariably revolve around its own facts. But this does not mean that some guidelines cannot be identified. In this regard, one must turn again to general principles, and the general test of illegitimacy.

At first glance, it might appear appropriate to make one’s starting point in economic duress cases the fact that a threat to breach a contract must automatically be deemed illegitimate.¹⁸² A breach of contract is considered to be a form of unlawful conduct for which an aggrieved party has certain remedies. But in duress cases there is no actual breach; a breach is threatened in order to inspire a modification of an original contract. It does not go so far as to constitute repudiation or anticipatory breach, since it is a form of proposal, and does not go so far as being an unequivocal statement of repudiation.¹⁸³ A threat to breach a contract is not commonly considered to be a wrongful act for the purposes of the law of delict, and is not usually actionable on that basis. The better view, which is supported by the bulk of the authorities, is that threats to breach a contract are not illegitimate per se.¹⁸⁴ Rather, the aggrieved party will have to show that the motive behind the making of the threat was

¹⁸² Some leading authorities who have adopted this view are Dalzell “Duress by Economic Pressure I” (1942) 20 *North Carolina LR* 237 at 256; Rafferty “The Element of Wrongful Pressure in a Finding of Duress” (1980) 17 *Alberta LR* 431 at 437; Stewart “A Formal Approach to Contractual Duress” (1997) 67 *University of Toronto LR* 175 at 186.

¹⁸³ On the question of repudiation in South African law generally, see Christie *Contract* 600.

¹⁸⁴ Other authorities that take this view are: *Universe Tankships of Monrovia v International Transport Workers Federation* [1983] AC 366 at 385B; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] 1 All ER 641; *Restatement, Second, Contracts* §176(e); Anson 273; Chitty §7-024 to 7-029; Goff and Jones 329ff; Beatson *The Use and Abuse of Unjust Enrichment* 133; Sutton “Duress by Threatened Breach of Contract” (1974) 20 *McGill LJ* 554 at 572-3. Article 4:108 of the Principles of European Contract Law has also expressly adopted the view that not all threats of breach are unlawful. See Comment B and C to the Article, discussed in Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 446.

objectively unreasonable, and only evidence to that effect will render the proposal illegitimate. This approach is congruent with the view in South African law that pure economic harm is not *prima facie* wrongful, and the courts will require further evidence that the conduct is *contra bonos mores*. To revert to the general test laid down by Lord Scarman in the *Universe Tankships* case, the key question will be: what is the nature of the demand that the threat is being made to support? To put it in another way, is the one party attempting to assert reasonable or legitimate grievances by making the demand, or is that party “fighting dirty” in a commercial sense, and being opportunistic¹⁸⁵ by exploiting his or her bargaining power? Due to the complex policy factors that permeate the enquiry in cases of alleged economic duress, it seems unlikely that a court will find that a modification was improperly induced unless it finds that the demand underpinned by the threat is extortionate, or exploits the circumstances unfairly.¹⁸⁶ This test was nicely articulated in *Hochmann v Zigler’s Inc*,¹⁸⁷ where the court said:¹⁸⁸

“[A] judgment whether the threatened action is wrongful or not is colored by the object of the threat. If the threat is made to induce the opposite party to do only what is reasonable, the court is apt to consider the threatened action not wrongful unless it is actionable in itself. But if the threat is made for an outrageous purpose, a more critical standard is applied to the threatened action.”

A simple example that illustrates the general principle in a very basic way is the well-known American case of *Wolf v Marlton Corporation*.¹⁸⁹ Here the purchaser of a house had been required under the contract of sale to pay an initial deposit — a common and recognised commercial practice, since financial institutions do not often grant lenders 100% mortgage bonds. Once he had received transfer of the property, he demanded that the sellers agree forthwith to repay the deposit. This demand was

¹⁸⁵ The element of opportunism that is inherent in cases where threats to economic interests are made is highlighted by Halson “Opportunism, Economic Duress and Contract Modifications” (1991) 107 *LQR* 649 at 650 and 659.

¹⁸⁶ In taking this approach I differ, with respect, from the approach of Bigwood, who argues that threats of breach should “invariably” or “*prima facie*” be treated as illegitimate, and that the party who made the threat should bear an evidentiary burden of rebutting the presumption of illegitimacy. See Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 251; “Economic Duress by (Threatened) Breach of Contract” (2000) 117 *LQR* 376 at 380. It is submitted that it is preferable to continue to utilise the general test, rather than altering the burden of proof for threats of economic harm. This seems appropriate especially in South Africa, where economic duress has not been recognised; it may be better to stick to a simple test at the start. The general test is also the one that is applied in the courts in England, the Commonwealth and the United States, as will be illustrated in the remainder of this section.

¹⁸⁷ 50 A 2d 97 (1946). For an analysis of the case, see Rafferty “The Element of Wrongful Pressure in a Finding of Duress” (1980) 17 *Alberta LR* 431 at 450-1.

¹⁸⁸ At 100.

¹⁸⁹ 154 A 2d 625 (1959).

coupled with a threat that if the sellers did not agree, the purchaser would immediately re-sell the property “to a purchaser who would be undesirable in our tract, and that the [original sellers] would not be happy with the results”.¹⁹⁰ The Superior Court of New Jersey held that this threat was malicious, involved an abuse of legal remedies, was morally objectionable and was accordingly illegitimate.¹⁹¹ In economic duress cases, the key factors that will usually have to be considered are twofold: (a) how have circumstances changed since the contract was concluded? and (b) how has the party who made the threat responded to the changed circumstances?

The first thing that is characteristic of an economic duress case is that the circumstances that formed the backdrop to the original contract change in some way that skews the balance of power of the original relationship in one party’s favour. For the purposes of simplification, the party making the threat will be described as P, and the recipient of the threat, who is placed in a dilemma situation, will be described as Q. No more needs to be demonstrated at this point than circumstances have changed to a degree that *prima facie* puts P in a position of strength and Q in an adverse position, that leaves Q vulnerable to pressure. (The detailed analysis of the adverse position that Q is in, and the appropriateness of Q’s reaction to the threat, is a matter for the choice enquiry, should the proposal enquiry ultimately be satisfied.) Most often Q is desperate for the contract to be performed, since he or she is faced with a deadline of some sort in terms of another commitment, and would be unable to find a replacement timeously in the event of breach: the contract is at that delicate stage where all the cards lie in the hands of P. The second thing that needs to be assessed is P’s response to the changed circumstances, and whether P conducted him or herself in a fashion that was either deliberately exploitative, or unreasonably opportunistic. This is of course a very general test. So, to refine the enquiry a little, the case law can, broadly speaking, be divided into four general scenarios. The scenarios move progressively from those situations where the impropriety of the threat is flagrant, through to situations where the enquiry is more nuanced, and it is more difficult to find that the threat was illegitimate, finally ending up with situations where a finding that the threat was illegitimate is virtually never made.

6.4.4.3.1 The creation and exploitation of a dilemma situation

First, there may be cases where P is the party to blame for the new circumstances, which P in turn exploits by making a threat of breach to manipulate Q to his or her advantage. In such cases, the conduct of the party that made the threat is doubly objectionable, and deserves censure. An example

¹⁹⁰ At 627.

¹⁹¹ At 630 Freund JA said “fundamental fairness requires the conclusion that his conduct in making this threat be deemed ‘wrongful’”

is the conduct of the lessor in the case of *Hochmann v Zigler's Inc.*¹⁹² Hochmann leased premises from Zigler, in order to run a business. The relationship operated quite happily until the landlord Zigler informed Hochmann that he would not be renewing the lease, and told Hochmann to vacate the premises. Zigler also suggested that Hochmann sell his business, and told Hochmann that if Hochmann found a prospective purchaser, and if he approved of the person, he would give the new purchaser the lease. Hochmann found a purchaser, who agreed to buy the business for \$7800, under the condition that he could secure the lease of the premises. Zigler then changed his tune and told Hochmann he would not give the new person the lease unless Hochmann agreed to pay him \$3500. Bound by his commitments to the sale of his business, and his promise that Zigler would give the new owner of the business the lease, Hochmann entered into the agreement, and subsequently paid the money. Zigler had not only created Hochmann's problem, but then maliciously used it to his advantage to extort an agreement to pay extra money out of Hochmann. The court needed little encouragement to find that this conduct was illegitimate.¹⁹³

6.4.4.3.2 The deliberate exploitation of changed circumstances

Examples of the first scenario described above are quite rare. On the other hand, the second scenario is the most common in economic duress cases. Here the shift in circumstance and bargaining position occurs not as a result of the conduct of P. Rather, the contractual relationship has naturally reached a point where P is in a position to perform his or her obligations, and Q requires performance to occur (either because Q needs the product personally to remain liquid, or needs the product to fulfil contractual obligations to a third party). As a result, Q is, at that point in time, in a vulnerable position. Then an event occurs that jeopardises P's commercial interests under the contract. (There might be a change in the market price of the goods, a currency fluctuation, or P might realise he or she has made an error in calculating the cost of the contract.) This prompts P to try to rectify his or her own problems by exploiting Q's sudden vulnerability at that point in the contractual relationship. P makes a threat of breach that is designed to do one of two things. These are: (i) to shift risks that were expressly or impliedly assigned to P when the contract was concluded, over to Q; or (ii) to acquire new advantages

¹⁹² 50 A 2d 97 (1946).

¹⁹³ Another example is *Aircraft Associates & Manufacturing Co v US* 357 F 2d 373 (1966). Here the government's failure to pay an installment due under a procurements contract left the manufacturer in a financially vulnerable position. This gave the government the opportunity to threaten to default on the contract and to renegotiate a far lower rate for the product. See on this case Sutton "Duress by Threatened Breach of Contract" (1974) 20 *McGill LJ* 554 at 574. See too *D&C Builders v Rees* [1966] 2 QB 617, where a failure to pay a debt of £482 put D&C Builders in financial difficulties, and created the opportunity for Rees to threaten not to pay at all unless the debt was reduced to £300. The case today would probably have been decided as a duress case; when this case was decided economic duress had not yet been recognised in England.

out of the contractual relationship to which P has no right or legitimate expectation.

I shall start with (i). There are a number of examples of cases where changed circumstances cause Q to be placed in a vulnerable situation, and this causes P to threaten to breach the contract to re-allocate risks that were expressly or impliedly foreseeable under the original contract. Such cases are the classic province of economic duress cases — where the risk was expressly or impliedly placed on P when the contract was originally negotiated, but a change in circumstance, coupled with knowledge of Q's desperate need for the product, or inability to acquire the product elsewhere, prompts P intentionally to try to pass its risk on to Q. By doing so, P acts for an improper purpose, and therefore improperly.

An example is *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*.¹⁹⁴ Hyundai contracted with North Ocean to build a tanker for a fixed price of \$30 950 000, to be paid in five installments. This transaction was concluded at the time of the OPEC crisis, when it was widely known that the US economy and currency was under some strain. Nevertheless, Hyundai chose to agree to the contract price being fixed in dollars. After the first installment was paid, the US dollar was devalued by 10%. Hyundai then demanded that the price of the remaining installments be increased by 10%, to cover its costs. This demand was coupled with a threat that construction would be stopped if the demand was not met. Hyundai also knew that at this time North Ocean was negotiating a lucrative deal with Shell to charter the tanker, and that any potential problem with the construction of the tanker would scupper the potential contractual relationship between North Ocean and Shell. North Ocean agreed to the new terms. Hyundai deliberately exploited North Ocean's delicate bargaining position with Shell to threaten to breach the contract, and thereby induced North Ocean to agree to a re-allocation of the risk of the devaluation of the dollar — a foreseeable risk that Hyundai had originally contracted to bear. The court held that this was an improper threat, and, ultimately, an example of economic duress.¹⁹⁵

¹⁹⁴ [1979] QB 705. For a comment on the case, see Dadson "The Atlantic Baron: Consideration, Economic Duress and Coerced Bargains" (1980) 38 *University of Toronto Faculty LR* 223.

¹⁹⁵ At 719, the choice enquiry also having been satisfied. As Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto LJ* 201 at 247n208 says: "It is relatively easy to infer that a party who chooses to contract against a fluctuating market should reasonably bear the risk of the contract turning out to be less profitable for him or her." It should be noted, however, that North Ocean's case ultimately failed since the agreement was held subsequently to have been ratified. See on this point Chapter 10 below. Since this is the most common way in which economic duress cases occur, there are many examples of this sort of illegitimate threat, two of which warrant discussion. In *Occidental Worldwide Investment Corporation v Skibs A/S Avanti (The Siboen and Sibotre)* [1976] 1 Lloyd's Rep 293 the charterers of two ships renegotiated the rate of hire for the ships from \$4.40 per ton per month to \$4.10 per ton per month after a slump in market rates. They did so by threatening the owners that they had no assets, and that they would go bankrupt and default if the rates were not lowered to give them a better chance of competing in the market. The charterers also knew that if they were to default, the ships would have to be laid up by the owners, meaning the owners would not have been able to pay their mortgage payments on the ships. The case was decided on the basis of fraudulent misrepresentation, so the comments on economic duress in the case were, strictly speaking, obiter. Kerr J held that these were mere commercial pressures that did not make out a case of duress on the facts. With respect, this conclusion cannot be supported. The charterers lied openly about their financial position, and used this as a threat to enforce a

Another example is *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd*.¹⁹⁶ Atlas, a courier company) contracted with Kafco to deliver Kafco's basketware to Woolworth stores in the United Kingdom for a price of £1.10 per carton. This price was negotiated and concluded after Atlas's representative had visited Kafco's warehouse and had seen a representative sample of the baskets and the packaging cartons in which the baskets were stored. When Atlas commenced performance, it discovered a problem: the cartons in which the baskets were stored were far bigger than Atlas had anticipated, meaning that it could only carry about half of its original estimate in each consignment. Atlas requested a renegotiation of the contract price, but Kafco refused, rightly pointing out that Atlas had been afforded an opportunity to inspect the baskets and cartons, and if the price it had offered to contract under was due to a calculation error, the mistake was Atlas's problem. Atlas then turned around and said that it would no longer perform its contract unless Kafco agreed to pay £440 per load — a substantial increase in price. Kafco was a small company, and its contract with Woolworth was the most important it had. Woolworth expected timeous delivery of the baskets, so Kafco was under pressure to perform. Furthermore, this all occurred in November, when, according to evidence led in court, the demand on courier companies is at its heaviest, and it would have been virtually impossible for Kafco immediately to find a substitute to take on such a large and wide-ranging contract. Kafco, faced with these pressures, submitted to Atlas's demand, backed by its threat of breach. Tucker J held that this opportunistic attempt by Atlas to pass its own costing mistake on to Kafco, knowing that Kafco was under severe pressure to perform its obligations to Woolworth, was illegitimate conduct.¹⁹⁷

The above cases concern the reallocation of risk under the contract. But there is another way in which a threat made in such circumstances can be illegitimate (see (ii) above). That is where P uses the

modification, knowing the implications of a breach for the owners. This was undoubtedly a case where the conduct of the charterers was improper. For a similar view see Chitty §7-010; Beatson "Duress by Threatened Breach of Contract" (1976) 92 *LQR* 496. Another example of a threat designed improperly to reallocate risks may be found in *Pao On v Lau Yiu Long* [1980] AC 614, where a threat to breach was used to change a set price for the repurchase of shares by the other party to a floating market-related price. The plaintiffs failed to take into account the possibility that the shares could rise in value, which was why they stipulated that the repurchase price should be \$2.50 per share. The share price rose dramatically above the \$2.50 level. Yet all the other parties were required to do was to pay \$2.50 per share. The threat of breach was used to modify the contract to the extent that the repurchase would have to occur at the market value of the share (in the region of \$4 per share). While the threat could be considered to be illegitimate, it should be noted that the duress claim failed at the choice enquiry stage. This matter will be discussed fully at 7.4.5.2 below. In Australia see *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323, where a sharp rise in the world price of iron convinced Sundell to threaten not to deliver a consignment of galvanised iron unless Yannoulatos agreed to pay £31 per ton extra. Yannoulatos had already subcontracted to sell the iron, and needed it desperately.

¹⁹⁶ [1989] 1 All ER 641 (QB). For comment on this case See Chandler "Economic Duress: Clarity or Confusion?" (1989) 2 *Lloyd's Maritime and Commercial Law Quarterly* 270; Phang "Whither Economic Duress?" (1990) 53 *MLR* 107. A similar case of a mistake in calculation is *Nixon v Murphy* (1925) 25 SR (NSW) 151.

¹⁹⁷ At 646i.

changed circumstances to extort a fresh advantage out of the contractual relationship to which P has no right or legitimate expectation. It is in this category that the sort of threat in *Hendricks v Barnett*¹⁹⁸ to break a service contract for extortionate purposes would fall.¹⁹⁹ The original contract could be modified, or the threat may result in the creation of a new, second contract. An example of such a case is *Austin Instrument Inc v Loral Corporation*.²⁰⁰ Loral won a contract from the Navy to produce radar sets. Loral subcontracted Austin to manufacture and supply twenty-three of the forty precision gear components that were necessary for the radar sets. Subsequently, Loral won a second contract from the Navy to produce more radar sets. Austin tendered for the subcontract for all forty gear components the second time around, but Loral rejected Austin's tender, and expressed its intention to subcontract with one of Austin's competitors, whose tender price was lower than Austin's. Austin refused to accept this decision, and said that if Loral did not agree to award Austin the second subcontract, as well as agree to substantial price increases for the twenty-three components it was already supplying, it would immediately breach its obligations under the existing subcontract. Loral refused, so Austin stopped delivery of the components. By this stage Loral was within days of the deadline for delivery of the first consignment of radar sets to the Navy. Austin knew this, and knew there was no way Loral could find an alternative supplier which would allow Loral to meet its Navy deadline. Austin waited until this point, where it effectively held all the cards, to make its demands. Loral succumbed, and awarded the second subcontract to Austin, as well as agreeing to price increases on the original subcontract. The court had little difficulty in finding the conduct of Austin to be extortionate. Austin had no right to be awarded the second contract under the tender process, but used Loral's looming deadline with the Navy to induce Loral to reverse its original decision and to agree to the modifications, as well as to agree to award the new subcontract to Austin.

6.4.4.3.3 P exploits Q's position, and threatens to breach, believing he or she is entitled to do so

The third scenario concerns those situations where circumstances have changed to the extent that P's position of power in the relationship has appreciated, and P makes a threat to breach, but one that P honestly believes he or she is entitled to make. In such cases P believes the proposal to renegotiate is entirely reasonable and justifiable, and honestly believes the other party is simply being intractable by refusing to renegotiate a fair deal. This category of case differs from the first two scenarios in that P

¹⁹⁸ 1975 (1) SA 765 (W).

¹⁹⁹ For American examples of similar cases, see Dalzell "Duress by Economic Pressure I" (1942) 20 *North Carolina LR* 237 at 272.

²⁰⁰ 272 NE 2d 533 (1971).

here honestly believes he or she is entitled to a renegotiation, whereas in the first two scenarios P acts deliberately in order to secure some advantage to which P knows he or she is not entitled. Obviously it will be more difficult in such cases for a court to find that the threat was *contra bonos mores*, but it is submitted that the possibility must not be excluded.²⁰¹ The mere fact that P honestly or subjectively believes he or she is entitled to a renegotiation will not mean that the threat will automatically be lawful. A simple subjective belief in the propriety of one's conduct does not make one's conduct lawful in any branch of the law. Furthermore, P in this scenario still capitalises on the vulnerable circumstances in which Q finds him or herself at that specific time in the contractual relationship by choosing that moment to make the threat coupled with the demand — and this occurs deliberately. The test to determine whether P has acted legitimately or improperly in these cases can probably not be stated any more precisely than the general test for illegitimacy: has P acted in a way that is *contra bonos mores*? In other words, has P acted for an illegitimate purpose, in that he or she has acted in a way that exceeds the legitimate bounds of his or her rights in the circumstances?

*B&S Contracts and Design Ltd v Victor Green Publications Ltd*²⁰² is a good example of a case where A threatened to breach, and coupled this with a demand to modify the original contract in the honest belief that it was entitled to do so, but the court held that the threat was illegitimate. B&S contracted to build exhibition stands for Victor Green. B&S brought a number of workers from its subsidiary company in Wales to do the work. This subsidiary was facing liquidation, and these workers were given notice that they were to be made redundant. As a result, the workers downed tools, demanding severance pay totalling £9000 from B&S.²⁰³ After some negotiation, Victor Green, who realised B&S could not resolve the dispute, and evidently had cash-flow problems, offered B&S £4500

²⁰¹ See the view of Mance J in *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 637, where the learned judge said that the *bona fides* of the party who made the threat would be relevant, but not conclusive. This approach is endorsed by Beatson *The Use and Abuse of Unjust Enrichment* 118 and 121; Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto LJ* 201 at 250. Others have suggested that if the threat is made in good faith, this eliminates the possibility of finding that the threat was illegitimate. See Birks *Restitution* 183; "The Travails of Duress" (1990) 3 *Lloyd's Maritime and Commercial Law Quarterly* 342 at 346-7; Nolan "Economic Duress and the Availability of a Reasonable Alternative" 2000 *Restitution LR* 105 at 108.

²⁰² [1984] ICR 419. In Australia see *Re Hooper and Grass' Contract* [1949] VR 269.

²⁰³ The law at the time did not allow them the severance pay that they were demanding (initially, 60 days). By comparison, the position was even worse in South African law until very recently. In South Africa, in situations where a business went insolvent, the Insolvency Act 24 of 1936 did not provide for any severance pay to be paid to the workers who lost their jobs. Their claim was limited to a preferred arrear claim for wages due, up to a limit stipulated from time-to-time by the Minister of Labour. See formerly s100 of the Insolvency Act, replaced in 2000 by s98A. After a concerted period of negotiation between organised labour, business and the government, Parliament passed the Insolvency Amendment Act 33 of 2002, which amended s98A of the principal act to allow workers to be treated as if they are being retrenched for operational reasons, and to claim severance pay.

as an advance on the contract price to try to help, as it was worried about the delays. B&S rejected this offer, but threatened in return that if Victor Green did not agree to modify the original contract, and agree to pay £4500 extra (ie on top of the original contract price) it was going to repudiate the contract. Since the exhibition was so close, and no replacement could have been found to carry out the job in time, Victor Green acceded to this demand, and agreed to the modification of the contract. Later on, however, Victor Green refused to pay, claiming duress. B&S rejected this argument, and referred to a *force majeure* clause in the original contract, that it alleged had entitled it to do what it had done. The clause allowed B&S to cancel or seek a variation of the contract in the event of a strike.²⁰⁴ In return, the court (Eveleigh, Griffiths and Kerr LJ) pointed out that the clause also required that B&S make “every effort to carry out the contract” at the estimated cost before it could vary or cancel. In their view, B&S had not made every effort to do so, for a number of reasons. First of all, by choosing to employ those particular employees, who were already facing retrenchment and were disgruntled, B&S was partially responsible for the problem in the first place.²⁰⁵ Secondly, B&S never alleged that it did not want to pay the workers. Rather, it faced cash flow problems that meant that it did not have £9000 immediately available. The obvious solution to B&S’s problem would have simply been to accept the offer of £4500 as an advance on the contract payment, which would have meant that it would only have had to find another £4500 itself to pay the workers. No evidence was led that B&S was either unwilling or unable to pay this lesser amount — indeed by demanding that the contract increase should be £4500 only, it suggested that B&S had sufficient funds at its disposal to make up the rest. To give in to worker’s demands may appear distasteful to some, said the Lord Justices, but it was not unreasonable in the circumstances, and B&S had contracted to take necessary measures to carry out the original contract before seeking a variation. The sum was not exorbitant. These workers were employed by the subsidiary company, and so were not in B&S’s immediate employment. B&S would not have had any relationship with these workers after the contract was completed, and would not have been “[feeding] an appetite that in the future [would be] likely to make even greater demands upon them”.²⁰⁶ In theory it could also have recovered the cost from its subsidiary. But instead of accepting the advance, which would have been a simple solution to the problem, B&S chose instead to pass the burden of the

²⁰⁴ The clause read: “Every effort will be made to carry out any contract based on an estimate, but the due performance of it is subject to variation or cancellation owing to an act of God, war, strikes, civil commotions, work to rule or go-slow or overtime bans, lock-out, fire, flood, drought or any other cause beyond our control, or owing to our inability to procure materials or articles except at increased prices due to any of the foregoing clauses.”

²⁰⁵ Although it is submitted that this case does not fall into the first scenario discussed above, as it was the third party workers going on strike that was the real catalyst for the problem.

²⁰⁶ Per Eveleigh LJ at 432.

industrial problem onto Victor Green, and to extort an increase in the contract cost out of Victor Green by threatening to breach the contract. What made B&S's conduct even more reprehensible is that it knew that Victor Green was desperate to have the stands completed, since the date of the exhibition was very close at hand, and there was no way a replacement could have been found at such short notice. By exploiting Victor Green's parlous position, as well as using the threat for an extortionate purpose, it was held that the threat to breach was an improper one in the circumstances.

Where a court is faced with a claim that P's conduct was honest, one of the things that can exonerate P is whether P at least took some measures to ascertain his or her legal rights in relation to the changed circumstances, and acted *bona fide* in accordance with that advice. In such circumstances P's honest actions will usually satisfy the test of reasonableness. It was this that prevented P's conduct from being deemed improper in *CTN Cash and Carry Ltd v Gallaher Ltd*.²⁰⁷ CTN ran a cash and carry business. One of its most important products was cigarettes, which it acquired on consignment from Gallaher. Each consignment was purchased in terms of a separate contract on standard terms. Gallaher had also granted CTN credit facilities, which Gallaher was entitled to withdraw at any stage. In November 1986 CTN in Preston ordered a consignment of cigarettes for £17 000. Gallaher delivered the consignment to the wrong warehouse in Burnley. The mistake was discovered, and arrangements were made by Gallaher to relocate the consignment to its proper destination. Unfortunately, the night before this was due to happen, CTN's warehouse in Burnley was broken into, and the cigarettes were stolen. Gallaher took legal advice, and was informed that the risk in the contract lay with CTN. As a result, Gallaher invoiced CTN for the price of the cigarettes. CTN rejected the invoice. As a result Gallaher stated that if it did not perform in terms of the contract, it would withdraw the credit facilities it had up to that time afforded CTN. Since CTN's *modus operandi* meant that it could not afford to pay for the consignments up front, and because Gallaher was effectively a monopoly supplier of cigarettes in the United Kingdom, it agreed to pay. Some years later, however, CTN sued for restitution of the £17 000. The court pointed out correctly that Gallaher was fully entitled to threaten to withdraw its credit facilities. Furthermore it had made its demand for performance in good faith, truly believing the risk of the theft lay with CTN. But subsequently it became clear that Gallaher's legal advice had been incorrect, and that in fact the risk had not lain with CTN, but with Gallaher. Its demand for payment (which it had backed up with the threat to withdraw credit facilities) was in fact unfounded. The Court of Appeal held that in these circumstances it could not be said that Gallaher had acted illegitimately.

²⁰⁷ [1994] 4 All ER 714 (CA). For comment on the case, see Carter and Tolhurst "Restitution for Duress" (1996) 9 *Journal of Contract Law* 220. Cf *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 where Mance J said (obiter) that even if there had been no repudiation in that contract, if Huyton had conducted itself *bona fide* in the belief that there had been some repudiation, and it could be shown that this belief was reasonable, the conduct of Huyton would not have been illegitimate (at 637).

Sir Donald Nicholls VC said:²⁰⁸

“Further, there is no evidence that the defendant’s belief [that the risk lay with CTN] was unreasonable. Indeed, we were told by the defendant’s counsel that he had advised his client that on the risk point the defendant stood a good chance of success. I do not see how a payment demanded and made in those circumstances can be said to be vitiated by duress.”

6.4.3.3.4 *Bona fide* re-negotiation

The fourth scenario concerns those situations where some circumstance that was unforeseen by the parties, and the risk of which was neither expressly nor impliedly assigned to either party, occurs. P in this situation motivates for a renegotiation of the contract, knowing that at that point in the contract Q’s options to withdraw or refuse are not as strong as they were at the commencement of the contract. One example is a situation where Q has repudiated the contract, and P (in terms of the powers a person faced with a repudiation possesses) threatens to cancel, but instead uses the opportunity to continue the relationship, but on renegotiated terms. Unless the renegotiated deal is openly extortionate, very few courts would be prepared to find the threat, based as it is upon a repudiation by the other party, is *contra bonos mores*.²⁰⁹ The best example is *Huyton SA v Peter Cremer GmbH & Co.*²¹⁰ Mance J found that Cremer had repudiated the international sale contract between the parties, meaning that Huyton was fully entitled under the laws of contract to threaten to cancel. Huyton knew this, but instead, Huyton chose to give Cremer another chance, provided Cremer agree to delete an arbitration clause in the contract.²¹¹ Mance J held that the threat coupled with the demand was not illegitimate in the circumstances.²¹²

A second example of this scenario may be explained by using a hypothetical example. P contracts to do the civil engineering work for a big property development, and some way into the contract the

²⁰⁸ At 719j.

²⁰⁹ Halson “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 *LQR* 649 at 662-3 adopts the same view.

²¹⁰ [1999] 1 Lloyd’s Rep 620.

²¹¹ The clause was supposed to provide a more simple mechanism for settling the problem concerning the disputed demurrage costs that Huyton claimed it was owed, due to delays in the delivery of the wheat that was the subject of the contract.

²¹² At 635.

excavators hit a vein of granite that had not shown up in the preliminary soil study.²¹³ P knows he or she will not be able to complete performance of the contract at the original cost. P thus proposes a modification to the contract, to cover the extra costs, the implication being that if this is not acceptable, some form of breach may potentially occur. The contract is now well advanced, and finding a replacement, with the attendant delays, would not be suitable. The stress associated with having P breach, and having to undertake legal proceedings at this delicate stage, is also undesirable. Q agrees. Provided that the modification that is sought is, in the circumstances, fair and reasonable, and P is merely seeking to protect legitimate rights, it is submitted that in such a situation P's "exploitation" of Q's position at that point in the contract would not be considered to be improper at all, but would be considered an acceptable settlement of a problem caused by legitimate commercial pressure. Of course, in many contracts (eg builder's contracts) there are express terms that allow for a renegotiation in the event of some unforeseen circumstance affecting the contract. It bears repeating, though, that the proviso is that the renegotiated fee is a fair and reasonable one in the circumstances, and satisfies the test of proportionality.²¹⁴ If the threat is coupled with a demand that is simply extortionate in the circumstances, the general test would apply, and P's conduct could be considered illegitimate. An example of a case where the threat to breach was made in circumstances where an unforeseen change to the contract occurred, and the demand coupled with the threat was designed merely to protect the legitimate interests of the party was *DSND Subsea Ltd v Petroleum Geo-Services ASA*.²¹⁵ PGS had subcontracted to DSND some of the work on the construction of a linking subsea system to transport oil from an oil platform in the North Sea to supply ships. After some time it became clear that the initial construction plan was flawed, and needed to be amended in a significant way. Both parties agreed to make the amendment to the construction process. But the new design was slightly more risky, and DSND was worried that the current insurance contract would not cover it under the new design. After a breakdown in negotiations with PSG over this and other contractual problems, DSND threatened to breach the contract unless the insurance agreement was amended in its favour, to cover the increased risk. PSG agreed to amended insurance cover, since it could not afford a work stoppage or delay at that point. Later PSG alleged the variation had been concluded under duress. Dyson J held that the circumstances fully justified DSND's concerns, and all that DSND was seeking was a reasonable amendment to the insurance cover to protect its risk. The threat to breach was, in these circumstances,

²¹³ See *Watkins v Carrig* 21 A 2d 591 (1941); *Restatement, Second, Contracts* §89 and §176. Halson "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 *LQR* 649 gives a similar example of discovering unanticipated mine shafts beneath a building site.

²¹⁴ This approach has been adopted in America, where the *Restatement, Second, Contracts* §89(a) requires that the modification in circumstances where the problem was unforeseen must be "fair and equitable".

²¹⁵ [2000] Build LR 530 (QB, Technology and Construction Court).

not illegitimate, but an entirely reasonable exercise of commercial pressure to protect its legitimate contractual interests, in the aftermath of a change to the contract that was unforeseen at the time the contract was originally concluded.²¹⁶

To conclude this section, the law concerning threats in the context of contract modification is still in a state of development around the world. But the scenarios discussed above could give at least some useful guidance to a court in undertaking the understandably difficult job of deciding whether or not a threat of breach used to inspire a contractual modification is illegitimate.

6.4.4.4 Industrial action

Probably the most common specific day-to-day example of contract modification through economic means in our law is industrial action. At the very heart of industrial action is the exercise of bargaining power, which means that any analysis of the modern doctrine of duress must consider how these two areas intersect. Industrial action usually takes the form of a strike or a lock-out.²¹⁷ Section 213 of the Labour Relations Act²¹⁸ defines a strike as the

“partial or complete refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or different employers for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee”.

Although there are a number of forms of strike, characterised by different motives,²¹⁹ the most common is what is known as an “economic strike”, where the employees withdraw their labour in order to try to convince their employer to improve their conditions of employment in some way. Similar motives may apply in so-called partial strikes (eg go-slows or work-to-rule action). The threat implicit in a strike of this kind is to cripple the productivity and profitability of the business unless the grievances of the workers are addressed. So, the threat is invariably coupled with a demand of some kind. Conversely, employers are entitled to lock-out their employees. A lock-out is defined in s213 of the Labour Relations Act as

²¹⁶ At 546.

²¹⁷ For a discussion of the law concerning strikes and lock-outs generally, see Grogan *Workplace Law* 323ff; Van Eck and Van Jaarsveld *Principles of Labour Law* 313ff.

²¹⁸ Act 66 of 1995.

²¹⁹ There can be economic strikes, secondary or sympathy strikes, political protest strikes, repetition strikes and partial strikes. For a brief overview, see Van Eck and Van Jaarsveld *Principles of Labour Law* 318, and for a detailed commentary, see Claasen “Verskyningsvorme van Stakings” 1979 *De Jure* 210.

“the exclusion by an employer of employees from an employer’s workplace, for the purposes of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee”.

There may also be an economic motive behind the lock-out, but this time on the part of the employer. Here too there is a threat implicit in the conduct — to prevent the employees from working, and therefore preventing them from earning their salaries. Settlements induced by such action (especially strikes) are a frequent occurrence in our law, and one can hardly imagine a situation in which questions of economic duress could potentially be more pertinent. Yet, curiously, there is very little literature on the issue of strikes, lock-outs and economic duress in South African law.²²⁰ The matter therefore needs some attention here.

Although a strike was considered to be a breach of the employment contract as well as a delict under the common law, the position has now changed. The right to strike is now considered to be one of the most fundamental labour rights an employee possesses. It exists in conjunction with an employee’s right to associate and to bargain collectively. These rights are designed to address the natural inequality in bargaining power of an employment relationship. So important is the right to strike in South African law that it is not only recognised in the Labour Relations Act,²²¹ but also in the Bill of Rights in the Constitution.²²² Employers are also able to “have recourse” to a lock-out under the Labour Relations Act,²²³ although this power is not granted the ultimate status of a claim-right in the Act, and is not recognised in the Constitution. It must be noted, however, that these prerogatives are not unlimited. The law does place some restrictions on striking workers and employers who lock-out employees, in that certain requirements have to be complied with before the strike or lock-out will be “protected”, and therefore legal. The requirements are mainly procedural:²²⁴ a failure to comply with these formalities will render the strike or lock-out an illegal or “unprotected” strike. Additionally, there are some specifically identified situations where a strike or lock-out is impermissible (and therefore

²²⁰ The one exception is Landman “Protected Industrial Action and Immunity from the Consequences of Duress” (2001) 22 *ILJ* 1509.

²²¹ Section 64(1).

²²² Section 23(1)(c) states: “Every worker has the right to strike.”

²²³ Section 64(1).

²²⁴ The procedural requirements in both cases are contained in Section 64 of the Labour Relations Act. For a full discussion see Grogan *Workplace Law* 328-332.

illegal or unprotected) in any circumstances.²²⁵ There are significant differences between a protected and an unprotected strike or lock-out. Section 67 of the Labour Relations Act provides (*inter alia*) that where the strike is protected the striker or employer does not commit a delict or a breach of contract by participating in the industrial action, civil proceedings may not be instituted against a person for participating in the industrial action, an employee may not be dismissed for participating in such a strike, and the employer may not employ “scab” labour. But where the action is illegal or unprotected s68 grants the Labour Court the power on application to interdict the strike or lockout, to order the payment of compensation for losses occasioned by the illegal industrial action, and allows the employer to treat an employee’s participation in an illegal strike as misconduct. The whole idea behind protecting strikes and lock-outs that comply with the requisite rules, but punishing illegal action, is to encourage both employer and employee to try to solve their dispute amicably using suitable forums and mechanisms, and to try to prevent either party resorting to the ultimate drastic option of a strike or lock-out.

There is no mention in the Labour Relations Act of the validity or otherwise of a settlement reached after industrial action. The matter must thus be dealt with according to the relevant principles of the common law. It is evident that if the strike or lock-out is unprotected, it is illegal, and would be considered an unlawful act. According to the general test for illegitimacy in duress cases, the illegal industrial action would automatically be *contra bonos mores*, and the first leg of the test for duress would be satisfied if a settlement had been induced. Of course, that is only half the problem: the difficulty in these cases comes in determining whether the employer should have succumbed to such an illegal strike, a question which has to be determined under the choice enquiry.²²⁶

So, the meaningful practical question that must be faced in the context of the proposal enquiry is whether the economic threat posed by a protected strike or lock-out, and which induces a settlement, could ever be considered improper, and provide initial support for a claim of economic duress? Prima facie, the provisions of s67 of the Labour Relations Act would suggest not. Planning and participating in protected industrial action is neither a crime nor a breach of contract, and civil litigation cannot be pursued against the participants for participating in the industrial action. The action, and thus the economic threat it poses, is lawful on the face of it. But it is submitted that once again there may occasionally be circumstances where the industrial action may be considered illegitimate under the

²²⁵ See s65 of the Labour Relations Act. To summarise, these are: (a) where the parties are bound by a collective agreement that prohibits a strike or lock-out; (b) where the parties are bound by an agreement that requires them first to seek arbitration; (c) where the nature of the dispute is such that the Act requires it be arbitrated, or referred to the Labour Court; (d) the organisation provides an essential or maintenance service; (e) where the parties are bound by an arbitration award, a collective agreement or a ministerial determination that was designed to settle the dispute. For a full discussion, see Grogan *Workplace Law* 332-337.

²²⁶ See 7.4.5.1 below.

duress doctrine, because the action has been implemented for an improper purpose. Probably the leading authority in this regard is the decision of the House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*.²²⁷ It is a case that has been cited with approval in the Commonwealth,²²⁸ and was also recognised by the Appellate Division (albeit sitting as a court of admiralty) in *Malilang v MV Houda Pearl*.²²⁹

The facts of this case were, briefly, as follows. A ship (the Universe Sentinel) registered in Liberia arrived in port at Milford Haven in July 1978. The ship did not hold a “blue certificate”, which meant that it was not recognised by the International Transport Workers Federation (ITWF). The ITWF was a international trade union that looked after the interests of sailors around the world, and whose stated aim was to improve the lot of such sailors, particularly those who sailed on ships registered under “flags of convenience”, where labour regulations were virtually non-existent, and exploitation was rife. Because the ship did not hold a certificate, and because it became clear while the ship was in port that the ship’s crew was working under terrible conditions for very poor pay, the ship was “blackened” by the ITWF, meaning that none of the workers in port (eg pilots, stevedores) would assist the ship in any way.²³⁰ Negotiations then occurred between the American owners and the ITWF, apparently with the knowledge of the ship’s crew,²³¹ which ultimately resulted in the owners submitting to a number of ITWF’s demands. These included (a) to pay over \$80 000 to the ITWF welfare fund (which included funds designated for the back-pay of crew, to bring their wages up to ITWF-recognised levels, as well as payment of \$6480 into the ITWF welfare trust fund, which had been set up to assist sailors around the world working on ships flying flags of convenience) and (b) to sign an agreement with the ITWF whereby the owners agreed henceforth to respect the ITWF collective agreement concerning basic minimum standards for wages and conditions for crew. Once these arrangements were concluded the blacking was lifted, and the ship was able to complete its off-loading and loading and set sail. A few

²²⁷ [1983] AC 366. For reviews of the case, see W (Lord Wedderburn) “Economic Duress” (1982) 45 *MLR* 556; Napier “Economic Duress, Restitution and Industrial Conflict” (1983) 42 *Cambridge LJ* 43; Carty and Evans “Economic Duress” 1983 *JBL* 218.

²²⁸ See *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 44-5 in Australia and *Gordon v Roebuck* (1990) 64 DLR (4th) 568 at 572-3 in Canada.

²²⁹ 1986 (2) SA 714 (A) at 730-1.

²³⁰ A description of the process of blacking and its effects may be found in the judgment of Corbett JA in *Malilang v MV Houda Pearl* 1986 (2) SA 714 (A) at 720B-E.

²³¹ This is clearly implied from the facts of the case. In this respect the case was different from the South African admiralty case of *Malilang v MV Houda Pearl* mentioned above, where contracts entered into by ship-owners and the crew of the ship the Houda Pearl could not be impugned for duress, as there was no knowledge of the threats posed by the ITWF on the part of the crew in that case. The issue of threats made by third parties is discussed fully at 6.5 below.

days later solicitors acting for the owners of the ship filed papers alleging that the whole deal was entered into under economic duress, and should be reversed.

The matter ultimately came before the House of Lords for resolution. The issue on appeal was narrowed down specifically to the claim for the return of the \$6480 paid to the ITWF welfare trust fund in terms of the agreement between the parties. His Lordship cited the basic principle that the threat posed had to be “illegitimate”,²³² but that in the field of industrial relations law, special considerations apply that complicate the enquiry somewhat. Of importance in this case was the Trade Union and Labour Relations Act, 1974, which gave immunity from liability for any tortious conduct that was committed “in contemplation or furtherance of a trade dispute”. And although this was not a case in tort, Lord Diplock pointed out that this statute gives a good indication as to

“where public policy should draw the line between what kind of commercial pressure by a trade union upon an employer in the field of industrial relations ought to be treated as legitimised..., and what kind of commercial pressure in that field does amount to economic duress that entitles the victim to restitutionary remedies”.²³³

The issue in this case was whether the act of the ITWF was committed in contemplation or furtherance of a trade dispute. The ITWF alleged that it had acted to protect “the terms and conditions of employment” of the crew (a motive recognised to be lawful in s29 of the relevant Act). Lord Diplock held that while this might be so, acting “in contemplation or in furtherance” of the terms and conditions of employment of the crew could only be stretched so far. It only stretched to regulating the relationship between employer and employee, and did not stretch to the provision of benefits to some third party acting as an independent principal, and not as an agent for the employees.²³⁴ Where the deal that is induced is designed for the benefit of the trade union acting on its own behalf, and not on behalf of those employees working for that employer, then the demand may be considered to have been made for an improper purpose, and may be considered to be illegitimate. In his Lordship’s words:²³⁵

“To take an extreme example, if a trade union were to demand as a condition precedent to lifting a blacking that the employer should make a contribution to a particular political party favoured by the union, or to a guerilla group in some foreign country, such a demand would not, in my opinion, have the necessary

²³² At 384C.

²³³ At 385F.

²³⁴ At 386G.

²³⁵ At 387B.

connection with any dispute about terms or conditions of employment in furtherance of which the blacking was imposed.”

Lord Diplock held that in complex cases such as this, each demand must be treated on its merits: some of the demands may have been made legitimately in contemplation of improving the terms and conditions of the crew; but others may not. It was this argument that proved to be fatal to the ITWF’s defence. While the other payments made as back-pay may have been valid, the \$6480 that lay at the root of this dispute had been paid directly to the ITWF welfare trust fund, and was unconnected with the crew and the crew’s conditions of employment. By demanding this sum, the ITWF had acted in the interests of its own fund, not the particular interests of the crew of the *Universe Sentinel*.²³⁶ This motive was, in the eyes of the majority of the court,²³⁷ improper, and thus rendered the action of the ITWF illegitimate. The decision in the *Universe Tankships* case was confirmed by the House of Lords in *Dimskal Shipping Co SA v International Transport Workers Federation*,²³⁸ a case virtually on all fours with the facts of those in the *Universe Tankships* case.

The importance of establishing the motive behind the threat of industrial action was also illustrated in the American case of *Lafayette v Ferentz*.²³⁹ In that case the court held that although it is acceptable to strike in order to convince the employer to pay the workers a higher wage, it is not acceptable to strike to convince the employer to hire entirely unnecessary extra workers, simply to make the lives

²³⁶ At 389A-D.

²³⁷ The majority consisted of Lord Diplock, Lord Cross of Chelsea and Lord Russell of Killowen. Lord Scarman and Lord Brandon of Oakbrook agreed on the legal principle, but disagreed on the findings of fact, feeling that the ITWF could be considered to have acted “in furtherance or contemplation” of the terms and conditions of the crew of the *Universe Sentinel* by demanding the payment to the trust fund. Their dissent was thus purely a matter of interpretation on the facts.

²³⁸ [1992] 2 AC 152. This time the ship (the *Evia Luck*) was Panamanian owned, and was berthed at the Swedish port of Uddevalla. It came to the ITWF’s attention that the Greek and Filipino crew were not unionised or working under ITWF recognised contracts, and that their pay and conditions were below that considered acceptable to the ITWF. Under threat that the ship would be “blackened”, the ITWF induced the ship-owners to agree to a number of demands, including (a) paying “outstanding” wages (ie the difference between what the sailors were being paid and what the ITWF thought the sailors should be paid) to the ITWF in London; (b) giving a bank guarantee of \$200 000 to the ITWF, notionally to secure the wage payments; and (c) causing the owners to promise to sign modified ITWF-model employment contracts with the crew-members. The “outstanding” wages were paid, but then the owners refused to provide the guarantee, or to execute the new contracts. The *Evia Luck* was then blacked, and loading ceased. Four days later the contracts were signed and the guarantee was paid, due to the crippling effects of the blacking process. Lord Goff confirmed the finding in the *Universe Tankships* case that the economic pressure could be illegitimate even if it was not tortious per se (at 169B-C). In this case the unilateral assessment of an appropriate wage by the ITWF, as well as the demand for a bank guaranteed cheque was considered to be illegitimate in terms of the tests laid down in the *Universe Tankships* case. For a comment on the case, see O’Dair “Restitution on the Grounds of Duress—Handle With Care” (1992) 5 *Lloyd’s Maritime and Commercial Law Quarterly* 145.

²³⁹ 9 NW 2d 57 (1934).

of the workers more leisurely.

It is submitted that this is the approach that should be adopted in South Africa. Although the Labour Relations Act does place careful restrictions on strikes and lock-outs, and requires consultation and conciliation in the event of disputes, there may yet be occasional circumstances where a protected strike could be considered illegitimate; usually where the motive behind the demands of the one party are questionable. In this respect my approach differs from that of Landman, who has argued that “a settlement, the result of industrial action, is not voidable for duress in South African law”.²⁴⁰ It is not possible to make such a sweeping generalisation about threats implicit in industrial action, just as it is not possible to make such a sweeping generalisation about threats to sue or prosecute. Instances where threats implicit in industrial action will be *contra bonos mores* will, it is accepted, be extremely rare;²⁴¹ but one should not discount the possibility entirely. The facts and circumstances of each case would have to be assessed in the light of the *boni mores*.

6.5 By whom can the illegitimate threat be made?

A question that arises from the facts of the case of *Universe Tankships Inc of Monrovia v ITWF*²⁴² is whether an agreement between two parties may be rescinded when the conclusion of the agreement was inspired by threats made by a third party. This question has inspired some controversy in South African law, and the matter remains unresolved. There would be no objection to this being allowed in situations where the third party and one party to the contract were aware of what was happening, or even colluded with each other in coercing the other party to enter the agreement, as was the case in the *Universe Tankships* case.²⁴³ But what of a situation where the third party acts *mero motu*, and is unconnected in any way to the party who benefits from the contract? Of course, in Roman-Dutch law, the aggrieved

²⁴⁰ Landman “Protected Industrial Action and Immunity from the Consequences of Duress” (2001) 22 *ILJ* 1509 at 1515. In fact, the conclusion that is drawn by Landman may not even be a true reflection of his views. He seems to suggest at 1514 that there may be situations where the industrial action may be illegitimate, and this will have to be determined by the *boni mores*. His conclusion is thus contradictory, unless he is suggesting that the *boni mores* would never consider a settlement reached by industrial action to be unlawful.

²⁴¹ Cf the view expressed in *Hennessy v Craigmyle & Co Ltd* [1986] ICR 461; Goff and Jones 328. Another case concerning a threat of work stoppage found to be legitimate was *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] Build LR 530 (QB, Technology and Construction Court). The important thing, though, is that these authorities do not discount the possibility that a threat of industrial action could potentially be illegitimate.

²⁴² [1983] AC 366.

²⁴³ See too *Smith v Smith* 1948 (4) SA 61 (N). The plaintiff (a minor) had been induced into concluding a marriage by threats made by her parents and her eventual husband. The court held that the threats had amounted to duress, and had improperly induced the contract of marriage, which was declared void. See too *Christie Contract* 358.

party would have been entitled to rescind the agreement, no matter who was responsible for the act of duress,²⁴⁴ an approach that has been absorbed into French law.²⁴⁵ The problem has never come crisply before the South African courts, although in an obiter dictum in the case of *Broodryk v Smuts NO*, Ramsbottom J did express support for the Roman-Dutch rule.²⁴⁶

“It seems probable that in our law a contract entered into through fear induced by the duress of a third party is voidable, on the principle that there is no true consent: ... but ... it is unnecessary to express an opinion on the point.”

Academic opinion on the question is divided. Some, like Wessels²⁴⁷ and Hahlo & Kahn,²⁴⁸ are supportive of the Roman-Dutch position. But for the most part, the Roman-Dutch position has been the subject of vigorous criticism. The rule has variously been described as “eienaardig”²⁴⁹ or “illogical”.²⁵⁰ The main thrust of the criticism is that if rescission were to be allowed in such circumstances, an innocent party to the contract would bear the consequences of an act that had nothing to do with that party, and is not attributable to that party. The other contracting party has committed no unlawful act, nor is even aware of the fact that the agreement was induced by threats. Allowing rescission in such circumstances would also mean that the rules of duress would run counter to the rules applying in the other forms of voidable contract: contracts tainted by misrepresentation and undue influence. In neither of these situations may a contract induced by an independent third party be rescinded in South African law.²⁵¹ In my submission, the position should be no different under the doctrine of duress, and the

²⁴⁴ See Voet 4.2.3 and 4; Huber *HR* 4.38.11; Van Leeuwen *CF* 1.4.41.9; Pothier *Obligations* § 23.

²⁴⁵ Art 1111 of the Code Civil: “Any threat brought to bear against the party who has contracted the obligation shall constitute a ground of nullity, even where it was brought to bear by a party other than the party for whose benefit the agreement was made.”

²⁴⁶ *Broodryk v Smuts NO* 1942 TPD 47 at 53. A similar assertion was made (obiter) by Coetzee J in *Ex Parte Coetzee et Uxor* 1984 (2) SA 363 (W) at 365-366.

²⁴⁷ Wessels *Contract* §1193-7. He points out that the rule has a long history in the *ius commune*, and that it has been incorporated into most civil law systems.

²⁴⁸ Hahlo and Kahn *Union* 472-3 submit that because duress is such a wicked method of inducing a contract, such a strict rule is warranted.

²⁴⁹ De Wet and Van Wyk *Kontraktereg* 50.

²⁵⁰ *Wille's Principles* 448. For further criticism, see Joubert *Contract* 110; Farlam and Hathaway 365; Van der Merwe *et al Contract* 89; Van der Merwe “Aspects of the Law of Contractual Torts” (1978) 95 *SALJ* 317 at 323.

²⁵¹ Christie *Contract* 358 argues (contrary to his views in his 3rd edition at 345) that the law of duress ought to be brought into line with the law of misrepresentation, for the sake of consistency. In the law of

Roman-Dutch rule, which derived its authority from certain peculiarities of the old Roman *actio quod metus causa*, ought to be rejected. The only situation where a threat of a third party should affect the contract should be where the one contracting party actually knew that the third party would be making a threat, or actively conspired with the third party with the intention of getting the third party to do the dirty work. This approach was followed by the Appellate Division in *Malilang v MV Houda Pearl*,²⁵² so there is some persuasive authority for this view, even though the court was sitting as a court of admiralty, applying English law to a shipping dispute. Adopting this approach would bring the law here into line with that which applies to the conduct of third parties in misrepresentation and undue influence cases in South African law,²⁵³ and accords with the approach to duress in English law²⁵⁴ and the law in the Netherlands.²⁵⁵ If this is the approach that is adopted, it does not mean that the aggrieved party is totally deprived of a remedy. In situations where a contract is induced by a third party, the aggrieved party would be entitled to a remedy in delict against the third party to compensate him or her for any loss which he or she has suffered.²⁵⁶

misrepresentation, before rescission will be allowed, the misrepresentation must have been made by the other party to the contract. In *Karabus Motors (1959) Ltd v Van Eck* 1962 (1) SA 451 (C) at 453, Watermeyer J said that where the misrepresentation which induces a contract “does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract”. See too *Standard Credit Corporation Ltd v Naiker* 1987 (2) SA 49 (N); *Karoo and Eastern Board of Executors and Trust Co v Farr* 1921 AD 413. In the law of undue influence, rescission would also not be possible in circumstances where the influence came from an independent third party unconnected with the two contractants. See *Silver Garbus & Co (Pty) Ltd v Teichert* 1954 (2) SA 98 (N) at 105.

²⁵² 1986 (2) SA 714 (A). In that case, the owners of the ship Houda Pearl entered into improved employment contracts with the crew of the Houda Pearl in 1979. This occurred after an independent international trade union (the International Transport Workers Federation) had blacked its sister ship, the Houda Star, in Italy, and had threatened to black all the owner’s ships around the world unless all its crews were given new contracts. The crew of the Houda Pearl were given new contracts to sign, the terms of which they then attempted to enforce a year later when the ship docked in Durban. The evidence showed that the impetus for the conclusion of the new contracts was the threats made by the ITWF to the owners, backed up by the blacking of the sister ship in Italy. Thus, the ITWF was an independent 3rd party; the contracts were eventually concluded between the owners and the crew of their ship the Houda Pearl. It became clear in evidence (see 731F-732B) that when the new contracts were signed, the crew-members of the Houda Pearl did not know why their conditions of service were being improved, and had not consulted in any way with the ITWF or their colleagues on the Houda Star. As a result, the crew did not know of the coercive actions of the ITWF on the owners, and if this had amounted to duress (this was not decided) it was not attributable to these contracts.

²⁵³ See *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 (2) SA 528 (W) at 540.

²⁵⁴ See *Kesarmal s/o Letchman Das v Valliappa Chettiar (NKKV) s/o Nagappa Chettiar* [1954] 1 WLR 380; *Talbot v Von Boris* [1911] 1 KB 254; *Hassan v Wilson* [1977] 1 Lloyd’s Rep 431 and Chitty §7-038. The facts of the decision in *Universe Tankships Inc of Monrovia v ITWF* [1983] AC 366 bear this out.

²⁵⁵ See art 3.44(5) of the NBW.

²⁵⁶ See 10.2.4 below.

Chapter Seven

The Choice Enquiry

“It is our choices, Harry, that show what we truly are.”

Professor Albus Dumbledore, in JK Rowling *Harry Potter and the Chamber of Secrets* 245

7.1 Outline

In this chapter the requirements of the second leg of the test for duress — the choice enquiry — will be discussed.¹ The enquiry focuses on the conduct of the aggrieved party who succumbed to the illegitimate threat and entered into the contract. First of all one must determine whether the threat in fact induced the person to agree to the terms of the proposal. Secondly, one must determine whether the person was justified in succumbing, as a matter of law. If both requirements are satisfied, then the aggrieved party will have successfully proved that the agreement was concluded under duress.

7.2 Introductory comments

A great deal of emphasis is placed in the modern case law on the legitimacy or otherwise of the conduct of the aggressor in the bargaining process, and rightly so, since it is the improper conduct of the aggressor that is the genesis of the legal problem that the doctrine of duress was conceived to address. That is why the test for duress is lexically arranged so that the proposal enquiry is examined first. It makes sense that the focus of much of the enquiry will be on evaluating, in a normative sense, the conduct of the stronger party. But proving that an illegitimate threat was made is not sufficient in itself to allow a party to avoid a contract for duress. The juridical effect that this illegitimate threat had on the other party must also be considered. In duress cases in contract, there are by definition at least two parties to the contract. And if duress is a species of coercion, it is necessary to determine whether the recipient of the threat was actually coerced by the threat.

The fact that the aggressor’s conduct was *contra bonos mores* does not mean that the recipient is relieved of any further responsibility for the transaction that results. The will of the recipient of the threat is not destroyed or “overborne”; the recipient applies his or her mind to the threat, and reacts

¹ For the full test, see the diagram at 5.5.1 above.

to it in some way by choosing a particular course of action. It is the evaluation of the conduct of the recipient of the threat that constitutes the second leg of the test for duress — the choice enquiry. In a nutshell, did the recipient of the threat behave reasonably in the eyes of the law by choosing to conclude the contract as a result of the pressures with which he or she was faced? This question can be refined and re-articulated in the following way: was the aggrieved party entitled to succumb to the threat and to enter into the contract, since the aggrieved party had, in the circumstances, “no reasonable choice”, or “no acceptable alternative” but to do so?² This choice enquiry has two essential requirements or elements to it:³

“First, there is the relatively unproblematic empirical aspect: whether the threat in fact caused or induced its recipient to manifest his or her assent to the contractual arrangement.... Second, there is the (potentially) more important question of whether the recipient of the threat was indeed *justified* in manifesting his or her contractual assent in response to the pressure.”

From a broader perspective of principle, there has been some uncertainty as to how these two aspects relate to one another. The common view is that the first aspect concerns the question of causation, and the second concerns a separate, additional, normative issue, involving an assessment about whether the aggrieved party was justified in consenting.⁴ Two problems have emerged from this view. Is there any relationship at all between these two aspects? And: if the first aspect concerns causation, then what test for causation ought to be adopted in such cases?

It is my opinion that while there are indeed two aspects to the enquiry, it is possible to make more sense about the choice enquiry, and the problems raised above, if these two aspects of choice can be related in a principled fashion. It is my suggestion that the best way in which to do this is to treat both aspects as issues of causation, rather than just one of them. The significance of using the principles of causation by analogy to solve questions of good faith *in contrahendo* has been underscored by the

² See Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 367ff. These two phrases are commonly used in the cases. In England see for example *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 at 719; *Vantage Navigation Corporation v Suhail & Saud Bahwan Building Materials llc (The Alev)* [1989] 1 Lloyd’s Rep 138 at 146, and 7.4 below. In America see *Radich v Hutchins* 95 US 210 (1877) at 213; *Hartsville Oil Mill v United States* 271 US 44 (1925) at 49.

³ Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 252.

⁴ For example, Nolan “Economic Duress and the Availability of a Reasonable Alternative” 2000 *Restitution LR* 105 refers to the “illegitimacy plus causation view”, and then describes the issue of reasonable alternatives as a “third” issue that is important to the overall test. Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 253 refers to “Causation: the *fact* of coercion” and at 258 refers to the matter of reasonable alternatives under a separate heading of “Duress: the *judgment* of coercion”. See also Smith “Contracting under Pressure: A Theory of Duress” (1997) 56 *Cambridge LJ* 343 at 354-6 and 366.

Supreme Court of Appeal in *Bayer SA (Pty) Ltd v Frost*.⁵ It will be argued below that there is a similarity between the two requirements mentioned by Bigwood and the two key elements of the test for causation in South African law generally — that it is necessary for both factual causation and legal causation to exist in cases where the matter of causation is at issue.⁶ Each of the two legs of the enquiry will be examined in turn, using the relevant concepts of coercion as a base.

7.3 Factual causation: did the threat in fact induce the contract?

The first requirement that has to be proved under the choice enquiry is one of factual causation. Did the threat in fact successfully induce the aggrieved party into contracting? It is self-evident that there can be no remedy for duress unless a contract was actually concluded between the parties as a result of the illegitimate threat. The misdirected nature of this element of causation is one of the shortcomings of the way in which the classical *Broodryk* test for duress that currently applies in South African law is articulated.⁷ Under the *Broodryk* formulation, the focus is on a threat causing “damage”, rather than the inducement of a contract by the threat. The result has been that the duress enquiry has been deflected into mostly irrelevant considerations of loss.

The test for causation in South African law finds its most advanced theoretical appraisal and its most significant practical application in the fields of criminal law and the law of delict, although it does apply where damages are sought for contractual breach,⁸ and is particularly relevant to the special contract of insurance.⁹ In these areas of law, factual causation requires that a factual nexus exists between the conduct of the one party and the harm suffered by the other party. In *Minister of Police v Skosana*,¹⁰ Corbett JA said:¹¹

⁵ 1991 (4) SA 559 (A) at 568B as read with 568F, and 575G. See too *LAWSA* Vol 5(1) §147. *Bayer*’s case concerned misrepresentations. However, the causation element has played a relatively understated role in that area of South African law. For a general discussion of causation, see Hart and Honoré’s seminal *Causation in the Law*.

⁶ See too Note “Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis” (1968) 53 *Iowa LR* 892 at 922.

⁷ See 4.3.1.2 above. It must be said, though, that the importance of the matter has not gone unnoticed by the South African courts. See *Savvides v Savvides* 1986 (2) SA 325 (T) at 329E; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SEC) at 439F.

⁸ The leading discussion on this matter in South Africa may be found in Kerr *Contract* 739ff.

⁹ See *Napier v Collett* 1995 (3) SA 140 (A) at 143-4; *Concord Insurance Co Ltd v Oelofsen* 1992 (4) SA 669 (A).

¹⁰ 1977 (1) SA 31 (A).

¹¹ At 34F. In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 the court said: “The first [enquiry] is a factual one and relates to the question as to whether the defendant’s wrongful act was a cause

“Causation ... gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the act or omission in question caused or materially contributed to ... the harm giving rise to the claim. If it did not, then no legal liability can arise, and *cadit quaestio*.”

The most popular approach that the courts use to determine whether or not there is factual causation is the *conditio sine qua non* formula.¹² According to this formula, one has to determine whether the act carried out by the one party was a necessary condition for the occurrence of the result that the other party is complaining about. More colloquially, it is described as the “but-for” enquiry: but for the act, would the result not have occurred? The court is enjoined to undertake the process of determining hypothetically what would have happened if the specific act under the microscope had not occurred, and comparing the result with the result that did actually come to pass. If the result would probably not have occurred, then the act can be considered to be a factual cause of the result, and the element of factual causation is satisfied.

In duress cases in contract, the enquiry is slightly different from the enquiry in criminal law or delict, where one needs to determine whether an act caused harm of some kind. The question of harm or loss is not particularly relevant in duress cases in contract. In duress cases, the question focuses on how the contract in fact came into being. The question that must be asked is: did the illegitimate proposal made by the one party in fact induce the other person to enter into the contract, or to agree to a contractual modification? This requirement is important in all jurisdictions.¹³ Despite the fact that this very important question is not specifically referred to in the traditional test for duress in South African law, the fundamental importance thereof has meant that it has been mentioned by the courts. For example, in *Paragon Business Forms (Pty) Ltd v Du Preez*,¹⁴ Leach J has said: “the party bearing

of the plaintiff’s loss. This has been referred to as ‘factual causation’.” For a discussion of factual causation generally, see Van der Walt and Midgley *Delict* 164; Neethling *et al Delict* 174; Snyman *Criminal Law* 76.

¹² See *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 35D; *S v Van As* 1967 (4) SA 594 (A); *Simian and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 915; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700; *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1077-9. It should be noted, however, that it is not an exclusive test of factual causation in South African law. See on this point Van der Walt and Midgley *Delict* 166.

¹³ For the use of the “but-for” formula in economic duress cases, see *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd’s Rep 620 at 636. §123(1) BGB states: “Where a person has been induced ... by unlawful threat to make a declaration, that person may avoid the statement in question.” Art 44(1) NBW states: “A juridical act may be annulled when it has been entered into as a result of threat” and art 44(2): “A person who induces another to execute a certain juridical act by unlawfully threatening him...” (my emphasis). The importance of factual causation to the test is emphasised in Note “Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis” (1968) 53 *Iowa LR* 892 at 917; Smith “Contracting Under Pressure: A Theory of Duress” (1997) 56 *Cambridge LJ* 343 at 354; Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 253.

¹⁴ 1994 (4) SA 434 (SEC).

the onus must show that he would not have concluded the agreement but for the duress”.¹⁵ In most cases concerning duress, particularly duress in its more traditional forms, the question is relatively easy to answer, and seldom detains a court for very long. A court would waste little time in finding that a gun to the head or a threatened call to the police would have induced the person to submit, and say: “I agree to your terms”. The only real problem area is the one that affects the question of factual causation in all relevant branches of the law: how to determine factual causation in situations where there are multiple causal factors.

There may be situations where the aggrieved party decides to enter into the contract for a number of reasons, one of which happens to be an illegitimate threat. This tends to be an issue mainly in economic duress cases, where the nature of the threat is usually less graphic or blatant. For example, in *Pao On v Lau Yiu Long*¹⁶ the plaintiff threatened to breach the original contract unless defendant agreed to a modification of the re-purchase price of shares. The defendant considered his position, and decided not only that the risk of the amendment was commercially worth taking in the light of the stock market position at the time, but also that it might be commercially expedient to accept the proposal, since other parts of the contract were so commercially beneficial that it seemed to be a small price to pay. Furthermore, it was also apparent to the defendant that agreeing was a worthwhile thing to do to avoid potential litigation and negative public sentiment.¹⁷ Thus, a number of causal factors existed, one of which was the threat to breach.¹⁸ But, as the facts in one of the leading cases, *Barton v Armstrong*,¹⁹ show, the problem of multiple causal factors can emerge in more traditional duress cases too. In that case Barton and Armstrong were the major shareholders in a company called Landmark Corporation Ltd. The principal business of the company was the development of a housing development near Surfer’s Paradise in Queensland, Australia. Armstrong made threats against Barton’s life. After these threats were made, Barton entered into a contract to buy Armstrong’s shares in the company. But it became clear from the evidence that there were also very good business reasons for buying the shares

¹⁵ At 439F. Other cases where the courts mention the importance of causation or inducement are *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 451; *Steiger v Union Government* (1919) 40 NLR 75 at 80; *Padayachey v Lebesse* 1942 TPD 10 at 13; *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 (SR) at 690E; *Savvides v Savvides and others* 1986 (2) SA 325 (T) at 329E; *Hamilton Paneelkloppers v Nkomo* 1991 (2) SA 534 (O) at 540A.

¹⁶ [1980] AC 614.

¹⁷ See the judgment of Li J in the court *a quo*, cited with approval by the Lords of Appeal at 626-7.

¹⁸ One could also imagine a situation where one party decides to accede to the threat, but mainly because he or she does not want to compromise the potentially lucrative future of a long-term commercial relationship. This is an example given by MacDonald “Duress by Threatened Breach of Contract” 1989 *JBL* 460 at 471.

¹⁹ [1976] AC 104.

in any event.²⁰ Armstrong had proved to be a problematic character in the business, and it was apparent that with him out of the way, a major backer of the business (United Dominions Corporation (UDC)) would be prepared to provide more funding to allow Landmark, through its subsidiaries, to complete the housing project. At that stage UDC were threatening to withdraw from the project, mainly as a result of clashes with Armstrong. There were thus two reasons for the contract being concluded, one of which was the threat of physical harm.

In South African law, cases of multiple causation are generally decided by the court taking a common sense approach to determining whether the unlawful conduct complained of in fact caused the result.²¹ The knowledge and experience of the court will be decisive in coming to the relevant conclusion, and there are no hard-and-fast rules to constrain the court. Usually the court will find that the act was a factual cause of the result, and to leave the question whether liability should be limited to the second requirement of legal causation. It is submitted that this approach is eminently suitable for determining factual causation in duress cases involving multiple causal factors. Nevertheless, there has been some controversy about this issue,²² which merits discussion.

It was in the case of *Barton v Armstrong* that it was first proposed that, provided the threat was a reason that motivated the other party to succumb, this will be sufficient to satisfy the test of factual causation. Lords Wilberforce and Simon phrased the test of factual causation in cases of multiple causal factors in the following way:²³

“[W]e are prepared to accept ... the test proposed by the majority, namely, that the illegitimate means used was *a* reason (not *the* reason, nor the *predominant* reason nor the *clinching* reason) why the complainant acted as he did.”

The majority (per Lord Cross of Chelsea) had phrased the test in the following way:²⁴ “[I]f Armstrong’s threats were ‘a’ reason for Barton’s executing the deed he is entitled to relief even though he might well have entered into the contract if Armstrong had uttered no threats to induce him to do so.” The test was

²⁰ At 115-6.

²¹ See Van der Walt and Midgley *Delict* 167; Neethling *et al Delict* 177; *Portwood v Svamvur* 1970 (4) SA 8 (RA) at 14-15; *Ncoyo v Commissioner of Police, Ciskei* 1998 (1) SA 128 (CkSC) at 137; *Silver v Premier, Gauteng Provincial Government* 1998 (4) SA 569 (W) at 575.

²² For comment on this issue, see especially Nolan “Economic Duress and the Availability of a Reasonable Alternative” 2000 *Restitution LR* 105.

²³ At 121.

²⁴ At 119.

cited with approval by the full board in *Pao On v Lau Yiu Long*,²⁵ and has also been adopted in Australia in *Crescendo Management (Pty) Ltd v Westpac Banking Corporation*.²⁶ The position was, though, complicated by Lord Goff in the House of Lords case of *Dimskal Shipping Co SA v International Transport Workers Federation*.²⁷ Despite citing the passages from all three decisions alluded to above, his lordship stated that the threat should constitute a “significant cause” for entering into the contract. This had led to speculation that the test proposed in *Barton*’s case is more easy to satisfy than Lord Goff’s test, and that there may even be a difference in the burden of proof (as far as this element is concerned) between cases involving threats of physical harm (like *Barton*) and other cases concerning threats to property or economic interests.²⁸ Much emphasis has naturally been placed on the word “significant”. In fact, Mance J in *Huyton SA v Peter Cremer GmbH & Co*²⁹, whilst accepting that the “but for” test was appropriate, interpreted the statement by Lord Goff to have increased the importance of the threat as a causal factor beyond the mere “factor” that was considered sufficient in *Barton*. Mance J said:³⁰

“The minimum basic test of subjective causation in economic duress ought, it appears to me, to be a ‘but for’ test. The illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching.”

It is my view that Mance J went too far in suggesting the threat must have been the decisive or clinching factor, and that in making this statement, the learned judge misunderstood Lord Goff. It seems to me that there is no need to draw such fine semantic distinctions, and that Lord Goff’s use of the term “significant cause” was merely another way of expressing the very test laid down in *Barton*. One must not forget that in making his statement, Lord Goff did in fact cite the passage in *Barton* (as well as those in *Pao On* and *Crescendo Management*) as authority. A threat could easily be a significant factor in inducing a person to agree to the contract or modification, without it being the only reason, or even the

²⁵ [1980] AC 614 at 635.

²⁶ (1988) 19 NSWLR 40 at 46.

²⁷ [1992] AC 152.

²⁸ See Chitty 7-015; Smith “Contracting under Pressure: A Theory of Duress” (1997) 56 *Cambridge LR* 343 at 364n61.

²⁹ [1999] 1 Lloyd’s Rep 620.

³⁰ At 636 (my emphasis).

predominant or clinching reason, if one could reduce this sort of thing to percentages on the facts.³¹ Were the threat not significant, one could hardly describe it as “an” inducing factor in the first place. To start drawing fine distinctions about the burden of proof in different forms of duress cases would also defeat the purpose of trying to establish a generalised test for duress in the first place. It seems that it is unnecessary to manufacture a legal difficulty at this point. Provided that the threat was a causal factor of at least some significance in inducing the contract, that should be sufficient to satisfy the first requirement of the choice enquiry. A common sense approach needs to be applied in this regard. In taking this view I am in agreement with Kerr, who has pointed out, correctly, I think, that adopting this test in South African law would mean the test of factual causation in duress cases would then be the same as that which applies in the law of misrepresentation. He states, with regard to misrepresentations, that “the misrepresentation need only be *an* inducing cause, but it must be one of some significance.”³² This approach seems to reflect what the Privy Council in *Barton and Pao On*, as well as Lord Goff in *Dimskal*, were trying to say. Adopting this approach would also ensure consistency of principle in duress cases and misrepresentation cases, which would seem to be to the benefit of the law generally.

7.4 Legal causation: was the aggrieved party justified in succumbing to the threat?

7.4.1 The foundations of the requirement

The mere fact that the illegitimate threat was the factor, or a factor that induced the contract is not enough, on its own, to satisfy the choice enquiry. This much was conceded by Mance J in *Huyton SA v Peter Cremer GmbH & Co*, when he said:³³

“On the other hand, it seems clear that the application of a simple ‘but for’ test of subjective causation in conjunction with an actual or threatened breach of duty could lead too readily to relief being granted. It would not, for example, cater for the obvious possibility that, although the innocent party would never have acted as he did, but for the illegitimate pressure, he nevertheless had a real choice and could, if he had wished, equally have resisted the pressure and for example, pursued alternative legal redress.”

³¹ For example, if a threat constituted, say, 40% of the reason behind the decision to contract, this would certainly be a factor of significance, even if it isn’t the predominant factor.

³² Kerr *Contract* 275. The authorities to this effect are *Orban v Stead* 1978 (2) SA 713 (W) at 717F; *Novick and another v Comair Holdings Ltd* 1979 (2) SA 116 (W) at 150C; *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 411-2; *Hulett and others v Hulett* 1992 (4) SA 291 (A) at 309D-E.

³³ [1999] 1 Lloyd’s Rep 620 at 636.

So: something more has to be proved. Classically, under the *Broodryk* formulation, the law requires that the aggrieved party show that the threat was one of “imminent and inevitable evil”, a phrase that also finds a place in the French Code Civil.³⁴ However, this phrase is rather vague, and does not really describe the test very clearly.³⁵ Furthermore, a requirement of “imminence” can be misleading without qualification, especially in more subtle cases like economic duress.³⁶ As a result, it is better to use the description of the test endorsed in some other jurisdictions. The test is whether or not the aggrieved party was justified, in the eyes of the law, in succumbing to the threat. It is submitted that an analogy can be drawn between this requirement and the second requirement of causation in the law: that there must not only be factual causation, but legal causation as well.

7.4.2 Legal causation generally

Again, the test for legal causation in South African law is most well developed in the law of delict and criminal law. The leading articulation of this second requirement of causation may be found in the case of *International Shipping Co (Pty) Ltd v Bentley*,³⁷ where Corbett CJ said:³⁸

“Demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, namely, whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue.... This is basically a juridical problem in the solution of which considerations of policy play a part. This is sometimes called ‘legal causation’.”

As a matter of policy, a person accused of committing a crime, a delict or a breach of contract will not be responsible for every consequence that can be attributed factually to his or her conduct. Thus, the purpose of the legal causation enquiry is to determine whether or not the factual link between conduct and effect should be recognised by law, and whether or not the person responsible for the unlawful conduct should be held liable in law for that conduct. The question that must be faced by a court is where the boundaries of legal liability should lie, taking into account the interests of both the person

³⁴ Art 1112(1) refers to a threat of “substantial and imminent harm”.

³⁵ See Chapter 4 above.

³⁶ Interestingly, the requirement that the threat be “imminent” in the old BW of the Netherlands (Art 1360 I) was removed in the new formulation of Art 3:44(2) of the NBW. See Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 453.

³⁷ 1990 (1) SA 680 (A).

³⁸ At 700. For a general discussion of the law concerning legal causation, see Van der Walt and Midgley *Delict* 168; Neethling *et al Delict* 183; Snyman *Criminal Law* 79.

who committed the wrong and the victim.³⁹ Since this essentially amounts to a value judgment based upon common sense,⁴⁰ the Supreme Court of Appeal has, after some debate about the appropriate mechanism for determining the presence of legal causation,⁴¹ opted to take a flexible approach to the problem. The flexible approach was adopted in *S v Mokgethi*,⁴² where Van Heerden JA said:⁴³

“I am sceptical whether a legal system could operate without a general elastic criterion for the determination of legal causation. It is evident ... that policy considerations must be considered in this regard, and that one must be careful to ensure that the defendant’s liability does not exceed the boundaries of what is reasonable, fair and just.”

So, the flexible test requires the court to take a common-sense, practical view of the matter, and to determine whether a sufficient link exists for legal liability to be imposed upon the defendant, taking into account all relevant policy considerations, and concepts of reasonableness, fairness and justice. The flexible approach has been confirmed by the Supreme Court of Appeal a number of times since *Mokgethi*’s case.⁴⁴ Van Heerden JA made it clear that this did not mean the traditional modes of determining the issue, such as foreseeability or the direct consequences test, ought to be discarded. Such mechanisms remain valuable and useful, but that they are only subsidiary mechanisms that can be used, either individually or in combination, to guide a court to a conclusion on the basis of the flexible

³⁹ See on this point *Blaikie v The British Transport Commission* [1961] AC 44 at 49; *S v Mokgethi* 1990 (1) SA 32 (A) at 40.

⁴⁰ A view articulated by the Appellate Division in *General Accident Insurance Co South Africa Ltd v Xhego* 1992 (1) SA 580 (A) at 586F, citing with approval the remarks to this effect of Corbett J (as he then was) in *Wells v Shield Insurance Company Ltd* 1965 (2) SA 865 (C) at 870E.

⁴¹ The dispute centred mainly around whether to adopt the direct consequences theory (see *In re Polemis v Furness, Withy & Co Ltd* [1921] 3 KB 560) or the foreseeability theory (see *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] AC 388). However, there were other theories that were advocated, such as the test of the *novus actus interveniens*, the intended consequences theory, and the adequate cause theory. A discussion of each of these theories, their merits and demerits, as well as the debate about which was appropriate for use in South Africa falls beyond the scope of this work. For a discussion see Van der Walt and Midgley *Delict* 168-176; Neethling *et al Delict* 186-209.

⁴² 1990 (1) SA 32 (A).

⁴³ At 40D. This is a translation of the original Afrikaans: “Ek betwyfel dan ook of ’n regstelsel sonder ’n oorheersende elastiese maatstaf vir die bepaling van juridiese oorsaaklikheid kan klaarkom. Soos blyk uit die passasies wat wat hierbo ... aangehaal is, kom beleidsoorwegings ter sprake en moet daarteen gewaak word dat dat ’n dader se aanspreeklikheid nie die grense van redelikheid, billikheid en regverdigheid oorskry nie.”

⁴⁴ See *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700; *Smit v Abrahams* 1994 (4) SA 1 (A) at 14; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764; *Napier v Collett* 1995 (3) SA 140 (A) at 143; *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) at 1113; *Road Accident Fund v Russell* 2001 (2) SA 34 (SCA) at 39.

criterion.⁴⁵

7.4.3 Legal causation and the test for duress

The general principle of legal causation may be usefully employed to describe the second requirement of the choice enquiry in duress cases. But again the general principles require a little contextual refinement to suit the needs of the duress enquiry. In criminal law, delict, or where damages for breach of contract are sought, the flexible criterion is designed to limit liability by ensuring there is a close enough connection between the unlawful conduct and the loss or injury that was suffered. At the risk of labouring the point, in duress cases, the problem is not a question of preventing indeterminate liability. Rather, the question is whether, in the eyes of the law, the aggrieved party to a contract was justified in succumbing to the illegitimate proposal of the other party, and is entitled to a remedy as a result. In broad terms, courts effectively apply a flexible criterion to solve this question: taking into account the facts of the case, any relevant matters of policy, and the requirements of reasonableness, fairness and justice, should the person who agreed to the contract or modified contract be entitled to escape the natural consequences of his or her conduct?⁴⁶ The focus thus rests on the reasonableness or otherwise of the conduct of the party who was the recipient of the illegitimate threat.⁴⁷ In cases where the person ought not to have succumbed to the threat and entered into the contract, the test of causation will not be satisfied. The court will find that the person was not justified in succumbing to the threat, and the person who made the illegitimate threat will be absolved of liability.

The more particular mechanisms or tests for legal causation in fields of law like delict or criminal law are not appropriate for duress cases. For example, questions of foreseeability are usually not relevant to the question whether a person was justified in submitting to a threat. As a result, the modern doctrine of duress has developed its own mechanism for determining whether the aggrieved party's submission to the threat was justified on grounds of policy, and after considering relevant facts and the

⁴⁵ At 40-1.

⁴⁶ Wertheimer *Coercion* 268 states: "Given A's credible coercive proposal, B is sometimes entitled to do what A demands and then be released from the normal legal consequences of his act. At other times B should either stand his ground, or, if he chooses to yield, he should at least not expect to recover later on."

⁴⁷ As a result, it is submitted that the recent criticism of Olivier JA in *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1077I-1079E that since the flexible test of legal causation refers to policy considerations, it overlaps confusingly with the wrongfulness enquiry, may be a matter of some concern and debate in an area like delict, but does not really apply in the context of duress cases in contract. In duress cases, the overall test divides itself out quite neatly so that the proposal enquiry focuses on the legitimacy or otherwise of the conduct of the party making the threat; the choice enquiry (incorporating questions of causation) focuses in turn on the conduct of the other person in response to that threat.

dictates of fairness and justice. The mechanism that the courts have developed is to investigate whether the aggrieved party was put in such a position that he or she had no reasonable or acceptable alternatives available other than agreeing to the illegitimate proposal.⁴⁸ The point is that the doctrine of duress does not allow a person to fold and succumb to any threat whatever: the recipient of the threat is expected to consider all other practical options of relief first, and only if there are no reasonable or viable options available, to bow to the threat and agree to the contract or the contract modification.⁴⁹ Should it be found that no other options were reasonably available, then the second requirement of the choice enquiry will be satisfied, and duress will be proved. But if there were other options that the aggrieved party could reasonably have exercised, then a court may find that the party was not justified in succumbing to the threat, and the aggrieved party will have no remedy. This requirement really requires an assessment of whether the aggrieved party is acting in good faith by attacking the transaction after having agreed to the terms at an earlier time.⁵⁰ As far as the choice enquiry is concerned, determining whether the aggrieved party acted reasonably in choosing to accede to the other party's proposal has become as integral to the modern test for duress as the enquiry as to whether an illegitimate threat has been made.⁵¹ From a broader perspective of principle, the investigation is

⁴⁸ It can be noted that this approach has the support of those theorists who take an economic approach to the analysis of the duress doctrine. For an in-depth analysis of this leg of the enquiry from an economic perspective, see Mather "Contract Modification Under Duress" (1982) 33 *South Carolina LR* 615 from 632.

⁴⁹ See Dalzell "Duress by Economic Pressure I" (1942) 20 *North Carolina LR* 237 at 240. The terms "no reasonable choice" and "no acceptable alternative" are variously used in *B&S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 at 428; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 at 719; *Vantage Navigation Corporation v Suhail & Saud Bahwan Building Materials llc (The Alev)* [1989] 1 Lloyd's Rep 138 at 146; *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 638. See too *Restatement, Second, Contracts* §175(1). In *Stott v Meritt Investment Corp* (1988) 48 DLR (4th) 288 at 305 the term "no realistic alternative" was used. Both Article 3.9 of the UNIDROIT Principles and Article 4:108 of the Principles of European Contract Law require that there have been "no reasonable alternative" to succumbing to the threat. John Lawrence Hill "Moralized Theories of Coercion: A Critical Analysis" (1997) 74 *Denver LR* 907 at 928 states, using a unique turn of phrase, that the threat should be "undeterrable". But this term should not be understood as a synonym for "involuntary". Hill defines the term very carefully to mean that the person's consent, which was given, is excusable on the grounds that there was no other reasonable or practical alternative that existed in the circumstances to have prevented the threat from being carried out.

⁵⁰ In the words of Atiyah *An Introduction to the Law of Contract* 269: "A party should not, in general, hoodwink the other by pretending to submit to the threats made by him, and then challenge his conduct later."

⁵¹ For an overview of the position in jurisprudential terms, see Wertheimer *Coercion* Chapter 15 and Stewart "A Formal Approach to Contractual Duress" (1997) 67 *University of Toronto LR* 175 at 197ff. For an overview of the Anglo-American and Anglo-Australian position, see Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto LJ* 201 at 258ff. For the position in England, see Chitty §7-019; Halson "Opportunism, Economic Duress and Contract Modifications" (1991) 107 *LQR* 649 at 668; Nolan "Economic Duress and the Availability of a Reasonable Alternative" 2000 *Restitution LR* 105 at 110. In America see *Restatement, Second, Contracts* §175; Dalzell "Duress by Economic Pressure I" (1942) 20 *North Carolina LR* 237 at 242-3; "Duress by Economic Pressure II" (1942) 20 *North Carolina LR* 341 at 366-7. In Canada see Ogilvie "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 *McGill LJ* 289 at 317. In Australia see Carter and Harland *Contract Law in Australia* 442-3. The test has also been used

designed to aid the court in drawing a balance between protecting the aggrieved party's legitimate contractual rights on the one hand, and protecting of the important contractual value of the sanctity of promises on the other hand.⁵² To sum up: the mechanism the courts use to find this balance — the generalised test of reasonable alternatives, and its divisions that will be examined below — amounts to a contextualised and acclimatised application of the test for legal causation, rather than a separate, unconnected, normative enquiry that tags on to the questions of illegitimacy and “but for” causation:

“The issue of causation in duress cases is complicated by the necessity for determining the victim's reason for accepting the contract. The criteria of adequate legal alternatives ... [provides the] means to decide if the victim would have acquiesced in the absence of wrongful threats. The decisive issue, however, continues to be causation.”⁵³

7.4.4 The nature of the test of reasonable alternatives

The fact that the test employed under the modern doctrine of duress requires an examination as to whether the aggrieved party had reasonable or acceptable alternatives to succumbing gives some important indicators as to the nature of the test. Applying a test of reasonableness means that the courts should not rely simply on the personal feelings of the aggrieved party: the fact that the aggrieved party “felt” that he or she had no reasonable alternative will not be sufficient to satisfy a court. To take a hypothetical instance of a contract modification case: the fact that someone has a personal aversion to litigating, and therefore chose the option of succumbing, rather than taking a hard line and exercising an available option to take the party threatening breach to court, would be unlikely to convince a court that the choice enquiry is satisfied. In Dalzell's words: “Certainly a personal dislike of litigation is not likely to be held sufficient to justify a court in giving the relief or in calling the remedy inadequate.”⁵⁴ Since the test is one of reasonableness, the court must ask: did the aggrieved party respond to the threat

in South Africa. See *Lombard v Pongola Sugar Milling Company Ltd* 1963 (4) SA 860 (A) at 863F-G; *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 826H.

⁵² Again, this reflects a test of proportionality. MacDonald “Duress by Threatened Breach of Contract” 1989 *JBL* 460 at 466 expresses similar views about the balancing act this leg of the enquiry plays, and the important questions of contractual policy that it seeks to address.

⁵³ Note “Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis” (1968) 53 *Iowa LR* 892 at 922.

⁵⁴ Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 382. A subjective test was rejected in *B&S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419. MacDonald “Duress by Threatened Breach of Contract” 1989 *JBL* 460 at 467 says: “the facts must be assessed as they are, rather than as they are perceived by X to be.”

in the same way that a reasonable person would have responded? Atiyah phrases the question as follows: “[to what extent can] society legitimately require people to stand up to threats when they are made, rather than to submit and litigate afterwards”?⁵⁵ The fact that the test is one of reasonableness, and takes into account society’s views and matters of policy means that, in philosophical terms, it constitutes a moralised or normative test of the behaviour of the aggrieved party, just like the proposal enquiry amounts to a moralised or normative test of the conduct of the aggressor.⁵⁶

But, like any test of reasonableness, the test is not completely objective and abstract either. An armchair approach must not be applied: the assessment of “reasonable” alternatives must occur against the backdrop of all the surrounding circumstances, and must also take into account the victim’s personal characteristics. This approach, which finds a median between a completely objective and a completely subjective test, is the one that applies in Anglo-American systems, in modern Dutch law,⁵⁷ and is also advocated by Article 3.9 of the UNIDROIT Principles.⁵⁸ Furthermore, this approach, which was also advocated by the old Roman-Dutch authorities, is already an entrenched feature of the South African doctrine of duress.⁵⁹ As far as the victim’s personal characteristics are concerned, the sort of things that might be taken into account by the court are the person’s age, sex, mental state, health, relationship with the other parties, and business experience. Even religion or custom may be relevant, when one thinks of arranged marriages under customary law or Muslim law.⁶⁰ The point is that it is especially those of a vulnerable nature that need the protection of the law. In the words of the American *Restatement, Second, Contracts*:⁶¹

⁵⁵ Atiyah “Duress and the Overborne Will Again” (1983) 99 *LQR* 353 at 356. Atiyah’s test was adopted in Australia in *Scolio Pty Ltd v Cote* (1992) 6 WAR 475 at 484.

⁵⁶ See Wertheimer *Coercion* 272ff; Ryan “The Normative Concept of Coercion” (1980) 89 *Mind* 481. See also the discussion in Dworkin “Compulsion and Moral Concepts” (1968) 78 *Ethics* 227.

⁵⁷ Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 453 quote Hartkamp’s submission to this effect in the latest (10th) edition of Asser and Hartkamp *Verbintenissenrecht* Vol 11 para 208, published in 2001. The original source was not available to me.

⁵⁸ “The imminence and the seriousness of the threat must be evaluated by an objective standard, but taking into account the circumstances of the individual case.”

⁵⁹ See Christie *Contract* 355 and 4.3.1.2 above. For the Roman-Dutch position, see 3.3.1.3 above.

⁶⁰ For a very interesting discussion of the importance of taking culture into account in the context of forced or arranged marriages, see Bradney “Duress, Family Law and the Coherent Legal System” (1994) 57 *MLR* 963. In African custom or Muslim culture the social stigma and potential ostracism may be a very real and relevant threat in situations where a party to a proposed marriage is not a willing participant; certainly far more significant than in liberal Western society. Other sources are Manchester “Marriage or Prison: The Case of the Reluctant Bridegroom” (1966) 29 *MLR* 622; Brown “The Shotgun Marriage” (1968) 42 *Tulane LR* 837; Bradley “Duress and Arranged Marriages” (1983) 46 *MLR* 499.

⁶¹ §175(c).

“Threats that would suffice to induce assent by one person may not suffice to induce assent by another Persons of a weak or a cowardly disposition are the very ones that need protection; the courageous can usually protect themselves. Timid and inexperienced persons are particularly subject to threats, and it does not lie in the mouths of the unscrupulous to excuse their imposition on such persons on the ground of their victims’ infirmities.”

But of course this precept cannot be extended too far. The submission of the aggrieved party must still satisfy the test of the reasonable response of a person of those characteristics. One must always remember the cautionary words of Christie:⁶²

“The point is that every person who complains of duress is entitled to be seen as the sort of person he or she is, but to prevent the remedy from getting out of hand he is not entitled to repudiate the contract if he claims to have succumbed to a threat that would be unreasonable even for the sort of person he is.”

The much criticised finding in the American case of *Welch v Beeching*⁶³ is an example of a case where this warning was not heeded. Mrs Welch had traveled from Indiana to Michigan to close a business deal. Before she could leave for home, Beeching threatened civil proceedings against her, which resulted in her agreeing to surrender 90% of her commission. The threat was entirely without foundation; the court said she had a “complete defence” to Beeching’s spurious claim. Nevertheless, she succumbed to his threat. The court found this was justifiable because she was a woman who was nervous because she was away from home. With respect, to suggest that it was reasonable for Mrs Welch, a businesswoman of some experience, to have succumbed simply because she was “away from home”, cannot be supported.⁶⁴ The submission must, in the circumstances, be reasonable and justifiable, and to suggest that someone is not in a position to defend one’s rights simply because that person is away from home seems unreasonable. The case can be contrasted with the South African case of *Block v Dogon, Dreier and Co*,⁶⁵ where the plaintiff had handed over two promissory notes under

⁶² *Contract* 351. In *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (4) SA 434 (SEC) at 441E-F Leach J said, in similar vein: “It would be somewhat startling to allow a person to escape from a contract on the ground of duress induced by a fear which is completely unreasonable and has no valid basis.... To prevent the remedy getting out of hand one must, in my view, have regard to the person complaining of the duress and the circumstances in which he found himself at the time, and then gauge, in the light of all those relevant factors, whether it was reasonable for him to have succumbed thereto.”

⁶³ 159 NW 486 (1916).

⁶⁴ For detailed criticism of the decision, see Durfee “Recovery of Money Paid under Duress of Legal Proceedings in Michigan” (1917) 15 *Michigan LR* 228; Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 353.

⁶⁵ 1910 WLD 330.

threat of criminal prosecution for theft. The allegations of theft were completely fabricated, but the court held that it was reasonable for Block to have been intimidated in these circumstances: he was a lowly employee who needed his job to subsist, was ill-educated, and was barely able to communicate in English. An assessment of his character, the nature of the threat made against him, and the predicament in which he found himself at that time led the court to find that in the circumstances, his submission was reasonable.

The relative bargaining positions of the parties is undoubtedly of relevance to this question: for example, where the aggrieved party is a consumer or a tiny commercial enterprise with few resources, a court might possibly feel that succumbing to a threat from a big corporation rather than resisting the problem was acceptable in the circumstances. But where the aggrieved party is also a powerful commercial organisation, or even a government, a court is likely to expect greater powers of resistance to be shown. The leading case in this regard is *United States v Bethlehem Steel Corporation*.⁶⁶ In 1917 and 1918, during World War One, the German submarine campaign was wreaking a heavy toll on the United States fleet. It became clear that the United States, in order successfully to assist in the prosecution of the war effort, needed to build as many ships as it could in the quickest possible time, to supplement its ailing fleet. To this end the Emergency Shipping Fund Act was passed, which gave the President sweeping powers to procure such ships, and to conclude contracts for this purpose. At this point in time the Bethlehem Shipping Corporation was the biggest shipbuilder in the world. A contract to build ships was eventually concluded between the government and Bethlehem, the ultimate cost of which was \$109 000 000. During the course of the bargaining process Bethlehem threatened to halt negotiations with the government unless the proposed fixed-sum contract was converted into a cost-plus-fixed-fee contract, which was far more financially beneficial for Bethlehem. The contract was concluded on these terms. After the war, the government instituted an action against Bethlehem. One of the grounds was that it had been induced into the contract under duress. The government claimed that because of the parlous war situation, and the fact that Bethlehem was the biggest shipbuilder in the world, it had had no option but to accede to Bethlehem's demands. The argument failed. Justice Black said:⁶⁷

“The word duress implies feebleness on one side, overpowering strength on the other. Here it is suggested that feebleness is on the side of the government of the United States, overpowering strength on the side of a single private corporation....”

⁶⁶ 315 US 289 (1941).

⁶⁷ At 300.

Although it was found that there were other options potentially available to the government,⁶⁸ which completely defeated its case, for present purposes the point is that its case foundered from the outset on the fact that it was found to have been unreasonable for a powerful government in those circumstances to have submitted to the demands, and then complained of duress afterwards.

With regard to the matter of personal characteristics, the question of the relationship between the parties is a controversial one in South African law. The question here is: can a threat directed against a third party coerce one person to contract with another? Under the classic *Broodryk* formulation, only threats directed against a member of one's family are to be considered coercive. A similar limitation may be found in the words of the French Code Civil.⁶⁹ The question is whether this limitation is appropriate. Almost all the cases concerning threats to third parties concern close relatives,⁷⁰ so there is no clear precedent for the extension of the rule. But it is submitted that where the circumstances are dire enough, there should be no entrenched limit as to the sort of person to whom a threat must be made before a court will consider it to be coercive. Why should a threat directed against any third party, whether it be a friend or even a stranger not suffice? This is the position that applies in the Netherlands⁷¹ and in Germany,⁷² where threats against all third parties can lead to a finding of duress in appropriate cases, and it has been argued that this rule should apply in English law.⁷³ The limitation contained in the classic *Broodryk* formulation that the threat must be directed only against oneself or

⁶⁸ These included the fact that other suppliers could potentially have been contracted; and that the Emergency Legislation gave the President the power to have either expropriated Bethlehem, or to have stipulated the price unilaterally (at 303-4). None of these options were exercised. In any event, the court held that the demands of Bethlehem were, in the circumstances, reasonable.

⁶⁹ Art 1113: "Threat shall constitute a ground of nullity of the contract not only where it has been brought to bear against the contracting party but also where it has been brought to bear against his or her spouse or relatives in the descending or ascending line." Interestingly enough, however, the limitations have subsequently been interpreted as mere examples, and the view today is that a threat against any third person would suffice in French law. See Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 438 and the authorities there cited.

⁷⁰ In South Africa see: *Bezuidenhout v Strydom* (1884) EDC 224 (threats to prosecute a son induce parents to contract); *Oos-Transvaalse Koöperasie Bpk v Heyns* 1986 (4) SA 1059 (O) (a threat to prosecute a brother induces the other brother to contract) In England see *Williams v Bayley* 1866 LR 1 HL 200 (a threat of action against son induces father to contract). In Canada see *Byle v Byle* (1990) 65 DLR (4th) 641 (a son threatened to kill his brother unless his parents agreed to sign over land to him).

⁷¹ Art 3.44(2) NBW: "A person who induces another to execute a certain juridical act by unlawfully threatening him or a third party ... makes a threat."

⁷² §123(1) BGB refers simply to threats directed against "a person" being voidable. This has been interpreted to include third parties. See Beale *et al Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* 438, and the authorities cited there.

⁷³ See Chitty 7-037.

a member of one's family to be considered coercive is unsupportable.⁷⁴

What needs to be considered next is what sort of considerations are relevant, in a more concrete sense, to determining whether or not the aggrieved party had reasonable alternatives available.

7.4.5 What is a “reasonable alternative”?

From the outset it should be made clear that there can be no closed list of “reasonable” alternatives, since the resolution of this question depends on the circumstances of the particular case. In the words of the compilers of the American *Restatement, Second, Contracts*, “[w]hether a victim has a reasonable alternative is a mixed question of law and fact, to be answered in clear cases by the court”.⁷⁵ Particularly in cases of economic duress, commonly recognised standards of commercial dealing will be very important considerations.⁷⁶ But while the test is flexible and circumstantial, over the years some concrete factors have been isolated in the various jurisdictions, that are designed to assist a court in assessing the reasonableness or otherwise of the alternatives available to the aggrieved party.

Some preliminary issues can be dealt with relatively swiftly. First of all, the decision as to whether there was an absence of reasonable alternatives is often easier to make in more traditional duress cases, where the threat is directed against person or property. In such situations, when the gun is pointed at the person's head, or the match is burning next to the barn, the imminence of the threat is indisputable, and the alternative choices available to the aggrieved party are clearly not reasonable ones in the circumstances. There are sound reasons of policy for suggesting that the nature and gravity of such threats is such that it makes a finding of duress under the choice enquiry virtually a formality.⁷⁷ But such cases are, of course, extremely rare. It is really in more modern versions of duress case, especially the economic duress cases, where the issue becomes more difficult to assess, and where the matter requires more careful examination. Although it should be pointed out that even in more classical duress cases the matter may not always be cut-and-dried, and some of the factors developed in more modern cases could also apply in appropriate cases of physical duress or duress of goods. There are, simply put, two categories of alternatives that could have existed at the time that the threat was made, and which

⁷⁴ See a full discussion of my criticisms at 4.3.2.4 above.

⁷⁵ *Restatement, Second, Contracts* §175(b).

⁷⁶ Cf the views of Ogilvie “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 *McGill LJ* 289 at 317. This ties in once again with the underlying requirements of the contextualised approach to good faith that underpins the duress doctrine.

⁷⁷ The obvious relevance of the gravity of the threat to the finding is emphasised by Chitty §7-021; Note “Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis” (1968) 53 *Iowa LR* 892 at 920. *Barton v Armstrong* [1976] AC 104 is obviously a classic example of this.

may, separately or in combination, influence the success or failure of the duress claim of the aggrieved party. These are either (a) options that involve having recourse to the legal system in some way; or (b) options that do not require the aggrieved party to resort to the legal system, but are reasonable and justifiable options in the circumstances.

7.4.5.1 Options that involve having recourse to the legal system

The opportunity to challenge the actions of the other party by having recourse to the legal system would certainly jeopardise an allegation that the aggrieved party was justified in submitting to the threat. In the case of *Hartsville Oil Mill v United States*⁷⁸ the American Supreme Court said:⁷⁹ “Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it ... for which the remedy afforded by the courts is inadequate.” If the legal system provides an option to the victim of the improper threat, there may be a reasonable expectation that that option should have been exercised. The courts are tasked specifically to deal with civil wrongs. So: if a threat to breach a contract is made, seeking a remedy for breach might be more appropriate. It might also have been possible to seek an urgent interdict (injunction) to prevent the threat from being carried out. Going beyond options to litigate, the failure of a party to take independent legal advice on the threat, when such an option was available, would in many cases seriously prejudice the duress claim of a party who simply succumbed to the threat immediately.⁸⁰

But the mere fact that a potential legal remedy exists does not take the enquiry far enough. The facts and circumstances of the case, more especially the likely effectiveness or practicality of the alternative relief on the facts of that particular case, must be considered.⁸¹ Although a legal remedy may

⁷⁸ 271 US 44 (1925).

⁷⁹ At 49 (per Justice Stone). The United States Supreme Court made the same point in *Radich v Hutchins* 95 US 210 (1877) at 213. In Canada, the failure to exercise an “adequate” legal remedy was fatal to the duress claim in *Gordon v Roebuck* (1990) 64 DLR (4th) 568 at 573.

⁸⁰ A failure to take legal advice was considered fatal to the duress claim in the full bench appeal in *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at 181F.

⁸¹ In this respect, the decision in *Hennessy v Craigmyle & Co* [1986] ICR 461 can be criticised. This was a case that in South African law could potentially have amounted to one of constructive dismissal. Hennessy was threatened with summary dismissal, but was offered a redundancy payment as long as he waived his rights to have his dismissal reviewed by an industrial tribunal. He took this option. He then challenged the agreement on the basis of duress. The court held that his plea failed, since he had had a reasonable alternative — to resign, complain to the industrial tribunal, and draw funds from the dole in the meanwhile. It is submitted that this finding is questionable, in that it takes an armchair approach to the problem. From the facts it appears that Hennessy was not aware of his rights to claim social security. But more importantly, perhaps, the court failed to take into account the social implications of walking out on a job, the possible lengthy delays of having his complaint reviewed, and the inequality in resources of a solitary person vis-à-vis a corporation. For criticism of the approach

exist in an abstract sense, a number of considerations could lead a court to find that the legal option was not a reasonable one in the circumstances. The first of these is if the alternative option is highly risky, and unlikely to succeed, or a *brutum fulmen*.⁸² In *Universe Tankships Inc of Monrovia v International Transport Workers Federation*,⁸³ the appellants had sought legal advice as to whether it would be possible to obtain an urgent injunction against the ITWF to stop the Federation and its members from blacking its ship. The appellants were advised that their prospects of obtaining an injunction were minimal,⁸⁴ presumably since the dispute was industrial in nature, and an injunction is not usually a terribly efficient mechanism of dealing with an industrial dispute. This was found to have been an important factor militating against the reasonableness of exercising the legal option in this case. In the duress of goods case *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials llc (The Alev)*,⁸⁵ the party who had made the threats to abandon the property that was the subject of the contract, unless the contract of carriage was amended, alleged that the defendants should have applied to the English courts for an injunction, rather than succumbing to the threat. Hobhouse J pointed out that this would have been useless, since the ship was outside English jurisdiction, and even if jurisdiction were to have been founded, there was no-one in England against whom the injunction could have been enforced. Hobhouse J said:⁸⁶

“On the facts this is a clear example of the situation where the legal remedies are inadequate to meet the victim’s commercial needs or to negative the compulsion operating upon him. There was no reasonable alternative open to the defendants.”

Another consideration is the likely quantum of damages that might be awarded if an action for breach were to be instituted. The nature of the rules regarding the award of damages for breach (including the difference between special and general damages, the rules on mitigation of loss) may mean that the likely award could be so negligible that taking action would be a waste of time. This could be a factor

of the Court of Appeal, see MacDonald “Duress by Threatened Breach of Contract” 1989 *JBL* 460 at 470-1.

⁸² For a full discussion of the application of this principle in American law, see Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 371ff.

⁸³ [1983] AC 366.

⁸⁴ Per Lord Scarman at 400G, citing with approval the finding of Parker J in the court *a quo*. Presumably the finding would have been the same in *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152.

⁸⁵ [1989] 1 Lloyd’s Rep 138.

⁸⁶ At 148.

to be borne in mind by the court in appropriate circumstances.

In the second place, a court may find on the facts that the option was of little use because of the attendant delays and costs that inevitably accompany legal action. In Dalzell's words:⁸⁷ "The alternative remedy available generally involves litigation, and litigation always involves delay; such delay is the common reason for that inadequacy of remedy which completes a case of duress." In cases where time was of the essence, the courts have been prepared to say that because of the nature of the litigation process, the alternative was unreasonable, and entering into the contract was justified.⁸⁸ In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*,⁸⁹ the building yard was threatening to breach the construction contract unless the owners agreed to a 10% increase in construction fees. Mocatta J held that in the circumstances of the case the owners of the ship that was being constructed could have claimed damages against the yard for breach, rather than submitting to the threat. But the judge held that exercising this option would have meant the owners would have been faced with "all the inherent unavoidable uncertainties of litigation", and "in view of the position of the Yard vis-à-vis their relationship with Shell it would be unreasonable to hold that this is the course they [North Ocean] should have taken."⁹⁰ In particular, if the party is vulnerable due to its parlous financial position,⁹¹ will face disaster if the threat is carried out because of commitments which it has to third parties,⁹² or will face ruin if the contract were to be breached,⁹³ the courts will take these matters into account in assessing whether the option to seek the assistance of the law was unreasonable in the circumstances, and capitulation was appropriate. Galt's suggestion that bankruptcy, as a mechanism provided for by law, should be recognised as a reasonable alternative to succumbing to the threat,⁹⁴ cannot be supported. To suggest that bankruptcy is a reasonable legal alternative in these circumstances goes against all principles of business as well as common sense, and this highly impractical suggestion has not been

⁸⁷ Dalzell "Duress by Economic Pressure II" (1942) 20 *North Carolina LR* 341 at 370. He gives examples from American state law.

⁸⁸ The principle was articulated in *B&S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 at 428 (per Kerr LJ). The same rule applies in Canada. See *Eadie v Township of Brantford* (1967) 63 DLR (2d) 561 at 570.

⁸⁹ [1979] 1 QB 705.

⁹⁰ Both quotes from 719F-G.

⁹¹ See, for example, the facts of *D & C Builders Ltd v Rees* [1966] 2 QB 617.

⁹² See *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] 1 All ER 641 at 644.

⁹³ See *B&S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 at 428; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] AC 366 at 383 and 400F.

⁹⁴ Galt "Economic Duress: A Rethinking After *Totem*" (1980) 9 *UCLA Alaska LR* 197 at 213.

embraced by courts anywhere in the world.

A situation where this significant practical issue of the usefulness of alternative legal options is relevant is where workers embark on an illegal or wildcat strike, in an attempt to modify their conditions of service. Under the proposal enquiry, such a strike would clearly amount to an illegitimate threat to the business's economic interests.⁹⁵ Now if the employer entered into a settlement with its workers in the face of such an illegal strike, would a court accept an argument that it had no reasonable alternative but to do so? Prima facie, it would appear not. In theory, the powers granted to the aggrieved party by s68 of the Labour Relations Act would allow the aggrieved party to interdict the defaulting parties and sue for compensation. Technically the Labour Relations Act provides for an alternative remedy for the employer where the strike is illegal. But sometimes law on paper does not translate so easily into law in action, and there may be circumstances where a wildcat strike could potentially pose such a serious threat for the business that the employer needs to get its workforce back on duty, and taking action in the courts may not be suitable on the facts of the case. Cases of this nature would probably be extremely rare, but it is submitted that the possibility should not be discounted that the choice enquiry could be satisfied, if the facts are extreme enough.

7.4.5.2 Options that do not require the aggrieved party to resort to the legal system

In the second place, there may be a number of options open to the party faced with the threat that do not require him or her resorting to the legal system in any way. Of course, some will be completely unreasonable, and no person would be expected to have exercised them, rather than succumbing to the proposal of the aggressor. At the outer limit of the spectrum would be the ludicrous option (in severely coercive situations like traditional physical duress cases) of physically challenging and subduing the aggressor, or rejecting the proposal and calling the aggressor's bluff. There may of course be situations where this has happened, but this sort of thing can be excluded from this study. A more intermediate example would be in the field of labour law, where an employee's resignation occurs because of illegitimate threats of dismissal, so constituting constructive dismissal. Such a threat could be highly coercive, not only because of the immediate spectre of losing one's income, but also because of the difficulties one is likely to face finding employment in the future with a tarnished record. One of the options available to the aggrieved party (other than resigning) would be to clam-up, and to try to accede to the demands of the aggressor, no matter how improper, inappropriate or humiliating they were. If the circumstances were such as to justify a finding of constructive dismissal, no court would find that

⁹⁵ See 6.4.4.4 above.

choosing the other option, rather than resigning, would have been a reasonable option.⁹⁶

On the other side of the spectrum would be threats that one should reasonably ignore. One thinks here of very minor threats. In such cases a court may find that it would have been reasonable for the other party to have shrugged off the threats, or ignored them, rather than withering and agreeing to a new contract or a contract modification. The general legal maxim *de minimis non curat lex* would apply here.

These sort of alternatives come under the spotlight most frequently where a threat to breach a contract has been made in order to inspire a renegotiation of the contract. In such circumstances, courts will be loath to accept the party's submission if other suppliers are readily available, and it would have been simple for the party to resist the threat, end the relationship with the aggressor, and seek a substitute elsewhere. In *Austin Instrument Inc v Loral Corporation*⁹⁷ Field CJ said:⁹⁸ "A mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not itself constitute economic duress. It must also appear that the threatened party could not obtain goods from another source of supply." Where other suppliers are not available, or some form of monopoly exists, a court would be far more likely to see the submission to the threat as having been justified.⁹⁹ But it must be emphasised again that an armchair approach must not be taken. Other circumstances may have a significant bearing on the outcome of the case, and the mere existence of other potential suppliers may not be decisive of the issue. The situation may be altered significantly if time is of the essence, and the aggrieved party is faced with either bankruptcy or potential action from third parties if the contract is not completed to plan. In *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd*,¹⁰⁰ the carrier Atlas threatened to breach its contract to deliver Kafco's baskets to Woolworth Stores unless the carriage rate was increased substantially. Kafco was therefore faced with defaulting on its obligations to deliver its product to Woolworth stores, the deadlines of which were immediate. Since Kafco was a small firm, its success depended heavily upon the Woolworth contract. It could not afford to default, and face the ruinous consequences of action by Woolworth. Secondly, the court found that although there are many

⁹⁶ As an aside, one can only speculate how many employees actually do exercise this option, rather than resigning and challenging the nature of their resignation via the appropriate labour tribunals.

⁹⁷ 271 NE 2d 533 (1871).

⁹⁸ At 535.

⁹⁹ See *Smith v William Charlick Ltd* [1924] 34 CLR 38. Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto LJ* 201 at 264n274 cites *Rose v Vulcan Materials Co* 194 SE 2d 521 (1973) (no other suppliers of stone available); *King Construction Co v WM Smith Electrical Co* 350 SW 2d 940 (1961) (no other suppliers of cranes available) and *Tri-State Roofing Co v Simon* 142 A 2d 333 (1958) (No other roofing subcontractors available) as other examples.

¹⁰⁰ [1989] 1 All ER 641 (QB).

carrier companies operating in the United Kingdom, the threats were made in early November, at a time of the year when commercial demand on carrier companies was at its heaviest. As a result, Tucker J found that it would have been difficult, if not completely impossible, for Kafco to have found an alternative carrier to meet its looming delivery deadlines.¹⁰¹ In the circumstances, Kafco was found to have been justified in acceding to the threats; the option of finding an alternative supplier was an unreasonable alternative on the facts.

Another example is the case of *B&S Contracts and Design Ltd v Victor Green Publications Ltd*.¹⁰² B&S had threatened to breach its contract to erect stands for an exhibition due to be hosted by Victor Green, unless Victor Green agreed to pay an extra £9000 on top of the original contract price, to meet the demands of B&S's striking workers. At the time the demands were made, the exhibition was due to start in a matter of five days. It would have been impossible for Victor Green to have found a substitute to do this sort of technical job at such short notice. Time was of the essence for Victor Green, and no other options were reasonably available to it in these pressing circumstances. Victor Green's submission to the demand was held to have been justifiable, and it was held to have acted under duress. In the words of Griffiths LJ:¹⁰³

"The defendants, faced with this demand, were in an impossible position. If they refused to hand over the sum ... they would not be able to erect the stands in this part of the exhibition, which would clearly have caused grave damage to their reputation and I would have thought might have exposed them to very heavy claims from the exhibitors who had leased space from them.... They seem to me to have been placed in a position ... in which they were faced with no alternative course of action but to pay the sum demanded of them."

The second situation where courts will generally find that there was no justification for the aggrieved party having acceded to the threat is where it becomes apparent from the facts and evidence that submitting to the threat was a calculated business choice, rather than a decision made in the agony of

¹⁰¹ At 644a-b.

¹⁰² [1984] ICR 419.

¹⁰³ At 426. Another example may be found in the Washington State case of *Rosellini v Banchemo* 517 P 2d 955 (1974), discussed by Crocker "Contracts—Modification Agreements: Need for New Consideration; Economic Duress—*Rosellini v Banchemo*" (1975) 50 *Washington LR* 960. In that case a threat to breach a contract was made at a time when the contractor Rosellini needed money to pay his sub-contractors, and a failure to do so would have had disastrous implications for the goodwill of his business. See also the Alaskan case of *Totem Marine Tug & Barge v Alyeska Pipeline Inc* 584 P 2d 15 (1978), noted by Galt "Economic Duress: A Rethinking after *Totem*" (1980) 9 *UCLA Alaska LR* 197. A threat not to pay a debt for eight months when it was due would have been disastrous to Totem, who cash flow problems, and had 30-day deadlines to make payments to creditors. A failure to pay its creditors would have meant bankruptcy. This inspired a re-negotiation of the contract price from \$300 000 to \$97 500 between Alyeska and Totem.

the moment, where no other options were reasonably available. Where the decision to agree to the contract or contract modification was a coldly analytical business decision, taken on the basis that the modification is a justifiable business risk, or the negative consequences of the modification are outweighed by other benefits of retaining the contractual relationship, the element of coercion is considered to be lacking.¹⁰⁴ It is here that the defendants in the case of *Pao On v Lau Yiu Long*¹⁰⁵ came unstuck. This case was cited earlier as a definitive example of a case where there were numerous causal factors that convinced the defendants to agree to a contract modification, one of which happened to be a threat of breach. While the defendants may have cleared the relatively simple hurdle of showing that the threat was a reason for entering the contract, they still had to show that in the end, they were justified in doing so. This they were unable to do. The House of Lords reviewed the evidence and found that the decision to enter the contract had been a calculated business choice: the pro's and con's of accepting or rejecting the proposal had been thoroughly debated; the defendants had decided that litigating would have meant negative publicity; and in any event, the amendment to the contract seemed, at the time, a risk well worth taking not only because the economic situation was in their favour, but also because other parts of the contract were so beneficial to them. Lord Scarman said:¹⁰⁶

“In the present case there is unanimity amongst the judges below that there was no coercion. In the Court of Appeal the trial judge’s finding ... that the first defendant considered the matter thoroughly, chose to avoid litigation, and formed the opinion that the risk in giving the guarantee was more apparent than real was upheld. In short, there was commercial pressure, but no coercion.”

From the examples given above, it is evident that the reasonableness or otherwise of any of these sort of alternatives will depend on the evidence before the court, as well as the surrounding circumstances of the case.

7.4.5.3 A protest?

¹⁰⁴ See Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 382; Ogilvie “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 *McGill LJ* 289 at 317; Ogilvie “Contracts-Economic Duress-Inequality of Bargaining Power-Quo Vadis?” (1981) 59 *Canadian Bar Review* 179 at 187; Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 262; Robinson “Enforcing Extorted Contract Modifications” (1981) 68 *Iowa LR* 699.

¹⁰⁵ [1980] AC 614. For a comment on the case, see England and Rafferty “Contractual Variations: Consideration and Duress” (1980) 18 *Osgoode Hall LJ* 627.

¹⁰⁶ At 635E-F.

The final topic that deserves attention is the relevance of the aggrieved party making some form of overt protest at the time the contract is entered into. A protest may be defined as some outward manifestation of dissent, or unequivocal objection to the demand being made by the debtor upon the creditor, and which is expressed at the time the payment is made by the debtor. A classical example of a protest was that which was made in the case of *Blackburn v Mitchell*.¹⁰⁷ In this case, a ship had parted with its anchors and had become grounded near the beach in Table Bay. The weather was poor, and therefore the ship was in serious danger of destruction. A tugboat came to the ship's aid, but the tug captain refused to help unless Mitchell, the ship's master, agreed to pay him £2000. He further threatened to leave the ship to the mercy of the elements unless an agreement to this effect was signed. The master, fearing for his ship's safety, signed the contract, but said at the time, "I protest against this," and "I'll sign the bill, but you will never get paid."¹⁰⁸

How important is this sort of act to the finding under the choice enquiry? Under the modern doctrine of duress, noting one's protest is a relevant factor to be taken into account when assessing whether the aggrieved party has succumbed legitimately to the threat. In *Pao On v Lau Yiu Long*¹⁰⁹ Lord Scarman specifically identified it as a factor to be taken into account by a court.¹¹⁰ But it is not considered to be a decisive substantive factor; rather, the fact that the victim protested before succumbing will only be useful evidence that could contribute to a finding that this requirement is satisfied. Lord Scarman clarified this matter in *Universe Tankships Inc of Monrovia v ITWF*,¹¹¹ where he said that a declaration of protest is "an evidentiary matter" that does "not go to the essence of duress", and "[t]he victim's silence will not assist the bully, if the lack of any practicable choice but to submit is proved".¹¹² This mirrors exactly the position that applies in the United States. In *Murphy*

¹⁰⁷ (1897) SC 338. It should be noted that this case (a salvage matter) was of a contractual nature, and was decided under English maritime law in terms of the General Law Amendment Act of 1879, but the facts provide an excellent illustration of the notion of a protest. See too *Hartje v Maasdyk* 1876 Buch AC 208; *Georgetta Lawrence v Calcutta* 1878 Buch AC 102.

¹⁰⁸ At 342.

¹⁰⁹ [1980] AC 614.

¹¹⁰ At 635C-E his lordship said: "In determining whether there was ... coercion ... it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether, after entering the contract he took steps to avoid it." Cf *Maskell v Horner* [1915] 3 KB 106.

¹¹¹ [1983] AC 366.

¹¹² At 400E. This principle was reaffirmed in *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials llc (The Aleve)* [1989] 1 Lloyd's Rep 138 at 146. Academic support for this view may be found in Halson "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 *LQR* 649 at 667; Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto LJ* 201

v The Brilliant Co,¹¹³ a duress of goods case, the court held that the agreement to pay a higher price for a boat was only made because of threats that the boat would not be repaired and released to the owner at a time when he desperately needed the boat. The Court held that duress was proved despite the absence of any protest on the part of the aggrieved party. The absence of protest was held to be irrelevant to its finding that the transaction was entered into under duress. Dalzell, citing a number of authorities,¹¹⁴ describes the existence of a protest in American law as a secondary issue that is usually only useful in borderline cases. He points out, correctly, it is submitted, that it is not acceptable to make a protest a requirement for two basic reasons, First, it could mean that declaring a protest could become a formality, which would obviously deprive the protest of any meaning. Secondly, the same pressure that induces the contract could very well induce the aggrieved party to keep quiet, rather than antagonising the aggressor any further.¹¹⁵

This position must be contrasted with the position that currently applies in South African law. It is commonly believed that in cases concerning duress of goods, it must be proved that in addition to all the *Broodryk* requirements, the aggrieved party must show that he or she protested at the time the agreement was concluded.¹¹⁶ This is so, it is argued, because a threat to property is less coercive than other types of threats.¹¹⁷ It is submitted that this is entirely inappropriate, and that the position described above should apply. Requiring proof that a protest was noted is illogical, for the reasons given above by Dalzell. The point cannot have been better articulated than by the learned judge in *Manhattan Milling Co v Manhattan Gas and Electric Co*:¹¹⁸ “protest [is] a mere gesture unless there [is] duress in fact, and in that event, protest [is] unnecessary”. Furthermore, requiring proof of protest in one type of duress case, but not in others, runs counter to the desirability for the existence of one single test for duress, that can be applied uniformly to all types of duress case. It is hoped that the misconceptions and

at 258; Furmston (ed) *Butterworths Common Law Series: The Law of Contract* 697.

¹¹³ 83 NE 2d 166 (1948). For comment on the case, see Rafferty “The Element of Wrongful Pressure in a Finding of Duress” (1980) 17 *Alberta LR* 431 at 434.

¹¹⁴ Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 382n288. See also “Duress by Economic Pressure I” (1942) 20 *North Carolina LR* 237 at 244 and 252.

¹¹⁵ At 382. For other critics of the requirement of protest in the American literature, see Crocker “Contracts—Modification Agreements: Need for New Consideration; Economic Duress—*Rosellini v Banchemo*” (1975) 50 *Washington LR* 960; Mather “Contract Modification Under Duress” (1982) 33 *South Carolina LR* 615 at 629n39.

¹¹⁶ See *Hendricks v Barnett* 1975 (1) SA 765 (W) at 769D; *Kapp v TC Valuta (Pty) Ltd* 1975 (3) SA 283 (T) at 284E; *Wille’s Principles* 446-7.

¹¹⁷ This was the view of De Villiers CJ in *White Brothers v Treasurer-General* (1883) 2 SC 322 at 350.

¹¹⁸ 225 P 86 (1924) at 90.

anomalies inherent in the judgment in *Hendricks v Barnett*¹¹⁹ will be exposed and eliminated by the South African courts at the first opportunity.

7.5 Conclusion

This concludes the detailed analysis of the test for duress in contract that it has been proposed ought to be adopted in South Africa, in place of Wessels's test that was adopted in *Broodryk*'s case. It is submitted that the test, which incorporates the proposal enquiry, which analyses whether an illegitimate threat was made, and the choice enquiry, which analyses whether the aggrieved party was justified in succumbing to the threat, since he or she had no reasonable alternative but to do so, establishes a test for duress that is both logical and rational, and appropriately balances the various contractual policy factors that need to be taken into account in determining whether or not the agreement between the parties is voidable. In this way, it is hoped that the doctrine can play a successful role in assisting to combat contractual abuses of bargaining strength in modern society.

There is one question that remains: whether duress constitutes a justification or an excuse.

7.5.1 Terminology: justification and excuse

Recently, there has been some controversy, mainly the philosophical literature, as to whether a successful plea of duress should be described as a justification or an excuse. The traditional view has generally been that duress is an excuse.¹²⁰ Wertheimer challenged this orthodoxy in his legally-based analysis of coercion, claiming that duress amounts to a justification.¹²¹ Wertheimer's view in turn has been heavily criticised by Hill, who argues (from a utilitarian rather than a more traditional deontological perspective) that duress is indeed an excuse.¹²² It is submitted that the authorities,

¹¹⁹ 1975 (1) SA 765 (W).

¹²⁰ Fletcher *Rethinking Criminal Law* at 829ff; Dressler "Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits" (1989) 62 *Southern California LR* 1331 at 1365; Moore "Causation and the Excuses" (1985) 73 *California LR* 1091 at 1098 and 1099n25.

¹²¹ Wertheimer *Coercion* 165-9 and 269-72.

¹²² Hill "Moralized Theories of Coercion: A Critical Analysis" (1997) 74 *Denver University LR* 907 at 917-9, and "A Utilitarian Theory of Duress" (1999) 84 *Iowa LR* 275 at 304 and 315ff. For his discussion of the difference between his utilitarian perspective and the deontological perspective, see the *Iowa LR* article at 310.

especially Wertheimer and Hill, have argued past one another, and that Wertheimer overplayed his hand to a degree by arguing that duress is a justification rather than an excuse. In fact, both concepts of justification and excuse are important to the analysis, if the role of each concept is understood correctly.

First of all, the concept of justification is important specifically to the second leg of the choice enquiry. Once it has been determined that an illegitimate threat has in fact induced the contract, the courts then turn their attention to the conduct of the recipient of the threat in the circumstances. Was that party justified in submitting to the threat, since he or she had no other reasonable or acceptable alternative but to do so? If the investigation reveals that there were no other reasonable alternatives, then the conduct of the recipient of the threat in agreeing to the contract or contract modification, viewed in the context of the choice enquiry, is justified. The second leg of the test for duress is therefore satisfied. The act or conduct of the aggrieved party in succumbing to the threat, and agreeing to the proposal, is at issue at this point in the enquiry.

Once this has occurred, and it has been proved (a) that an illegitimate threat was made that (b) induced the contract since the recipient had no reasonable alternative, then, viewed as a whole, a case of duress has been made out. Viewed as a whole, duress amounts to an exculpatory defence, or an excuse. By proving duress tainted the transaction, the aggrieved party will be excused from the ordinary consequences of choosing to agree to the contractual proposal of the other party. In Hill's words, "we feel sorry for him. We empathize. And we decide accordingly to hold him not responsible for his act."¹²³ The defence of duress, viewed as a whole, establishes how we treat the actor, or the aggrieved party him or herself, from a legal perspective. Is that person to be contractually responsible for his or her act, in terms of the ordinary requirements of reliance theory? Or, can that person be excused from the ordinary contractual consequences of assent because of the duress?

It is therefore my submission that while questions of justification are important in one sector of the test for duress, once all sectors of the test are satisfied, the duress, viewed as a whole, amounts to an excuse that relieves the aggrieved party from being legally bound by terms of the agreement, and entitles him or her as a result to certain remedies.

¹²³ Hill "Moralized Theories of Coercion: A Critical Analysis" (1997) 74 *Denver University LR* 907 at 919.

Chapter Eight

The Effect of Duress on the Validity of a Non-Contractual Performance: The Current South African Position

“It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another that it is against conscience that he should keep.”

Lord Wright, in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61

8.1 Outline

Chapters 4 to 7 have focused on the position with regard to duress as a cause of action in the law of contract in South Africa. But the doctrine of duress does not only affect obligations that arise out of contract. Additionally, duress has been a ground that has justified the recovery of a payment or a transfer made in a situation where there was never a contractual relationship of any kind between the parties.¹ Currently in South African law, there are a number of fundamental distinctions drawn between these two situations, as far as the duress claim is concerned. Where non-contractual performances are made under duress, these sort of cases fall to be decided purely in terms of the principles of the law of unjustified enrichment in South Africa. This chapter is designed to compare and contrast the application of the doctrine of duress purely in these enrichment cases from that which applies in the contractual milieu, and to show where the current position is either deficient or idiosyncratic. The chapter will commence with a brief description of unjustified enrichment as a branch of the law of obligations, to put the discussion in its context. The bulk of the chapter will then be dedicated to an analysis of how

¹ Cf Du Plessis *Compulsion and Restitution* 127 and “Fraud, Duress and Unjustified Enrichment” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 194 at 212. In the contractual context, a performance occurs *obligandi causa*, whereas a performance in a non-contractual context would usually occur *solvendi causa*. See Zimmermann *The Law of Obligations* 889 and “Unjustified Enrichment: The Modern Civilian Approach” (1995) 15 *OJLS* 403 at 405-6.

the doctrine of duress has developed in this field of law in South Africa. This chapter, as was the case with Chapter 4 with regard to the position in contract, is designed to provide the backdrop for the re-examination of the current position that will follow in Chapter 9.

8.2 The law of unjustified enrichment

8.2.1 General conceptual framework

The law of unjustified enrichment is that branch of the law that applies, in the simplest of terms, to situations where one person's estate has been unjustifiably enriched at the expense of another person. Eiselen and Pienaar define an obligation arising from unjustified enrichment succinctly as "an obligation arising whenever one person's estate has been increased at the expense of another person's estate and sufficient legal ground (*causa*) for the retention of such increase is lacking."²

The law of unjustified enrichment constitutes the third main source of obligations in South African law, together with the law of contract and the law of delict. But this was not always so. The Roman and classical Roman-Dutch idea that these obligations were quasi-contractual remained popular in the formative years of South African law, and this meant, conceptually anyway, that cases of unjustified enrichment were traditionally not understood as a distinct species of obligation, but were treated as a peculiar sub-species of contract.³ However, the trail-blazing work of especially De Vos and Scholtens in the mid 20th century led to the abandonment of the quasi-contract theory, and led to recognition of the fact that the field of unjustified enrichment constitutes a separate source of obligations in its own right.⁴

The goal of the law of unjustified enrichment is either to reverse a transfer of value (usually a transfer of money or property, although enrichment can occur by consumption) that has occurred without good cause, or to restore the aggrieved party to the position the person was in, in a patrimonial sense, prior to the making of the undue transfer of value that has resulted in the impoverishment his or

² Eiselen and Pienaar 3.

³ See on this point *Wille's Principles* 630-1; Zimmermann *The Law of Obligations* 837. This idea had a particularly strong effect on English law, after the idea was received into English law in the case of *Moses v Macferlan* [1760] 2 Burr 1005. Birks *Restitution* 29 describes this approach waspishly as the "implied contract heresy".

⁴ See *Nortje en 'n ander v Pool NO* 1966 (3) SA 96 (A) at 119; *Govender v Standard Bank of Southern Africa Ltd* 1984 (4) SA 392 (A). The leading works on unjustified enrichment in South Africa are: De Vos *Verrykingsaanspreeklikheid*; *LAWSA* Vol 9; *Wille's Principles* Ch XXXVIII; Eiselen and Pienaar *Unjustified Enrichment: A Casebook*. Scholtens wrote the section on unjustified enrichment in the *Annual Survey of South African Law* for over 20 years, and was a prolific publisher of academic articles on the subject.

her estate. The appropriate way to describe this branch of law has been a matter of some debate in South African law. It has been referred to as “onregmatige verryking” (ie wrongful or unlawful enrichment).⁵ This cannot be accurate, since unlawfulness or wrongfulness is not a requirement that is necessary to establish enrichment liability, in a general sense. Frequently, this area of law is described by the name “unjust enrichment”,⁶ which is the approach followed in English law.⁷ The general opinion in South Africa is that this is a misnomer. Since the key issue in enrichment cases is whether either property or money was transferred without some legally recognisable cause, or, to use the Latin term, *sine causa*, in South Africa it is now widely accepted that this branch of law concerns instances of “unjustified enrichment”.⁸ In this respect South African law is similar to the German civil model, which refers to *Ungerechtfertigte Bereicherung* (unjustified enrichment), not *Ungerechte Bereicherung* (unjust enrichment).⁹

8.2.2 Principles of enrichment liability in South African law

8.2.2.1 The recognition of enrichment liability

There was not only a conceptual paradigm shift in the 20th century South African law with regard to recognising the field of unjustified enrichment as a discrete branch of the law of obligations. In addition, our law has advanced to a point where it is now recognised that certain general elements

⁵ *Le Roux v Van Biljon and another* 1956 (2) SA 17 (T) at 20G.

⁶ See *Greenhills Producers (Pty) Ltd v Benjamin* 1960 (4) SA 188 (E); *Visser en 'n ander v Rosseau en andere NNO* 1990 (1) SA 139 (A) at 148H; *ABSA Insurance Brokers (Pty) Ltd v Luttig* 1997 (4) SA 229 (SCA) at 241I.

⁷ The use of this term in English law is controversial though, but not because of its formulation. It was only in 1990s that the House of Lords openly recognised that the principle of unjust enrichment existed in English law (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 48), and that law of unjust enrichment constituted a branch of the law of obligations in English law (*Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] AC 221 at 227). Before this, the general opinion had been that no general principle of unjust enrichment existed in English law. See *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104. But perhaps the bigger controversy has been over what to call this area of law. Under the influence of scholarly writers, this branch of law has commonly been called the law of restitution in England. Although this remains the common view, recently it has been suggested that the term “unjust enrichment” more properly explains the principled reason behind the existence of this area of law, rather than restitution, which is the consequence of a finding of unjust enrichment. Notable commentaries in this regard are Birks “Misnomer” in Cornish *et al Restitution Past, Present & Future* 1, and Hedley *Restitution: Its Division and Ordering* Ch 8.

⁸ This is the view that has been adopted by Eiselen and Pienaar 5; *Wille's Principles* 630; Van Zyl “Verrykingsaanspreeklikheid in Perspektief” 1984 *De Jure* 42. The view has won over most courts. See, by way of example, *Nortje en 'n ander v Pool NO* 1966 (3) SA 96 (A) at 133F; *Blesbok Eiendomsagentskap v Cantamessa* 1991 (2) SA 712 (T) at 717H; *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 488E.

⁹ See Markesinis *The German Law of Obligations Vol 1* 725.

common to all types of enrichment action can be identified. There are four requirements applicable to all enrichment cases, which must be proved before enrichment liability will arise.¹⁰ These are:

1. The defendant must be enriched;
2. The plaintiff must be impoverished;
3. The defendant's enrichment must be at the expense of the plaintiff;
4. The enrichment must be unjustified (*sine causa*).

Element four requires that, in order to institute an enrichment action for the recovery of a performance in South African law, it is necessary for the plaintiff to show, in addition to the fact that the defendant was enriched at the plaintiff's expense, that the enrichment occurred *sine causa*; ie there was no legally recognised ground for the enrichment. But as the law stands, this general enrichment principle actually does very little work in the South African legal context. This is so because South African law does not as yet recognise one general enrichment action of the sort found in §812 of the German BGB, or art 6:212 of the new Dutch civil code.¹¹ The individualised enrichment actions of Roman and Roman-Dutch law were received into South African law, and a plaintiff is still required to frame his or her claim in terms of one or another of the classical Roman-Dutch enrichment actions to this day. The result is a "unified patchwork"¹² of general principles supporting specific species of action.

Naturally, this means that, in addition to the general elements of enrichment, the specific factors and requirements applicable to the relevant traditional enrichment action must also be proved in order for the plaintiff to have a restitutionary remedy in terms of one of the actions. The picture of enrichment law in South Africa is thus an interesting one. Whereas the roots of the South African law of unjustified enrichment, and indeed the classical enrichment actions themselves, are of impeccable civilian origin, in a true hybrid sense, the South African approach to enrichment cases also reflects characteristics of the more casuistic English approach to restitution.¹³ By way of comparison, although the English have

¹⁰ This list was cited with approval by Schutz JA in *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 490E. The list of elements comes from *LAWSA* Vol 9 §76, and may also be found in Eiselen and Pienaar 26. A full description of these elements may be found in these two sources.

¹¹ See *Nortje en 'n ander v Pool NO* 1966 (3) SA 96 (A); *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 488-9.

¹² The term is that of Schutz JA in *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 487G.

¹³ Zimmermann and Du Plessis "Grondtrekke en Kernprobleme van Die Duitse Verrykingsreg" 1992 *Acta Juridica* 57 at 57-8 and n5; Du Plessis "Fraud, Duress and Unjustified Enrichment" in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 194 at 212-3.

recognised the principle of unjust enrichment in their law,¹⁴ and also recognise general principles of enrichment liability,¹⁵ a plaintiff has to demonstrate an “unjust factor” or specific ground for restitution in order to make out a case for restitution on the basis of unjust enrichment. There is no general requirement in English law that the enrichment must have occurred *sine causa*.¹⁶ In English law, a claimant will have to show that the enrichment occurred as a result of grounds like mistake, ignorance, duress, necessity, or illegality,¹⁷ before the plaintiff will be entitled to restitution. The differences between the civilian and common law approaches to enrichment will be returned to in Chapter 9.

In South Africa, the Supreme Court of Appeal has been quite happy to recognise and impose liability in situations and circumstances where liability would not have existed under the traditional enrichment actions in Roman or Roman-Dutch law. However, the court will only do so if modern circumstances and equities necessitate it, and if a particular form of traditional enrichment action is amenable, in some way, to development. The traditional actions thus remain of paramount importance, and will only be extended in an *ad hoc* fashion.¹⁸ This has significance for duress cases in this branch of the law, as will be seen below.

The traditional enrichment actions currently available in South African law can be divided into a number of distinct categories.¹⁹ In this study only the *condictiones* will be discussed, since this is the only category of enrichment action relevant to cases of duress.

¹⁴ *Lipkin Gorman v Knarpdale Ltd* [1991] 2 AC 48; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] AC 221 at 227; Goff and Jones 11ff; *Virgo Restitution* 49ff.

¹⁵ These are: (a) has the defendant been enriched? (b) was the enrichment at the plaintiff’s expense? (c) was the enrichment unjust? (d) are there any defences? See Burrows *Restitution* 7.

¹⁶ In fact, the English are mostly resistant to this idea. For an interesting analysis of the difference between the English “unjust factors” approach and the German general enrichment action, see Johnston and Zimmermann “Unjustified enrichment: surveying the landscape” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 3; Meier “Unjust factors and legal grounds” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 37; Krebs “In defence of unjust factors” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 76.

¹⁷ A full list of so-called unjust factors may be found in Burrows *Restitution* 21. A full discussion thereof may be found in Burrows *Restitution* 94ff; Goff and Jones 175ff.

¹⁸ See on this point *Nortje en ’n ander v Pool NO* 1966 (3) SA 96 (A) at 137; *Kommissaris van Binnelandse Inkomste en ’n ander v Willers en andere* 1994 (3) SA 283 (A) at 333; *Bowman, De Wet and Du Plessis NNO and others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 40A-B; *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 488-9; *First National Bank of Southern African Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 971; *LAWSA* Vol 9 §75.

¹⁹ These are: the *condictiones*; the *actio negotiorum gestorum utilis*; the various actions for compensation for improvements made to the property of another; the action for work done or services rendered; and the action against persons of limited capacity to act. A full analysis of these topics may be found in any of the leading South African texts on unjustified enrichment. One category of enrichment action has been added by statute. That is the action in terms of s28(1) of the Alienation of Land Act 68 of 1981.

8.2.2.2 The *condictiones*

The purpose of the enrichment *condictiones* in South African law was described by Van den Heever J in *Pucjowski v Johnston's Executors* as follows:²⁰ “The object of condition is the recovery of property in which ownership has been transferred pursuant to a juristic act which was *ab initio* unenforceable or has subsequently become inoperative.” The *condictiones* of modern South African law, are, to all intents and purposes, the same as those that existed in post-classical Roman law and Roman-Dutch law. The most commonly utilised action is the *condictio indebiti*.²¹ This action has traditionally allowed person who has either handed over property or paid money *indebite* — particularly in the mistaken belief that it was due, although its scope has been broadened to cover other situations, as will be discussed below — to reclaim the money or property. Secondly, there is the *condictio ob turpem vel iniustam causam*.²² In terms of this action, where either money or property has been transferred in terms of an illegal contract, which has been declared void, the aggrieved party is entitled to reclaim what has been transferred, or its value. Thirdly, there is the *condictio causa data causa non secuta*.²³ This action, which is instituted very rarely, allows a person to recover something that has been transferred (i) on the assumption that a particular event will take place in the future, and the event does not occur, or (ii) in terms of a modus that has been ignored or frustrated.

The fourth type of *condictio* is the *condictio sine causa*. The *condictio sine causa* comes in two forms.²⁴ First, there is the *condictio sine causa generalis*. The *condictio sine causa generalis* overlaps with the three *condictiones* discussed in the previous paragraph. In effect, it has no distinct characteristics, and is simply another name under which any one of the three above-mentioned *condictiones* can be pleaded. Secondly, there is the *condictio sine causa specialis*. This form of *condictio* does have a separate existence, and is available in certain specified circumstances where unjustified enrichment has occurred, but the claim does not fall under one of the three specific *condictiones* mentioned above. In South African law, a *condictio sine causa specialis* may be claimed in four circumstances. These are: (i) where money or property is transferred due to a *causa* that was

²⁰ 1946 WLD 1 at 6.

²¹ See *D 12.6.1.1*; Voet 12.6.1; *La Riche v Hamman* 1946 AD 648; De Vos *Verrykingsaanspreeklikheid* 171ff; LAWSA Vol 9 §78ff; Eiselen and Pienaar 106ff; *Wille's Principles* 636.

²² See *D 12.5*; 27.3.5; *C 4.7*; Voet 12.5; Grotius *Inleiding* 3.30.17; *Jajhbay v Cassim* 1939 AD 537; De Vos *Verrykingsaanspreeklikheid* 160ff; LAWSA Vol 9 §82ff; Eiselen and Pienaar 89ff; *Wille's Principles* 636.

²³ See De Vos *Verrykingsaanspreeklikheid* 154ff; LAWSA Vol 9 §85ff; Eiselen and Pienaar 158ff; *Wille's Principles* 635.

²⁴ See *D 12.2.18.1*; *Greenhills Producers (Pty) Ltd v Benjamin* 1960 (4) SA 188 (E); De Vos *Verrykingsaanspreeklikheid* 209ff; LAWSA Vol 9 §87ff; Eiselen and Pienaar 171ff; *Wille's Principles* 638-9.

originally valid, but which subsequently falls away;²⁵ (ii) where the money or property that has been transferred has been consumed by someone else who was in possession of the money or property; (iii) where a bank has made payment under a forged or countermanded cheque;²⁶ or (iv) where property has been transferred to another party *sine causa*, but the circumstances are such that none of the other *condictiones* lie.²⁷

Each of these enrichment actions therefore specify what sort of factors and circumstances will justify a conclusion that some form of enrichment was *sine causa*; for example whether it be because of mistake (the time-honoured province of the *condictio indebiti*), or because of illegality (which provides a ground for an action under the *condictio ob turpem vel iniustam causam*).

8.3 The doctrine of duress and the recovery of non-contractual transfers in the law of unjustified enrichment

As far as the topic of this study is concerned, where it can be proved that a non-contractual transfer of property or money has occurred under duress, the transfer will be considered to have occurred *sine causa*, or without legal cause. According to the authorities, the relevant specific enrichment action under which a claim based on duress must be framed is the *condictio indebiti*.²⁸

The remainder of the chapter will be dedicated to a discussion of how South African law came to recognise that duress constituted a ground for instituting the *condictio indebiti*, and what the courts have required a plaintiff to prove in order to make out a case for restitution of a non-contractual performance because of duress.

8.3.1 The Roman-Dutch law

Ordinarily, it would be the Roman-Dutch law that would provide the basis for legal developments in the South African law of obligations. To recapitulate very briefly, in Roman and Roman-Dutch law,

²⁵ An example would be where a contract is rendered void for supervening impossibility of performance. See *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427. In such cases the action can also go by the name of the *condictio ob causam finitam*.

²⁶ This is a relatively new category of liability. See *B&H Engineering v First National Bank of South Africa Ltd* 1995 (2) SA 279 (A) at 284.

²⁷ The precise referents of this form of liability are uncertain in our law. See Eiselen and Pienaar 171.

²⁸ See *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A). This classification will be discussed in more detail below.

the actions and remedies for duress were uniform, and covered both contracts induced by duress as well as payments or transfers made under duress outside the bounds of contract.²⁹ But the test for duress was very stringent, and applied almost exclusively to duress of the person. In certain circumstances a *condictio ob turpem vel iniustam causam* could have been instituted in cases where the coercion fell outside the fairly strict limits of the traditional doctrine of duress, but this is likely to have been a rare occurrence. Since the majority of the Roman and Roman-Dutch authorities focussed on duress in contract, and enrichment was not recognised as a discreet category of obligations, there is not a great deal of guidance to be found on these sort of enrichment cases in the old authorities.

8.3.2 Early developments in the courts

As discussed in 8.2 above, it was only in the mid 20th century that South African law finally came to recognise that unjustified enrichment constituted a separate and distinct facet of the law of obligations, with its own distinct characteristics. And although this branch of the law is receiving increasing attention, the law of unjustified enrichment remains something of a Cinderella subject in South Africa right up to this day.³⁰ Now, cast the mind back to the early days of the colonial courts in the 1800s, when these conceptual developments were still some years away, and enrichment cases were generally treated as a “quasi-contractual” oddity. Add to this mix colonial judges who lived in a fairly primitive and rudimentary environment. Most of these judges were schooled in English law, yet they were expected to nurture and apply rules, principles and doctrines of Roman and Roman-Dutch law that were not only alien to them, but were also difficult to establish due to a lack of source material. Finally, as stated above, there was very little authority to be found in the Roman-Dutch sources anyway on non-contractual payments made under duress, especially with regard to cases that did not concern threats of physical harm. The stage is set for a discussion of how the doctrine of duress as it pertains to non-contractual transfers in the law of unjustified enrichment came to take on a peculiarly South African form.

The first case in South African law concerning non-contractual payments made under duress was that of *White Brothers v Treasurer-General*,³¹ decided in the Cape in 1883. The opinions expressed in this decision put the law on the path that it continues to tread today. The facts of this case were as follows. The plaintiffs had instituted a claim for the recovery of payments that they alleged had been made under duress. In short, the plaintiffs complained that they had unlawfully been forced to pay

²⁹ For a full discussion see Chapters 2 and 3 above.

³⁰ For a similar view see Zimmermann and Visser *Southern Cross* 523.

³¹ (1883) 2 SC 322. For another review of the case, see Du Plessis *Compulsion and Restitution* 135.

customs duties for goods that they, as merchants, had imported into the harbour at Port St Johns. These goods had continuously been impounded by the authorities, and since the plaintiff's livelihood depended on getting access to the goods, they were each time forced to pay the duties to secure the release of the goods. During the years 1878 to 1881, the White Brothers paid out just over £1018 in dues. Eventually, the White Brothers took action in the courts to reclaim this amount, alleging the money had been paid under duress. They argued that these customs duties had not been due, since the Governor and High Commissioner of the Colony (Sir Bartle Frere) had not had the authority to order that customs be levied at Port St Johns. This authority, they alleged, was vested in the English Parliament and sovereign alone, and Sir Bartle Frere had not procured this authority before beginning to collect customs duties at Port St Johns. The upshot was, in the opinion of the White Brothers, that the customs officials had unlawfully coerced them into paying this money by withholding their goods.

All three judges who heard the case delivered opinions. The most comprehensive opinion was that written by De Villiers CJ. The Chief Justice granted the defendants absolution from the instance. This was so for two reasons. First of all, De Villiers CJ investigated at length the question whether the payments that had been made were *ultra vires* or not.³² On this point De Villiers CJ held that only payments made up to 1879 could be considered *ultra vires*. De Villiers CJ conceded that Sir Bartle Frere's original proclamations concerning the payment of duties at Port St Johns had been made without the authority of the Imperial government. However, the illegality of such payments was cured in 1879 by the ratification of the proclamations by the Secretary of State for the Colonies. While the learned judge held that this ratification did not cure the illegality of the previous payments, all payments made thereafter were valid, and could not be reclaimed.

The second aspect of De Villiers CJ's argument concerned the cause of action regarding those payments that had been extracted when the Colonial Government was not legally empowered to do so. This he classified as a claim for *restitutio in integrum*. De Villiers CJ said:³³

"Now the only tangible ground upon which the plaintiffs can claim relief in the present case is that the payments were not voluntary, that they were made under a sort of duress, and that therefore the first of the grounds for restitution which I have just mentioned [*metus*] is in principle applicable. The plaintiffs, it has been fairly argued, were constrained to make the payments by the fear that they would not obtain their goods without such payments, and in order to induce the Collector of Customs to do that which he was bound to do without payment."

Having identified this as a case of duress, De Villiers CJ turned to the works of those writers who he

³² At 345-348.

³³ At 349.

considered to have been influential in articulating the classical Roman-Dutch position: Voet, Van der Linden and Pothier. From these sources De Villiers CJ identified what he considered to be certain rudiments: first, that it is the lack of “free consent” that invalidates contracts or payments made because of threats; secondly, that this lack of free consent will not lightly be presumed — the intimidation will thus have to be such as would affect a person of “ordinary firmness”; and thirdly, that it is only threats of serious evil directed against one’s person or one’s family that will invalidate a payment or contractual obligation. He also pointed out that in the English law of the time, a contract could not be avoided for duress when the threat had been made against property. De Villiers CJ attributed this congruence between the two systems to the influence of Roman law on English judges.³⁴

“The principles of the Civil Law must have been clearly present in the mind of LORD DENMAN in giving judgment in the case of *Skeate vs Beale* (11 Ad. & E. 990): ‘We consider,’ said he, ‘the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods.’”

This similarity led him to conclude, in his opinion, that the civilian law of duress and the English law of duress were identical, and English law could be applied to the facts of the case before him.³⁵ As he saw it, the English position was as follows:³⁶

“I take it to be clear that although mere duress of goods will not avoid a contract,³⁷ a payment of money in order to obtain goods improperly obtained is not considered to be a voluntary payment, and is therefore recoverable. But in all the cases which have been cited to establish this proposition, there has been some unequivocal act on the part of the person paying to show that the payment was not a voluntary one.”

Since this was not a contractual arrangement under scrutiny, but a case in which the plaintiffs were reclaiming payments that had been made under duress, De Villiers CJ held that the payments could be recovered, but only if the payments were shown to be “involuntary”. In order to prove this, the

³⁴ At 350.

³⁵ At 350. This was hardly a novel occurrence. Although De Villiers CJ was conscious of the need to utilise and perpetuate the principles of Roman-Dutch law, he was not intimately acquainted with the Roman-Dutch sources (being English trained), and he did not hesitate to apply the rules of English law if he was uncertain about the Roman-Dutch law, or where the Roman-Dutch authorities were silent. For more on De Villiers CJ’s tendencies in this regard, see Walker *Lord De Villiers and His Times: South Africa 1842-1914* 80-84.

³⁶ At 351.

³⁷ This anomaly, and the position with regard to duress of goods in contract has been discussed at 4.3.4.2.2 and 6.4.2 above.

plaintiffs had to show that some overt protest had been made at the time of payment.³⁸ On the facts De Villiers CJ held that no clear proof of protest existed, and that the plaintiffs were not, for this reason, entitled to reclaim any of what they had paid.

Smith J agreed with De Villiers CJ's order, but his reasoning was, with respect, somewhat peculiar. The learned judge set down the following test for adjudicating the issue before the court:³⁹

"There is no doubt of the proposition that if goods are wrongfully taken and a sum of money is paid simply for the purpose of obtaining possession of these goods, especially if it be under protest, that money can be recovered back on the ground that it was not a voluntary payment."

Smith J then went on to hold, first, that there was sufficient proof of protest to render the payments involuntary.⁴⁰ But after this initial conclusion had been drawn, he went on to find that the proclamation of the Governor and High Commissioner concerning the payment of customs duties had been ratified *ex post facto* by Queen Victoria, which legitimised the actions of the customs officials *ab initio*. Since the demands were thus clothed with legal authorisation, the government was held to be exempt from liability, and Smith J concluded that an order of absolution was appropriate.

With respect, Smith J's reasoning cannot be correct. On the basis of his test, it was critical for him to investigate the validity or otherwise of the payments before he could address the question whether the payments were voluntary or not. He could not find that the money had been paid "involuntarily", but then deny the plaintiffs their claim on the basis that the demand for customs dues was entirely lawful. His chain of reasoning puts the cart before the horse, and means that his judgment is not very helpful, from a legal perspective.

Dwyer J (in what eventually amounted to a dissenting opinion) held that the plaintiffs were entitled to reclaim the money that they had paid.⁴¹ As far as Dwyer J was concerned, these payments had been exacted under duress of the plaintiff's goods. The plaintiffs had been put in a position whereby they had no realistic option but to pay the money over, in the light of the threat that their property would be withheld unless they paid over the customs dues. These threats were, in Dwyer J's eyes, unlawful, since his lordship found that Sir Bartle Frere had acted *ultra vires* in ordering the customs dues to be levied

³⁸ At 350-1. De Villiers CJ relied upon three English decisions where the requirement of protest had been articulated. These were: *Parker v The Great Western Railway Company* 7 M&G 253, *Parker v Bristol and Exeter Railway Company* 6 Exch 702, and *Ashmole v Wainwright* 2 QB 837.

³⁹ At 337.

⁴⁰ At 338.

⁴¹ At 336.

without the express prior authority of the sovereign.⁴² It is significant to note that Dwyer J was sceptical of the notion that clear proof of protest was required before a payment made under duress of goods could be recovered. He remarked:⁴³

“[I]t is said that any illegality in the levy was cured by a voluntary payment by the plaintiffs of the sums claimed to be repaid, and that unless the payments were made under protest, they must be regarded as involuntary. I cannot agree that the authorities go to this extent.... I think there was sufficient evidence of duress and illegality to render more formal protests unnecessary.”

Although the government was ultimately successful by a majority of two to one, the legal and factual disputes within the three opinions mean that it is technically impossible to extract a ratio decidendi from the case. But subsequent courts did not trouble themselves with such academic niceties. When reading the reports of ensuing cases where this sort of problem arose, one is struck by the fact that it is as if neither Smith nor Dwyer JJ were involved in deciding the case at all. In the next twenty-five years, the judgment of De Villiers CJ in the *White Brothers* case became the automatic point of reference for cases decided in the erstwhile Colonial and Republican courts where the plaintiff sought to have payments set aside as a result of duress of goods, and in each and every case, the approach set down by De Villiers CJ was applied.⁴⁴ This should not be surprising: De Villiers CJ’s impact on the South African legal system, both from a point of view of principle and by sheer force of his character, is legendary.⁴⁵ What is significant, though, is the effect this judgment was to have on the law concerning the recovery of payments made under duress.

At a macro-level, the most important feature of De Villiers CJ’s judgment in the *White Brothers* case was that it absorbed the 19th century English doctrine of duress of goods into South African law. Of course, this sort of mixing is not necessarily a problem: since the South African legal system is hybridised, there are many areas of South African law where English common law and Roman-Dutch

⁴² At 334-5. Dwyer J relied particularly on an obiter dictum of Parke B in the Privy Council case of *Cameron v Kyte Knapp*’s PCC 332, where it was held that the Governor of a Colony does not, merely by virtue of his position, have sovereign authority delegated to him, and any unauthorised act that he performs is not a valid act of the Crown.

⁴³ At 335 and 336.

⁴⁴ See *Knapp and Kayser v Loonguana* (1892) 7 EDC 61; *De Beers Mining Company v Colonial Government* (1888) 6 SC 155; *Leicester Brilliant Syndicate v The Colonial Government and the New Elandsdrift Mining and Estate Company* (1898) 15 SC 121 at 127; *Vergotinie v Ceres Municipality* (1904) 21 SC 28 (and cf 1904 (14) CTLR 92); *Hopkins v The Colonial Government* (1905) 22 SC 424 (and cf 1905 (15) CTLR 647); *Van Mandelsloh v The African Banking Corporation Ltd* 1905 (28) NLR 628 at 640.

⁴⁵ For a discussion of De Villiers CJ’s enormous impact in the South African legal system see Corder *Judges at Work* 34. The book is based on Corder’s DPhil thesis from Oxford, which traces the record and role of the South African Appellate judiciary from 1910 to 1950.

civilian principles have coalesced or have been harmonised, to the benefit of the system as a whole. Problems only emerge where the overlapping is unprincipled. It is submitted that unfortunately, this was just such a case. Three important factors emerge from De Villiers CJ's judgment. First, there was the absorption of the peculiar differentiation between threats to property in the contractual realm (which were not actionable), and threats concerning property in the law of unjustified enrichment (which were actionable). Secondly, from a philosophical perspective, the entitlement of the aggrieved party to relief was grounded in the notion that such payments, when induced by duress, are "involuntary". Thirdly, the requirement of protest was identified as a *sine qua non* of any successful claim for the return of money paid under duress of goods. All three of these issues, and the negative role they have played in the development of the doctrine of duress, have already been discussed in the context of the law of contract, and will be analysed again in the context of enrichment law below. It is submitted, for preliminary purposes, that De Villiers CJ's judgment put the South African law regarding the recovery of payments made under duress on an unsatisfactory path from the outset.

The principles laid down by De Villiers CJ in the *White Brothers* case continued to be applied by the newly founded provincial divisions of the Supreme Court after Union in 1910.⁴⁶ And it was not long before the newly established Appellate Division was called upon to examine this legal problem. A trio of cases concerning payments allegedly made under duress were taken on appeal in 1914 and 1915 — *Benning v Union Government (Minister of Finance)*,⁴⁷ *Union Government (Minister of Finance) v Gowar*,⁴⁸ and *Caterers Ltd v Bell and Anders*.⁴⁹ The trend remained: these three decisions provided judicial affirmation of De Villiers CJ's approach in the *White Brothers* case, and firmly established the traditional features of an action for the recovery of money paid under duress of goods.

8.4 The features of an enrichment claim for money paid under duress

Having reviewed how the early South African courts and the Appellate Division came to deal with enrichment claims for duress, it is necessary to discuss in more detail what are the key features of such

⁴⁶ See *Verster v Beaufort West Municipality* 1911 CPD 356; *Cupido v Brendon* 1912 CPD 64 at 73; *Kama v Rose-Innes* 1913 CPD 393 at 396; *Benning v Union Government (Minister of Finance)* 1914 CPD 422; *Gowar v Union Government (Minister of Finance)* 1914 EDL 428.

⁴⁷ 1914 AD 420.

⁴⁸ 1915 AD 426.

⁴⁹ 1915 AD 698.

a cause of action. The traditional features⁵⁰ of an enrichment claim for payments made under duress of goods in South African law can be identified as the following:

1. The aggrieved party seeks repayment of money handed over in order to secure the release of property that is being withheld;
2. The party will have to show that he or she was entitled to the property;
3. The payment must not have been due, and as such, the demand must have been unlawful;
4. The payment must have been involuntarily made;
5. The involuntary nature of the payment is determined by establishing whether the party protested at the time payment was made;
6. A litigant's remedy for restitution is enforced in terms of the relevant enrichment action — the *condictio indebiti*.

These six features require some analysis and explanation.

8.4.1 The ambit within which recovery on grounds of duress may occur

Traditionally in South African law, claims for restitution for non-contractual transfers have concerned threats to withhold property, or what has been called “duress of goods”. In *Benning v Union Government (Minister of Finance)*,⁵¹ the Appellate Division confirmed that (a) a payment of money made to regain possession of (b) corporeal property that was being withheld was recoverable, if all the requirements of duress could be proved.⁵² The case concerned the payment of customs duty that Benning had made in order to acquire possession of a floor-surfacing machine detained by the Commissioner of Customs at the docks in Cape Town. Several other cases fit this traditional mould. To give just one more example, in *Knapp and Kayser v Loongwana*,⁵³ the respondent's cattle had been impounded, and he had been coerced into paying a sum of money in order to secure their release.⁵⁴

⁵⁰ I have deliberately not called these six features “elements” that must be proved to have duress as a cause of action, since they are not all elements, and cover other matters, such as the identity of the appropriate action.

⁵¹ 1914 AD 420.

⁵² However, the claim ultimately failed, since there was no proof of protest (at 421). For interest's sake, this case is of historical significance for two reasons. First, the decision was handed down on behalf of the court by Lord De Villiers CJ. The Chief Justice was thus able to confirm his *White Brothers* decision in the loftier environs of the Appellate Division. Secondly, an analysis of the South African Law Reports shows that this judgment was the final reported judgment of Lord De Villiers's legal career.

⁵³ (1892) 7 EDC 61.

⁵⁴ See too *Vergotinie v Ceres Municipality* (1904) 21 SC 28, *Verster v Beaufort West Municipality* 1911 CPD 356 and *Mattison v Mpanga* 1928 (2) PH, A44 for other cases where stock was involved. In *White Brothers v*

However, the ambit of the action does extend beyond this traditional situation. One can see this occurring in two distinct ways.

8.4.1.1 Extension of the idea that payments of money may be recovered

Traditionally, aggrieved parties in South African law have sought to recover payments of money made under duress. But claims are not limited to the recovery of payments of money alone. Like in Roman and Roman-Dutch law, it is possible for the aggrieved party to recover property handed over *sine causa* to avert a threat. In *Miller and others v Bellville Municipality*,⁵⁵ the plaintiffs had decided to develop a piece of land owned by them. To do so, they needed the consent of the Municipality. But before the Municipality would approve the development scheme, the plaintiffs were required to relinquish, free of charge, a portion of the property in order that it could be used for the construction of streets.⁵⁶ After this had occurred, the Appellate Division held, in another case,⁵⁷ that the clause allowing the Municipality to expropriate land free of charge was *ultra vires*. Therefore the plaintiffs sought to have their transfer of land revoked, *inter alia* on the basis that they had been forced to hand the land over because of their fear that the building plans would not be approved if this did not occur.⁵⁸ The court held as a principle of law that the remedy for duress of goods did not extend merely to the repayment of money alone. The remedy was also available where the person had been forced to hand over property under duress. This was so because the remedy was designed to ensure that one party was not unjustifiably enriched at the expense of the other, and therefore it did not matter in what way the enrichment had occurred.⁵⁹

8.4.1.2 Extension of the idea that corporeal property be withheld to induce the payment

Treasurer General (1883) 2 SC 322, the plaintiffs sought to recover dues paid to secure the release of their commercial goods that had been impounded. The plaintiff in *Hopkins and Co v The Colonial Government* (1905) 22 SC 424 had paid an extra transportation fee after the Railways had refused to deliver a cargo of stone until the higher tariff was paid. The case of *Cupido v Brendan* 1912 CPD 64 concerned the validity of payments made to secure the possession of stud certificates, which had to be handed over to the racing authorities before the plaintiff's horses could race legally.

⁵⁵ 1973 (1) SA 914 (C).

⁵⁶ Clause 8A(i) of the Bellville Town Planning Scheme.

⁵⁷ *Belinco (Pty) Ltd v Bellville Municipality* 1970 (4) SA 589 (A).

⁵⁸ At 920E-F.

⁵⁹ At 921A-B. Although ultimately, on the facts of the case, the claim based on compulsion failed, since there was no evidence whatsoever that the donation had been made under protest (at 922). For another case concerning property, see *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 (SR).

The courts have also expanded the scope of the action by broadening the rule that the threat must have been directed against the plaintiff's corporeal property. This extension has occurred in two ways.

First, the withholding of incorporeal property (including rights) can also be classified as duress of goods, provided all the other necessary elements are satisfied.⁶⁰ When one considers that incorporeal rights are classified as property in South African law,⁶¹ this extension of the rule beyond the traditional detention of corporeal property is entirely in accordance with principle. The leading case in this regard is *Union Government (Minister of Finance) v Gowar*.⁶²

In that case, the Appellate Division had to decide whether a payment made in order to get a public official to register a life usufruct on the title deeds of immovable property was equivalent to a payment made under duress of goods. One Mr Gowar (the deceased husband of the respondent) had granted his wife a usufruct over his property in his will. The Registrar of Deeds had refused to register the usufruct unless Mrs Gowar paid transfer duty. Mrs Gowar eventually paid the money (£75 3s 6d) under protest, and then sued the government, alleging the payment was not due, and that she was entitled to recover it. Innes CJ conceded that in such a case there was no detention of goods in the normal sense of the word. However, the Chief Justice (Solomon JA and Wessels AAJA concurring) held that the actions of the Registrar of Deeds amounted to a failure to perform a public duty, which amounted to a "detention of a right".⁶³ It was held that there was no difference in principle between the normal detention of corporeal property and this particular scenario, and therefore the law on duress of goods was applicable to the facts. Innes CJ said:⁶⁴

"If a payment made under protest to obtain possession of goods wrongfully obtained is involuntary, than a payment similarly made to obtain delivery of a right wrongfully withheld is also involuntary. A man who under protest pays transfer duty not legally claimable in order to secure registration in the Deeds Office is surely in the same position as a man who similarly pays customs dues wrongfully demanded in order to obtain possession of his goods."

Although the fact is not mentioned by any of the five Judges of Appeal in *Gowar's* case, this extension had already occurred in an earlier decision of the Cape Supreme Court in *De Beers Mining Co v The*

⁶⁰ At 741E.

⁶¹ See Kleyn and Boraine *Silberberg and Schoeman's The Law of Property* 30.

⁶² 1915 AD 426. See too *Port Elizabeth Municipality v Uitenhage Municipality* 1971 (1) SA 724 (A) at 741E.

⁶³ At 435. See too 440-1 (per Solomon JA) and 454 (per Wessels AAJA).

⁶⁴ At 435.

Colonial Government.⁶⁵ In that case De Beers had purchased certain claims on the Kimberley Diamond Mine from the Compagnie Française for £825 000. The defendants had refused to register transfer until an extra stamp duty of £2063 was paid. The plaintiff paid the amount under protest, and sought to recover the money in court. De Villiers CJ (Smith and Buchanan JJ concurring) held that the amount was not claimable under statute, and therefore the government had not been entitled to withhold registration, and demand an additional payment.⁶⁶ The plaintiffs were therefore entitled to recover the money they had paid to ensure their right was registered.

A second development with respect to the property requirement is that in several cases a remedy has been granted in situations where a payment was made in response to threats that were directed against the plaintiff's property, but where the defendant was not yet in fact in possession of the property. In *Kama v Rose Innes*,⁶⁷ the plaintiff had tendered a sum of £111 to the defendant (the Deputy Sheriff of King Williamstown) to satisfy a judgment against him, and therefore avoid a writ of execution against his property. The sheriff refused to accept this amount, claiming that an extra sum of £5 had to be paid in respect of his fees. He threatened to attach the plaintiff's property unless the full amount of £116 was paid. The plaintiff eventually paid the full amount under protest, and sued to recover the additional sum, which he claimed was neither due nor payable. The court held first that the fees charged were excessive,⁶⁸ and secondly that the plaintiff had been coerced into making the payments because of the ramifications of the sheriff's threat to attach his property.⁶⁹ The plaintiff succeeded in reclaiming his money on the basis of duress of goods. A similar finding was made in *Brakpan Municipality v Androulakis*.⁷⁰ Androulakis had lost an application for a licence to run an eating establishment. He had taken this decision on review to the magistrate's court, where the magistrate had set aside the municipal tribunal's order, and ordered the Municipality to pay the costs of the hearing.⁷¹ The attorney acting on behalf of Androulakis threatened to take legal proceedings unless the costs were paid immediately. The Municipality paid the costs, and then in turn brought an application for a review of the magistrate's court proceedings, on the basis that it was acting as an administrative tribunal at the time, and was therefore not empowered to grant a costs order. The court held that the magistrate had acted *ultra*

⁶⁵ (1886) 5 SC 155.

⁶⁶ At 156-7.

⁶⁷ 1913 CPD 393.

⁶⁸ At 399.

⁶⁹ At 397.

⁷⁰ 1926 TPD 658.

⁷¹ At 659.

vires.⁷² In the premises, the Municipality pleaded that the payment was recoverable because of duress, since they had feared that if they did not pay, Androulakis would have had its property attached on the basis of the magistrate's court order. The court upheld this argument.⁷³

The Appellate Division appeared to endorse this extension in the case of *Kruger v Sekretaris van Binnelandse Inkomste*,⁷⁴ where Jansen JA held that a claim for the recovery of payments made because of the existence of the possibility that one's goods would be attached, could fall under the definition of duress.⁷⁵ However, this particular protraction of the traditional rule was carefully circumscribed by the Appellate Division in *CIR v First National Industrial Bank Ltd*.⁷⁶ Nienaber AJA held that the mere prospect of penalties being imposed would not automatically bring the doctrine of duress of goods into play.⁷⁷ Only in circumstances where an unlawful demand is made, backed up by "inevitable statutory penalties", ⁷⁸ would the court be able to infer that an act of duress has occurred. The key word is "inevitable": so, a demand backed up by an official sanction (like a writ of execution) would qualify as duress (eg *Kama's* case above), but in the *First National Bank* case, where a penalty could be imposed not automatically, but merely at the discretion of the Commissioner for Inland Revenue, this was held not to fall under the extended rule.

Cases like *Kama* and *Brakpan Municipality* concern contingent threats to corporeal property. In the spirit of the *Gowar* case, the Supreme Court of Appeal has also recognised that payments made in response to a threat that certain rights could potentially be withheld, can be recovered. In *Dali and*

⁷² At 660.

⁷³ At 664. But it should be noted that that court, being a court of review, was unable to order that the money that the Municipality had paid to Androulakis be paid back. Presumably the Municipality would have had to have concluded some arrangement with Androulakis for the return of the money, or would have had to sue Androulakis for the amount by which he had been unjustifiably enriched.

⁷⁴ 1973 (1) SA 394 (A).

⁷⁵ At 410C-D. "He alleges that the payment of the money ... occurred as a result of duress, namely the threat of attachment of his property. Although it is debatable whether the alleged 'fear' satisfies the requirements laid down by Voet 4.2.11 and following, it can potentially be incorporated under the wider concept thereof that were recognised in *White Brothers v Treasurer-General* 2 SC 322 and in this court in *Union Government (Minister of Finance) v Gowar* 1915 AD 426." This is my translation of the original Afrikaans: "Hy maak daarop aanspraak dat die betaling van die geld ... as gevolg van vreesaanjaging geskied het, nl, die bedreiging van beslaglegging op sy goed. Alhoewel dit te betwyfel is of die beweerde 'vrees' aan die vereistes deur, bv Voet 4.2.11 ev, gestel sou doen, kan dit moontlik tog tuisgebring word onder die wyer begrip daarvan, soos in *White Brothers v Treasurer-General* 2 SC 322, aanvaar en deur hierdie Hof in *Union Government (Minister of Finance) v Gowar* 1915 AD 426, erken." However, on the facts there could be no finding of duress, since the threat that was made was completely legal, in that it was made in pursuance of a judgment of court. See the judgment of the court *a quo* at 399A, and the judgment on appeal at 411C-E.

⁷⁶ 1990 (3) SA 341 (A).

⁷⁷ At 647G.

⁷⁸ At 648E.

others v Government of the Republic of South Africa and another,⁷⁹ certain members of the Venda Government Pension Fund paid back money that had accrued to them from the Fund, and which the Venda Government had alleged were overpayments. The Fund members had been coerced into paying back the money by threats (contained in a proclamation by the relevant Government Department) that any active member who refused to pay would be suspended without pay, and that the courts would be deprived of any jurisdiction to hear any disputes with regard to the payments. In the Supreme Court of Appeal the Government conceded that such threats amounted to duress, and the court held that payments made in the light of such contingent threats could be reclaimed.⁸⁰

These extensions show that an action for the return of money or property transferred under duress applies not only to the conventional threat to property (or duress of goods). As far as enrichment claims for duress are concerned, it has been recognised since the late 19th and early 20th century that an action may be instituted where the threat operates in a wider sense, to the detriment of the aggrieved party's rights. Invariably in these cases (including the cases concerning threats to corporeal property) the threat has severe implications for the patrimonial or economic interests of the aggrieved party, whether it be because the person cannot get hold of his property that he or she needs for his or her business,⁸¹ or because the access to the right that could potentially be withheld could compromise his or her estate or business.⁸² Effectively, this means that the phenomenon of economic duress has been recognised and accommodated quite happily in the law of unjustified enrichment since the 1800s, and makes the failure to recognise that threats to economic interests are actionable in the South African law of contract all the more illogical.

8.4.2 Entitlement to the property or right

Before a party will be able to reclaim payments made under duress, that party will have to show that he or she was entitled to the property that was in possession of the other party. This requirement seems obvious, but lay at the heart of the dispute in *Caterers Ltd v Bell and Anders*.⁸³ In this case, the plaintiff brought an action to recover money that it claimed it had been forced to pay to the defendants (a firm

⁷⁹ [2000] 3 All SA 206 (A).

⁸⁰ At 209-10.

⁸¹ As in *White Brothers v Treasurer-General* (1883) 2 SC 322, where White Brothers needed the property to sell on to their customers.

⁸² As in *De Beers Mining Co v The Colonial Government* (1886) 5 SC 155, where De Beers needed transfer of its ownership of claims to be registered before it could commence mining diamonds commercially.

⁸³ 1915 AD 698.

of attorneys) in order to get possession of deeds of transfer pertaining to certain plots of land. But the plaintiff's claim failed for one very simple reason: it was unable to prove that the payment was made on its behalf, nor that, at the time the payment was made, it was entitled to the transfer deed.⁸⁴ At the time of the payment, Caterers Ltd had been registered as a company, but no directors had yet been appointed, and no-one had any authorisation to make any payments on behalf of the company. The court held that if anything, the payments were more likely to have been made on behalf of the Henley-on-Klip Township Company, an organisation that had overseen the sale of plots of land in the area. What had contributed to the confusion was that the payments were made by the hand of one Horace Kent, who was not only the promoter of Caterers Ltd, but was also chairman of the Henley-on-Klip Township Company. What appears to have happened is that the contract of sale made the Henley-on-Klip Township Company responsible for the payment of transfer fees. When the fees were demanded, Kent paid these fees, but alleged in correspondence he was paying on behalf of Caterers Ltd. This appears to have been part of an elaborate scheme that he hoped would allow him to reclaim the money as an undue payment later on, for the benefit of his new company. But Kent's allegation that he had made the payments on behalf of Caterers Ltd was entirely illegitimate. Innes CJ summed up the problem in the following way:⁸⁵

"It is important to note that Caterers Ltd had no knowledge whatever of these transactions, or the letters written; and the payments made ostensibly on its behalf.... It [Caterers Ltd] had been floated with the object of running a small sanatorium, which was not proceeded with. It had elected no directors and appointed no manager, secretary or other officer, and, though its articles contained a clause purporting to invest the subscribers to the memorandum with all the powers of directors, no resolution had been taken thereunder. The company, therefore, was for practical purposes little more than a legal expression, and the use of its name by Kent, who was not even a shareholder, was wholly unauthorised."

In effect, Caterers Ltd were not responsible for the payment, nor had they the right, at the time the money was paid, to the transfer deeds at all. This lack of *locus standi* was fatal to the company's claim.

8.4.3 The payment must not be due, and as such, the demand must have been unlawful

Before the aggrieved party will be able to show that the other party was enriched unjustifiably, that

⁸⁴ At 705 (per Innes CJ); 708-710 (per Solomon JA); 712 (per CG Maasdorp JA).

⁸⁵ At 704.

party will have to prove that the payment that he or she made was *indebitum*, or not in fact due. This is an axiomatic feature of any successful claim of this nature. The way in which the courts determine this is to ask whether the threat to withhold the property or right was unlawful, since the demand for payment was unlawful.⁸⁶ In the words of Jansen JA in *Kruger v Sekretaris van Binnelandse Inkomste*:⁸⁷ “For duress to constitute grounds for restitution, it must be unlawful.... A person who pays money out of fear of a lawful demand can hardly say that he acted under duress.”

In *Kruger*’s case, the plaintiff was unable to make out a case of duress, since the court held that the money demanded by the Commissioner for Inland Revenue in that case was entirely in accordance with the rules of the Income Tax Act, and was indeed due and payable.⁸⁸ On the other hand, in *Union Government (Minister of Finance) v Gowar*,⁸⁹ a majority of the Appellate Division held that the payment that Mrs Gowar had made to the Registrar of Deeds to get her life usufruct registered had been unlawfully demanded, since the relevant Act exempted her from liability for payment.⁹⁰

As the case law stands, assessing the legitimacy of the demand has invariably required the court either to interpret whether particularly wide or vague statutory language makes provision for the sort of payment that was demanded (as in the *Gowar* case), or to determine whether the person demanding payment has acted beyond the powers he or she has in terms of delegated legislation, which provides for the exercise of some administrative discretion. In the second instance, if the power is exercised for some purpose other than that contemplated by the drafters of the legislation, this will render the demand unlawful in the eyes of the law.⁹¹

8.4.4 The payment must be involuntary

⁸⁶ Of course, it is not an essential feature of claims for unjustified enrichment generally that the enrichment have been unlawful or *contra bonos mores* in any way. See in this regard 8.2.1 above. The requirement is relevant to claims predicated upon duress, though.

⁸⁷ 1973 (1) SA 394 (A) at 410E-F. This is a translation of the original Afrikaans: “Vir vreesaanjaging om grond vir restitutie te wees, moet dit onregmatig wees.... ’n Persoon wat ’n vonnisskuld betaal uit vrees vir die teenuitvoerlegging van ’n geldige vonnisskuld kan kwalik sê dat die vreesaanjaging onregmatig was.”

⁸⁸ At 417E. This was the Income Tax Act 31 of 1941, since repealed.

⁸⁹ 1915 AD 426.

⁹⁰ The Registrar of Deeds, purporting to act in terms of the Cape Transfer Duty Act 5 of 1884 had refused to register the life usufruct granted to Mrs Gowar by her deceased husband on the title deeds of the property until the sum of just over £75 was paid. After a thorough investigation of the legislation, the majority held that an exemption in the Act concerning *fideicommissa* applied by analogy to the registration of usufructs, and that as a result, the demand for payment (backed by the threat not to register the usufruct) was unlawfully made at 432 (per Innes CJ); 439 (per Solomon JA); 444 (per De Villiers AJA) and 450 (per Wessels AJA). Juta AJA dissented, holding that, in his opinion, the payment had validly been claimed by the Registrar of Deeds.

⁹¹ Cf *Port Elizabeth Municipality v Uitenhage Municipality* 1971 (1) SA 724 (A).

A refrain that runs like a golden thread through the cases is that the payment must have been involuntary. In the *White Brothers* case, De Villiers CJ said:⁹²

“I take it to be clear that although the mere duress of goods will not avoid a contract, a payment of money in order to obtain goods improperly obtained is not considered to be a voluntary payment, and is therefore recoverable.”

In other words, the person was placed in a position where he or she had no choice but to make the payment in order to secure the release of the property, which would otherwise have been withheld. From whence does this approach originate? Certainly not from the traditional Roman and Roman-Dutch sources. The English approach to duress and the civil approach to duress may have been tarred with the same brush by De Villiers CJ,⁹³ but the Roman-Dutch authorities are seldom referred to in the unjustified enrichment cases.⁹⁴ It has been shown in Chapters 2 and 3 that in Roman and Roman-Dutch law, the doctrine of duress was not grounded in an overborne will theory. Rather, this “voluntariness” approach finds its origins in the 19th century English cases from which De Villiers CJ borrowed so heavily in the *White Brothers* case. In particular, his lordship relied on a dictum from *Parker v The Great Western Railway Company*⁹⁵ in adopting this terminology, which is indicative of the fact that at the time, the English doctrine of duress was philosophically grounded in the theory of the overborne will. The requirement that the payment must have been “involuntary” was repeated by Innes CJ in *Union Government (Minister of Finance) v Gowar*:⁹⁶

“In every instance of duress of goods the person paying has other remedies, but the fact that he cannot forthwith possess his property unless he does pay, is considered sufficient to establish the involuntary character of the payment. The fact that he elects to part with his money shows that, in his opinion, his interests

⁹² *White Brothers v Treasurer-General* (1883) 2 SC 322 at 351.

⁹³ *White Brothers v Treasurer-General* (1883) 2 SC 322 at 351; *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 433.

⁹⁴ To my knowledge, the only times where the Roman and Roman-Dutch law of duress is referred to in these unjustified enrichment cases are in *White Brothers v Treasurer-General* (1883) 2 SC 322 at 350 (per De Villiers CJ); *Gowar v Minister of Finance* 1914 EDL 428 at 433 (per Graham JP); *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 451-2 (per Wessels AAJA); *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A) at 410 (per Jansen JA). Barring the *Kruger* case, the mention of the Roman-Dutch law does not have a fundamental impact on the determination of the disputes.

⁹⁵ 7 M&G 253 at 293, where Parke B said: “We are of the opinion that the payment was involuntary.” This passage is also quoted by both Innes CJ and Solomon JA in *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 434 and 441. In that case Wessels JA at 453 cites an early edition of the English text *Pollock on Contracts* to the effect that such payments are treated as “involuntary” in English law.

⁹⁶ 1915 AD 426 at 436.

will be prejudiced by the delay which preliminary proceedings would entail.”

Since then, the idea that a payment made under duress is an involuntary payment has become an established feature of any case of this kind.⁹⁷ And one simple question dominates the enquiry as to whether or not a payment was involuntary, to the exclusion of any other. That is the question whether the payment was made under protest.

8.4.5 The existence of a protest

8.4.5.1 Rationale

In South African law, a payment will not be considered “involuntary” unless there is some clear proof that the aggrieved party protested at the time the payment was made. As far as the courts are concerned, the only viable method of establishing that the payment was involuntary, and, accordingly, made under duress, is to require proof that the payment was accompanied by a form of protest.

8.4.5.2 Origins

The roots of this protest requirement are once again to be found in the judgment of De Villiers CJ in the case of *White Brothers v Treasurer-General*.⁹⁸ The Chief Justice was adamant that proof of protest was critical to the plaintiff’s claim in this context:⁹⁹ “[I]t is impossible to know whether the payment is voluntarily or involuntarily made unless some unequivocal objection to the payment is made at the time it is made.”

De Villiers CJ made it quite clear that an articulated protest is a *sine qua non* — an unexpressed mental reservation will not be sufficient. Ever since the *White Brothers* decision, it has been accepted

⁹⁷ See *Knapp and Kayser v Loonguana* (1892) 7 EDC 61 at 63; *De Beers Mining Company v Colonial Government* (1888) 6 SC 155 at 156; *Vergotinie v Ceres Municipality* (1904) 21 SC 28 at 29; *Cupido v Brendon* 1912 CPD 64 at 73; *Kama v Rose-Innes* 1913 CPD 393 at 396-7; *Benning v Union Government (Minister of Finance)* 1914 CPD 422 at 425-6; *Gowar v Minister of Finance* 1914 EDL 428 at 438-9, 441; *Benning v Union Government (Minister of Finance)* 1914 AD 420 at 422; *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 434, 435, 436, 441, 445, 453; *Caterers Ltd v Bell and Anders* 1915 AD 698 at 704; *Lilienfield and Co v Bourke* 1921 TPD 365 at 370-1; *Port Elizabeth Municipality v Uitenhage Municipality* 1971 (1) SA 724 (A) at 741D; *Miller v Bellville Municipality* 1973 (1) SA 914 (C) at 921; *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 647D-F; *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1996 (4) SA 1151 (T) at 1155H. See too Eiselen and Pienaar 138. The desirability of this approach will be discussed at 9.2.1 below.

⁹⁸ (1883) 2 SC 322. De Villiers CJ found authority for this requirement in English law, citing *Parker v The Great Western Railway Co* 7 M&G 253; *Parker v Bristol and Exeter Railway Co* 6 Exch 702 and *Ashmole v Wainwright* 2 QB 837.

⁹⁹ At 351.

almost unanimously, and generally without question, that the existence of some form of protest is a critical and inalienable factor to the success of a plaintiff's claim for the return of payments made under duress of goods.¹⁰⁰ To give two examples: in *Verster v Beaufort West Municipality*,¹⁰¹ the plaintiff was able to recover the amount of a fine paid to release his donkeys (that had been impounded by the defendants), since he had expressly objected to the fine and the attendant payment. However, in *Benning v Union Government (Minister of Finance)*,¹⁰² the appellant failed to recover money paid over to customs officials to release his floor-surfacing machine, because there was absolutely no evidence that any protest had been made at the time the amount was paid. In *Benning's* case, De Villiers CJ reaffirmed his *White Brothers* hypothesis:¹⁰³

“[I]n every claim in which duress of goods has been relied upon as a ground of restitution, the courts have been careful to require the clearest proof of the involuntary nature of the payment and have considered such proof incomplete without evidence of some unequivocal protest at the time of payment.”

Any possible doubts about the need for protest in cases of this character were dispelled by Innes CJ in *Union Government (Minister of Finance) v Gowar*.¹⁰⁴

“Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily, as by way of gift or compromise, but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The *onus* of showing that the payments had been made involuntarily and there had been no abandonment of rights would, of course, be upon the person seeking to recover. And hence the importance of a protest or unequivocal statement of objection made at the time. Without such protest it is difficult to see how the plaintiff's state of mind could be established to the satisfaction of the court.”

¹⁰⁰ See *Knapp and Kayser v Loonguana* (1892) 7 EDC 61 at 63; *De Beers Mining Co Ltd v Colonial Government* (1888) 6 SC 155 at 156; *Leicester Brilliant Syndicate v The Colonial Government and The New Elandsdrift Mining and Estate Co* (1898) 15 SC 121 at 122; *Vergotinie v Ceres Municipality* (1904) 21 SC 28 at 29; *Van Mandelsloh v The African Banking Corporation Ltd* 1905 NLR 628 at 640; *Hopkins v The Colonial Government* (1905) 22 SC 424; *Cupido v Brendan* 1912 CPD 64 at 73; *Lilienfield and Co v Bourke* 1921 TPD 365 at 370; *Brakpan Municipality v Androulakis* 1926 TPD 658 at 663; *Mattison v Mpanga* 1928 (2) PH, A44 (N); *Miller v Bellville Municipality* 1973 (1) SA 914 (C) at 921C; *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1996 (4) SA 1151 (T) at 1154; Cassim “Economic duress in the law of unjust enrichment in USA, England and South Africa” (1991) 24 *CILSA* 37 at 67.

¹⁰¹ 1911 CPD 356.

¹⁰² 1914 AD 420.

¹⁰³ At 423.

¹⁰⁴ 1915 AD 426 at 434.

8.4.5.3 The nature and effect of a protest

The circumstances in which the protest is made, as well as the interpretation that the court does place upon the protest, will determine the effect it has on the transaction between the parties. The protest that the aggrieved party makes can be interpreted in a number of different ways. In *CIR v First National Industrial Bank Ltd*,¹⁰⁵ Nienaber AJA described the first form of protest as follows:¹⁰⁶

“The phrase can serve as confirmation that, in the broad sense, the payment was not a voluntary one or, in the narrower sense, that it was due to duress. The failure so to stipulate could support an inference that the payment was voluntary or that in truth there was no duress.”

In this scenario, the existence of a protest will provide the court with proof that the payment was made under duress (and therefore, in the opinion of the court, involuntarily). One might label this the *White Brothers* scenario. The plaintiffs in that case would have needed to provide evidence that some obvious protest had been made at the time the customs duties had been paid, in order to succeed with their allegation that they had been forced to pay the money under duress of goods. In this circumstance the protest is not generally made with the knowledge that it is a requisite element of a claim for unjustified enrichment. Typically, the person would protest indignantly as a matter of course to vent his or her frustration about the threat and the demand. An example of a successful claim that was brought under this particular category was that in *Hopkins and Co v The Colonial Government*.¹⁰⁷ The Railway Department refused to release a quantity of stone that it had transported from Queenstown to Cape Town until the plaintiff paid a higher transport tariff. Since the plaintiff needed the stone urgently for building purposes, it was forced to pay over the money immediately, which it did while expressing disgust at the state of affairs. Maasdorp J held that the plaintiff had had no option but to pay the extra money because of the deadlines that the company faced, and its complaints provided confirmation that the payment was indeed made involuntarily under duress.¹⁰⁸

The second interpretation of a protest was described by Nienaber AJA in the following way:¹⁰⁹

¹⁰⁵ 1990 (3) SA 641 (A).

¹⁰⁶ At 649G.

¹⁰⁷ (1905) 22 SC 424.

¹⁰⁸ At 431.

¹⁰⁹ *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 649H.

“It [the protest] can serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying without protest, the *solvens* conceded the validity or the legality of the debt, or his liability to repay it, or the correctness of the amount claimed. The object is to reserve the right to seek to reverse the payment.”

In this scenario, the aggrieved party who is being coerced into making the payment under duress realises that it is necessary for him to exhibit some protest at the time payment is made in order (a) to satisfy the protest requirement, and (b) to ensure that he has expressly reserved his right to reclaim the payment if it is subsequently challenged and found not to be valid. One might describe this as the *Gowar* scenario. At the time Mrs Gowar made her payment to get her usufruct registered, she noted her protest at the demand made by the Registrar of Deeds, reserved her rights to contest the Registrar’s ruling, and, after the registration of the usufruct had been completed, she took legal proceedings to challenge the validity of the demand made upon her.¹¹⁰ Innes CJ described Mrs Gowar’s behaviour in similar terms to those used by Nienaber AJA to describe the general scenario above:¹¹¹

“Had she parted with her money meaning to compromise or to waive her rights, or in ignorance of them, the payment would have been voluntary, but as she intended to reserve her right to demand registration without payment, and paid merely because she could not obtain registration forthwith in any other way, her payment was involuntary in the sense in which that word is used in the cases.”

Mrs Gowar was able to show, to the satisfaction of the court, that an unlawful threat had been made, that she could not secure registration of her right in any other way other than by making the payment, and that she had protested at the time she had paid, so demonstrating (in the eyes of the court) that her payment was involuntary. All the basic elements of the duress claim were present. But, as far as the protest is concerned, where this scenario differs from the first is that the protest is made deliberately and intentionally, in a calculated fashion, rather than as a spur-of-the-moment expression of disgust.¹¹²

Thirdly, protesting against a payment made on demand might not help the person at all. Simply saying that one is paying “under protest”, and no more, when one hands over money is not sufficient to warrant a refund — payment under protest does not equate to payment under duress. The plaintiff

¹¹⁰ *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 430.

¹¹¹ At 435-6.

¹¹² See too *De Beers Mining Co v The Colonial Government* (1888) 6 SC 155. In that case, the defendants refused to allow transfer of diamond claims unless the plaintiffs paid just over £2000 in stamp duty. The plaintiffs paid the money, noting for the record that they were paying “under protest”, and then took legal action to challenge the validity of the demand that had been made upon them. The court held that the duties were not payable, and the payments had been made involuntarily, since they had paid expressly under protest. As such, the plaintiffs were entitled to reclaim their money as having been paid under duress.

will have to show that all the elements necessary to make out a case of duress are proved, of which protest is but an aspect. At the very least, the plaintiff will have to show that he or she was put in a dilemma situation by some unlawful threat. This point was made by Wessels JP in *Lilienfield and Co v Bourke*.¹¹³ Counsel for the plaintiff in that case had argued that all that was necessary to entitle a plaintiff to reclaim his money was to show evidence of protest. Counsel relied on a passage of De Villiers AJA's judgment in the *Gowar* case in support of this argument.¹¹⁴ Wessels JP considered the remarks made by De Villiers AJA, and came to the conclusion that a mere protest would never be sufficient to justify a claim that a payment was made under duress. The Judge President's cutting response to Counsel was the following:¹¹⁵

"It is, however, true that this proposition [by counsel that a mere protest is sufficient] may be supported by what was said by Mr. JUSTICE DE VILLIERS in the case of *Union Government v Gowar*, and I must frankly confess, if one takes a portion of that judgment there is a good deal to support the contention, i.e., if you simply cut out of the judgment a few lines and wrest them from the context. But I do not think that the learned Judge meant to lay down the general rule that a protest always makes a payment under it an involuntary payment.... I do not think that if a person pays money simply saying that he pays it under protest, that that is equivalent to payment under pressure."

This dictum has been described by a full bench of the Appellate Division in *PE Municipality v Uitenhage Municipality*¹¹⁶ as "a correct statement of the law",¹¹⁷ and was also cited with approval in *CIR v First National Industrial Bank Ltd*.¹¹⁸ To justify a claim for repayment on the grounds of duress, the aggrieved party must prove this, and evidence of protest is but one ingredient of that cause of action.¹¹⁹

A good example of the practical application of this rule may be found in the case of *Vergotinie v*

¹¹³ 1921 TPD 365.

¹¹⁴ In *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 446, De Villiers AJA had said: "But if he pays under protest he is entitled to recover, for the protest is inconsistent either with the idea of a gift or of a compromise between the parties."

¹¹⁵ At 370.

¹¹⁶ 1971 (1) SA 724 (A).

¹¹⁷ At 742A.

¹¹⁸ 1990 (3) SA 641 (A) at 650E-H. See too *Venter NO v Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Local Council* 1998 (3) SA 1076 (W) at 1079F-G.

¹¹⁹ See *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1996 (4) SA 1151 (T) at 1155-6.

Ceres Municipality.¹²⁰ The plaintiff sought to reclaim a grazing fee of 10s levied against him by the Municipality, which he had paid under protest. At the trial, the plaintiff could lead no evidence that any threat had been made that his cattle would be impounded if he did not pay the licence money. De Villiers CJ (Hopley J concurring) held that mere protestations were not enough to justify the claim. There needed to be proof that his property had been subjected to duress: since no threats of any kind had ever been made, the plaintiff's appeal was dismissed.¹²¹

8.4.6 The nature of the action to obtain a remedy of restitution

8.4.6.1 *Restitutio* or *condictio*?

It may be trite that a non-contractual payment made under duress can be reclaimed, but the type of action the aggrieved party must bring in order to obtain this relief has been a matter of debate. In the *White Brothers* case, De Villiers CJ treated the plaintiff's claim as one for *restitutio in integrum* based upon *metus*.¹²² He repeated this view in *Leicester Brilliant Syndicate v The Colonial Government and the New Elandsdrift Mining and Estate Company*¹²³ and *Benning v Union Government (Minister of Finance)*.¹²⁴ He was consistently and adamantly of the opinion that this was not a situation where a plaintiff could have a remedy in terms of an enrichment *condictio*, and that the *condictiones* were not designed for, and were not intended to apply to, payments made under duress.¹²⁵

In the case of *Union Government (Minister of Finance) v Gowar*,¹²⁶ the majority came to the opposite conclusion. In that case Innes CJ drew a clear distinction between the Roman-Dutch rules on *metus* on the one hand, and the English rules of duress on the other hand. Implicit in his judgment is that in classic cases of *metus*, as defined by the Roman-Dutch writers, an order of *restitutio in integrum*

¹²⁰ (1904) 21 SC 28.

¹²¹ At 29.

¹²² At 349-351. A comparable approach was adopted in *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A). In that case Jansen JA identified the plaintiff's claim as one for restitution, which he was seeking to enforce in terms of the *actio quod metus causa* (at 410B). This is the only instance where the old Roman *actio* is referred to in the unjustified enrichment cases. The adoption of this term seems inappropriate, since it is unlikely that the *actio quod metus causa* was even received into Roman-Dutch law. See 3.4.1 and 10.2.1.

¹²³ (1898) 15 SC 121 at 128.

¹²⁴ 1914 AD 420 at 422.

¹²⁵ See on this point *White Brothers v Treasurer-General* (1883) 2 SC 322 at 349; *Benning v Union Government (Minister of Finance)* 1914 AD 420 at 422.

¹²⁶ 1915 AD 426.

will generally lie for acts amounting to duress of the person. As far as the learned Chief Justice could ascertain, coercive forces directed at property did not amount to duress in Roman-Dutch law.¹²⁷ However, on the basis of equity, the learned Chief Justice felt that a person who was forced to pay money to release property ought to be entitled to a remedy, and that those South African cases that had allowed an aggrieved party a remedy in such circumstances were correct. But what was the nature of the plaintiff's action to obtain the remedy? As far as Innes CJ was concerned, the answer was to be found by drawing an analogy with the English position. In English law, the claim took the form of a quasi-contractual *assumpsit* for the recovery of money had and received. The equivalent action in South Africa was not an action for *restitutio in integrum* (which he saw as being an action particular to the law of contract), but rather a claim to be prosecuted in terms of an enrichment action. To be more precise, in South African law, money paid over without good cause was to be reclaimed by means of a *condictio*.

“As a fact the English decisions allowing money paid under duress of goods to be reclaimed are not based upon the principle of what we should call a *restitutio in integrum*; they are examples of relief granted by reason of the quasi-contractual relationship created by the receipt by one person of money which rightfully belongs to another. The actions shape themselves in *assumpsit* for the recovery of money had and received for the use of the plaintiff.... It seems to me that money wrongly exacted by a possessor of goods from the true owner as a condition precedent to their delivery, and paid by the latter not as a gift, but in order to obtain possession of his own property and with a reservation of his own rights would be recoverable by a *condictio*. As in English law, so in ours, a quasi-contractual relationship would be established which would enable money so paid to be reclaimed.”¹²⁸

Innes CJ did not go on to discuss what type of *condictio* would be relevant to a case of this nature. De Villiers AJA stated in his opinion that the relevant enrichment action was the *condictio indebiti*.¹²⁹ The fact that De Villiers AJA found that this case was not a duress case appears to have escaped both subsequent courts and academic writers.¹³⁰ In the years after the *Gowar* decision, the courts in South Africa, as well as academic writers have generally accepted that the *condictio indebiti* has become the

¹²⁷ Wessels AJA disputed this by referring to isolated instances where certain jurists did appear to recognise the possibility that threats directed against property constituted duress (at 451).

¹²⁸ At 433-434.

¹²⁹ At 444.

¹³⁰ In fact, he decided the case on the basis of protest, not duress. For a discussion of the judgment, and the distinction between an action brought on the grounds of duress, and an action brought on the grounds of protest, see 9.6.2 below.

proper designation for an action for restitution of a non-contractual payment coerced by duress.¹³¹

8.4.6.2 The *condictio indebiti*

The *condictio indebiti* is probably the most well-known and most liberally utilised enrichment action in South African law.¹³² Traditionally, it was the action that allowed a plaintiff to reclaim either money or property that had been handed over in error, when the money was in fact not due.¹³³ Should a plaintiff be successful in pleading the *condictio indebiti*, the defendant will be required to restore the property or money to the plaintiff,¹³⁴ together with any fruits or accessories.¹³⁵ If the particular thing cannot be returned, its value may be recovered.¹³⁶ In the case of *La Riche v Hamman*,¹³⁷ Watermeyer CJ set down three requirements that have to be proved before a *condictio indebiti* will lie:¹³⁸

“The *condictio indebiti* is a personal action by which the *solvens* reclaims *quod indebiti solutum est*.... In order to succeed in that claim, the plaintiff has to prove —

(1) that the property which he is reclaiming was transferred to the defendant;

(2) that such transfer was given *indebite*, in the widest sense (i.e., that there was no legal or natural obligation to give it);

¹³¹ In *Caterers v Bell and Anders* 1915 AD 698, which was heard in the Appeal Court only six months after the *Gowar* decision, both Solomon JA and CG Maasdorp JA referred to the action as one brought in terms of the *condictio indebiti* (at 709, per Solomon JA, and 712, per CG Maasdorp JA). Other cases concerning payments made under duress, where the *condictio indebiti* was held to be the appropriate action, are: *Mattison v Mpanga* 1928 (2) PH, A44 (N); *Gluckman v Jagger and Co* 1929 CPD 44 at 47; *Cranbourne Road Council v Derbyshire Estates Ltd* 1967 (1) SA 8 (R); *Port Elizabeth Municipality v Uitenhage Municipality* 1971 (1) SA 724 (A) at 741C; *Miller and Others v Bellville Municipality* 1973 (1) SA 914 (C) and *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1996 (4) SA 1151 (T) at 1155. For academics who state that an action for duress is framed in terms of the *condictio indebiti*, see De Vos *Verrykingsaanspreeklikheid* 172; *Wille's Principles* 637; Eiselen and Pienaar 128; *LAWSA* Vol 9 §79(b); Du Plessis *Compulsion and Restitution* 136ff.

¹³² De Vos *Verrykingsaanspreeklikheid* 171. I do not intend to discuss this remedy in great detail, since the topic has been researched in depth by other authors. For a comprehensive analysis of the *condictio indebiti*, its origins, development and current applications, see De Vos *Verrykingsaanspreeklikheid*; Visser *Die Rol van Dwaling by die Condictio Indebiti*; Van der Walt “Die *Condictio Indebiti* as Verrykingsaksie” (1966) 29 *THRHR* 220; Eiselen and Pienaar 106ff.

¹³³ *D* 12.6.1.1; Voet 12.6.1; De Vos *Verrykingsaanspreeklikheid* 23; *LAWSA* Vol 9 §78.

¹³⁴ *D* 12.6.7.

¹³⁵ *D* 12.6.65.5.

¹³⁶ Voet 12.6.12.

¹³⁷ 1946 AD 648.

¹³⁸ At 656. See too *Frame v Palmer* 1950 (3) SA 340 (C) at 346.

(3) that it had been transferred by mistake.”

The first two requirements are relatively straightforward, and can be described without much trouble. First, the plaintiff has to show that he (or his agent) has either paid money or transferred property (whether corporeal or incorporeal) to the defendant.¹³⁹ Secondly, the payment must have been made *indebite*; that is, in a situation where the plaintiff was not in fact obliged to make the payment at all.¹⁴⁰ But the third requirement (that the money or property must have been transferred by mistake) needs some explanation.

Transfer by mistake means that the money or property must have been transferred *solvendi animo per errorem* — in other words, because of an erroneous belief that the property or money was due or payable.¹⁴¹ The rule has traditionally been qualified in a number of ways. The first hallowed qualification used to be that the mistake had to be one of fact, and not law.¹⁴² This qualification has been the subject of enormous criticism in the past, for obvious reasons. There seemed to be no coherent reason why a mistake of fact could legitimately be reversed, but not a mistake of law. In any event it is extremely difficult, if not impossible, to identify the difference between a mistake of fact and a mistake of law in a practical context.¹⁴³ The controversy surrounding the appropriateness of this requirement has been laid to rest by the Appellate Division in the case of *Willis Faber Enthoven (Edms) Bpk v Receiver of Revenue and another*,¹⁴⁴ where Hefer JA, after undertaking a thorough analysis of the Roman and Roman-Dutch law, held that in South Africa we should no longer draw a distinction

¹³⁹ D 12.6.33; Voet 12.6.11; Huber *HR* 3.35.7; Grotius *Inleiding* 3.30.5; Eiselen and Pienaar 106ff; *LAWSA* Vol 9 §79.

¹⁴⁰ D 12.6.1.1; Voet 12.6.12 and 17; Grotius *Inleiding* 3.30.10; *Duff's Trustees v Estate Aarde* 1937 NP 207 at 201; Eiselen and Pienaar 110ff; *LAWSA* Vol 9 §79.

¹⁴¹ D 12.6.1; Gaius *Institutes* 3.91; Voet 12.6.6; Grotius *Inleiding* 3.30.6; Huber *HR* 3.35.2; Van Leeuwen *Censura Forensis* 1.4.14.3; *Union Government v National Bank of South Africa Ltd* 1921 AD 121; *Recsey v Riche* 1927 AD 554 at 556; Eiselen and Pienaar 115ff; *LAWSA* Vol 9 §79.

¹⁴² Voet 12.6.7; *Rooth v The State* (1888) 2 SAR 259; *Benning v Union Government (Minister of Finance)* 1914 AD 420; *Leicester Brilliant Syndicate v The Colonial Government and the New Elandsdrift Mining and Estate Company* (1898) 15 SC 121 at 127; *Cranbourne Road Council v Derbyshire Estates Ltd* 1967 (1) SA 8 (R) at 10; *Miller v Bellville Municipality* 1973 (1) SA 914 (C) at 919B-C.

¹⁴³ It appears that the majority of Roman-Dutch authorities did not feel that such a distinction was appropriate, and this was another aspect of English law that was drafted into South African law. For an attempt to define the difference between a mistake of fact and a mistake of law, see *White Brothers v Treasurer-General* (1883) 2 SC 322 at 349. For criticism of the mistake of fact/law divide, see *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600(D) at 607; *Barker v Bentley* 1978 (4) SA 204 (N) at 206; Van der Walt “Die *Condictio Indebiti* as Verrykingsaksie” (1966) 29 *THRHR* 220 at 227; De Vos *Verrykingsaanspreeklikheid* 182-3; Visser “Daedelus in the Supreme Court — The Common Law Today” (1986) 49 *THRHR* 127 at 135-6; Wille’s *Principles* 637; Visser *Die Rol van Dwaling by die Condictio Indebiti* 235-253.

¹⁴⁴ 1992 (4) SA 202 (A).

between mistakes of fact and law for the purposes of the *condictio indebiti*.¹⁴⁵

The second fundamental qualification to the mistake element is that the mistake must be excusable (or *iustus*), and should not have been made in a careless or foolish manner (*supina aut affectata*).¹⁴⁶ This requirement has also been the subject of much criticism, which is neatly summarised by Visser as follows:¹⁴⁷

“This requirement is also unacceptable since it punishes the plaintiff for his or her carelessness, but unfairly disregards the fact that the defendant is often equally careless (or, alternatively, knew that the payment was not due). In any event, the use of the law of enrichment to encourage diligent behaviour in business affairs does not appear at all appropriate.”

Despite the criticism of this prerequisite, the court in *Willis*’s case refused to avail itself of the opportunity to expunge it from our law, and therefore it remains an important facet of a successful claim under the *condictio indebiti*.

Thirdly, as a natural consequence of the requirement that the payment or transfer must have been made by mistake, no action will lie if the plaintiff makes the payment voluntarily (*scienter*), knowing or believing that the payment is not due.¹⁴⁸ A payment made in these circumstances will be classified as a valid donation or a compromise.

But how then can this particular action be relevant to a payment made under duress? The glaring problem with the *condictio indebiti* is that in cases where a payment is made under duress, the person does not make the payment by mistake. Since payment by mistake is an essential element of a claim under the *condictio indebiti*, it seems inappropriate to classify the action for the repayment of money handed over under duress as a *condictio indebiti*. The answer is that the Appellate Division appears to have created an exception to this requirement. The general opinion is that in *Union Government*

¹⁴⁵ At 224B. Joubert, Nienaber, Van den Heever JJA and Kriegler AJA concurred on the point of law. The judgment has been welcomed by commentators. See Eiselen and Pienaar 126-7; Visser “Error of Law and Mistaken Payments: a Milestone” (1992) 109 *SALJ* 177; Pretorius “The *Condictio Indebiti*, Error of Law and Excusability” (1993) 56 *THRHR* 315. The decision in the *Willis Faber* case was in fact cited by Lord Goff of Chieveley in his speech in the equivalent English case of *Kleinwort Benson Ltd v Lincoln City Council and others* [1999] 2 AC 349 at 374A.

¹⁴⁶ Voet 12.6.7; *Divisional Council of Aliwal North v De Wet* (1890) 7 SC 232 at 234; *Union Government v National Bank of Southern Africa Ltd* 1921 AD 121 at 125; *Rahim v Minister of Justice* 1964 (4) SA 630 (A).

¹⁴⁷ *Wille’s Principles* 637. An analysis of this issue falls beyond the scope of this thesis, but for criticism of this rule, see De Vos *Verrykingsaanspreeklikheid* 69-70 and 184-5; “Van der Walt “Die *Condictio Indebiti* as *Verrykingsaksie*” (1966) 29 *THRHR* 220 at 226-30; Visser *Die Rol van Dwaling by die Condictio Indebiti* 177-82 and 288-98; Eiselen and Pienaar 127.

¹⁴⁸ *D* 12.6.1; *D* 50.12.6; *C* 4.5.9.pr; Voet 12.6.6; Grotius 3.30.6; *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 445; *CIR v First National Bank Ltd* 1990 (3) SA 641 (A) at 655.

(*Minister of Finance*) v *Gowar*,¹⁴⁹ the ambit of the *condictio indebiti* was extended beyond its traditional confines, to cover the situation where a person knowingly pays over a debt that he or she does not consider to be due, but does so because he or she has been forced to make the payment under duress.¹⁵⁰ The method that the courts use to draw payments made under duress under the general requirement stated in the previous paragraph is that a payment made under duress is an “involuntary” one.

8.5 Conclusion

In this chapter, the present position that applies with regard to the restitution of non-contractual payments made under duress has been reviewed. In Chapter 9, the current position with regard to the role of the doctrine of duress where non-contractual transfers are concerned will be critically analysed, and suggestions will be made with regard to how these sorts of cases might be more suitably understood and dealt with in the future.

¹⁴⁹ 1915 AD 426.

¹⁵⁰ See De Vos *Verrykingsaanspreeklikheid* 172; *LAWSA* Vol 9 §79; *Wille's Principles* 637-8; Eiselen and Pienaar 138-9; Visser *Die Rol van Dwaling by die Condictio Indebiti* 229ff.

Chapter Nine

The Effect of Duress on the Validity of a Non-Contractual Performance: A Reconsideration

“Differing in degree, but of kind the same.”

John Milton *Paradise Lost* V i 490

9.1 Outline

The analysis in Chapter 8 showed that cases concerning payments or transfers made under duress outside the law of contract are treated quite differently from duress cases in contract in South Africa. In this chapter, the current position will be reconsidered.¹ First, since there is no general enrichment action recognised in South Africa, it is necessary to re-examine the position in the light of the relevant traditional action: the *condictio indebiti*. After examining the approach to enrichment cases in German law and English law, it will be shown that while the South African approach to enrichment cases is civilian in origin and principle, certain English influences appear to have imposed themselves upon our understanding of the operation of the *condictio indebiti*. The implications of this for the doctrine of duress in particular will be examined. The need for a more uniform test for duress, if we are to utilise this doctrine, will be fully examined. The problems associated with adopting an “unjust factors” approach to determining when the *condictio indebiti* may be claimed in our law will be analysed, before it is proposed that an alternative approach can be taken to our understanding of how the *condictio indebiti* works: an approach that is civilian in nature, and at the same time goes some way to resolving some of the problems with the error requirement of the *condictio indebiti*, as well as the problems concerning the treatment of cases based on duress and protest.

¹ It should be noted that this thesis is limited to examining the situation as regards undue non-contractual performances, especially where these are made under duress. For a comprehensive analysis of the position with regard to due transfers entered into under duress, see Du Plessis *Compulsion and Restitution* 223, and Du Plessis “Fraud, Duress and Unjustified Enrichment” in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 194 at 213.

9.2 A general enrichment action?²

The first point that needs to be made is that the review of the current position must occur in the light of the fact that we still do not have one general enrichment action in our law. Although there are certain generic elements that are common to all forms of enrichment action,³ the Supreme Court of Appeal has not gone so far as to recognise that one general enrichment action exists. This is unlike both the Germans and the Dutch, who have chosen to base their law of unjustified enrichment around a general enrichment action, rather than adopting a compartmentalised approach that requires a plaintiff's claim to be framed under a specific enrichment action.⁴ De Vos has, since the 1950s, strongly advocated the recognition of a general enrichment action to replace the compartmentalised traditional enrichment actions,⁵ but in the case of *Nortje v Pool NO*,⁶ the Appellate Division rejected this suggestion, fearing uncertainty, limitless liability and "commercial stultification",⁷ and held that there was no general enrichment action in our law. This is despite that fact that it has been shown by Scholtens that a general, all-embracing enrichment action did in fact exist in the final stages of the existence of the Roman-Dutch common law.⁸ The judgment in the *Nortje* case has been the subject of much criticism,⁹ and there have

² For a comprehensive discussion of the debate about the existence of a general enrichment action in South African law, see Zimmermann and Visser *Southern Cross* 549ff.

³ See 8.2.2.1 above.

⁴ In Germany see §812(1) of the BGB, and in the Netherlands, art 6:212(1) of the NBW. For a discussion, see 9.4.2 below.

⁵ See De Vos *Verrykingsaanspreeklikheid* 311ff.

⁶ 1966 (3) SA 96 (A) (Rumpff JA dissenting).

⁷ For comment, see Zimmermann "A road through the enrichment forest? Experiences with a general enrichment action" (1985) 18 *CILSA* 1 at 2.

⁸ See Scholtens "The general enrichment action that was" (1966) 83 *SALJ* 391. Scholtens finds authority for this in certain reported decisions of the Hooft Raad in the 18th century. See Van Bynkershoek *Obs Tum* 277; 303; 2751 and 2754, as well as Pauw *Obs Tum Nov* 12; 196 and 558. The majority of authors are convinced by Scholtens's research. See De Vos *Verrykingsaanspreeklikheid* 110ff; Eiselen and Pienaar 10; Wille's *Principles* 630. This view has now been accepted by the Supreme Court of Appeal in *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 488H. Schutz JA stated that the problem was that the reports of Van Bynkershoek and Pauw were not available in published form until recently, and so the courts relied on the views expressed in the works of the main institutional writers, who discussed only the traditional enrichment actions.

⁹ See De Vos *Verrykingsaanspreeklikheid* 311ff; Eiselen and Pienaar 22ff; *LAWSA* Vol 9 §75; Scholtens "The general enrichment action that was" (1966) 83 *SALJ* 391; De Vos "Aspekte van verrykingsaanspreeklikheid" 1970 *Acta Juridica* 231; Zimmermann "A road through the enrichment forest? Experience with a general enrichment action" (1985) 18 *CILSA* 1; Eiselen "Herlewing van die algemene verrykingsaksie" (1992) 55 *THRHR* 124; Sonnekus "Algemene vordering gebaseer op ongeregverdigde verryking in heroerwering" (1992) 55 *THRHR* 301; Van Zyl "The General Enrichment Action is Alive and Well" 1992 *Acta Juridica* 115.

even been suggestions in provincial divisions of the High Court that the time is indeed ripe for a general enrichment action to be recognised and put to work.¹⁰ The South African Law Commission even set up a project committee to investigate the possibility of introducing a general enrichment action into our law by means of legislation, in the light of the decision in the *Nortje* case.¹¹ This project was ultimately abandoned after the decision in *Kommissaris van Binnelandse Inkomste v Willers*,¹² where the Appellate Division intimated that a general enrichment action ought to be recognised in our law.¹³ However, this suggestion was obiter, since the court in that case was not charged with the matter on the facts of the case. Those who had hoped that the Supreme Court of Appeal would soon take the step once and for all of recognising a general enrichment action have, though, been disappointed. In the recent case of *McCarthy Retail Ltd v Shortdistance Carriers CC*,¹⁴ the judges in the majority held that although they felt that the *Nortje* case had been wrongly decided,¹⁵ they thought it would be wiser for the Supreme Court of Appeal to take the ultimate step of recognising a general enrichment action in our law only in a case that could not be accommodated under the traditional enrichment actions.¹⁶ In Schutz JA's words:¹⁷

“[I]f this court is ever to adopt a general action into modern law it would be wiser, in my opinion, to wait for that rare case to arrive which cannot be accommodated within the existing framework and which compels such recognition.”

The *McCarthy* case was not such a case, and so the Supreme Court of Appeal chose not to take the ultimate step of recognising a general enrichment action. A similar approach was adopted by the Supreme Court of Appeal a few months later in *First National Bank of Southern Africa Ltd v Perry*

¹⁰ See *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D) at 606-7; *Blesbok Eiendomsagentskap v Cantamessa* 1991 (2) SA 712 (T).

¹¹ Project 97 of the South African Law Commission.

¹² 1994 (3) SA 283 (A).

¹³ At 333. As a result of this judgment, the South African Law Commission resolved to abandon the project, and leave the development of a general enrichment action in the hands of the courts. See *South African Law Commission 24th Annual Report* 21.

¹⁴ 2001 (3) SA 482 (SCA).

¹⁵ At 488J.

¹⁶ At 489A-B. For a discussion of the decision, see Visser and Purchase “The General Enrichment Action Cometh” (2002) 119 *SALJ* 260.

¹⁷ 2001 (3) SA 482 (SCA) at 489A-B.

NO.¹⁸ The degree of caution that has been shown by the Supreme Court of Appeal with regard to taking the step of recognising a general enrichment action appears to have been based primarily on two policy considerations. First, there is the fear of uncertainty that could be generated by the recognition of one general enrichment action to replace the traditional forms of action, and the dislocation that such a radical step could create for a legal system and a profession used to the current approach to enrichment law. Hand-in-hand with this is the perceived danger of the courts being flooded with hard-luck cases, and the licence such a step could give to courts to interfere with transfers on nebulous grounds of equity.¹⁹

The South African legal system certainly faces difficult choices and decisions with regard to the recognition of a general enrichment action, as the German experience has shown.²⁰ Schutz JA's observations in the *McCarthy* case reveal his lordship's understanding of these tensions, and also give some important indications as to the way South African law could develop when this step is ultimately taken. His comments, which I have set out in full, were as follows:²¹

“One of the restraints upon the acceptance of a general action is the belief, or fear, that a tide of litigation would be let loose. Initially there may be some surge of litigation, particularly under the emotive banner of ‘unjust enrichment’. But it should not last long, once the restrictions even on a general enrichment action are appreciated. My opinion is that under a general action only very few actions would succeed which would not have succeeded under one or other of the old forms of action or their continued extensions. For this reason, if it be a good one, the acceptance of a general action may not be as important as is sometimes thought, save, of course, that its denial may lead to occasional injustices. A more daunting consequence of acceptance is the possible need for a re-arrangement of old-standing rules. Are the detailed rules to go and new ones derived from a broadly stated general principle? Or are the old ones to stand, and be supplemented by a general enrichment action which will fill the gaps? The correct answers to these questions are not obvious. But I would support the second solution. In a rare case where even an extension of an old action would not suffice I would favour the recognition of a general action. The rules governing it should not be too difficult to establish.... We have been applying them for a long time.”

The most significant thing about this dictum is that while supporting the idea of a general enrichment

¹⁸ 2001 (3) SA 960 (SCA) at 969-70.

¹⁹ See especially *Nortje v Pool* 1966 (3) SA 96 (A) at 139-40 (per Botha JA). For comment, see De Vos *Verrykingsaanspreeklikheid* 322ff; Visser “The Role of Judicial Policy in Setting the Limits of a General Enrichment Action” in Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett* 342.

²⁰ See 9.4.2 below, and Zimmermann “A road through the enrichment forest? Experiences with a general enrichment action” (1985) 18 *CILSA* 1.

²¹ At 487J-488D.

action, Schutz JA promotes the idea of its subsidiarity²² — ie that the general enrichment action will exist to supplement the traditional forms of enrichment action, rather than sweeping them aside and replacing them with one all-embracing action, à la the German model. However, as an aside, in both *Perry* and *McCarthy*, Schutz JA, who delivered the main judgments, stated that too much time is wasted on trying to identify the “correct” *condictio*, when this question is not that important in the light of the fact that the classical enrichment actions are but contextualised forms of action that derive their basic origins from one general set of requirements common to all forms of enrichment claim. In both these cases the Supreme Court of Appeal exhorted counsel to spend more time on identifying whether the elements of enrichment were present than indulging in stifling doctrinal arguments about whether the case was properly framed in terms of one “correct” enrichment action.²³ Such comments by the Supreme Court of Appeal are all well and good, but what is an advocate to do when faced with a tricky enrichment case that does not fall clearly into one of the traditional actions? Schutz JA’s comments suggest that it would not really matter how the case was framed, but could an advocate take the risk of not framing the action correctly, seeing that the Supreme Court of Appeal has also said that cases concerning unjustified enrichment must still be framed and pleaded in terms of the classical enrichment actions? It is unlikely that an advocate would be prepared to take such a risk, not only because of the implications for his or her client, but also because of his or her own professional reputation.

The above comments aside, it is not intended to debate the appropriateness of the subsidiarity approach extensively in this thesis. Rather, the present position will be accepted at this stage for the purposes of reviewing the current approach to the *condictio indebiti*, and the role and relevance of a duress claim to this action.

9.3 The *condictio indebiti* and cases of duress

9.3.1 The *condictio indebiti* as the appropriate action

It was shown in Chapter 8 that it has become settled law that where a non-contractual transfer has occurred under duress, the relevant enrichment action under which to frame the action is in terms of a *condictio indebiti*. There has been some disquiet expressed by certain writers about whether the

²² For a discussion of the subsidiarity theory, see Visser and Purchase “The General Enrichment Action Cometh” (2002) 119 *SALJ* 260 at 268ff. They also point out (at 267-8) that the adoption of a general enrichment action in art 6:212(1) of the Dutch NBW (which came into force on 1 January 1992) can be interpreted as being an action that is subsidiary to art 6:211, which covers undue payments.

²³ See *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 489B; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 969H-J. This approach has been cited with approval in the recent decision of *IFP Nominees (Pty) Ltd v Nedcor Bank Ltd* 2002 (5) SA 101 (W) at 113F-G.

condictio indebiti is the correct action under which to classify a claim for the return of money paid under duress. De Vos²⁴ contends that while this is the position that has been adopted by the courts, it is a clear departure from the Roman-Dutch law, where the appropriate action would have been either an order of *restitutio in integrum*,²⁵ or a *condictio ob turpem vel iniustam causam*.²⁶ De Vos submits that the better action would be the *condictio sine causa specialis*,²⁷ presumably for the reason that he feels the action for the recovery of money paid over under duress does not, in the strict sense of the law, fall fairly and squarely under the elements of the three traditional *condictiones*. This view is endorsed by Wessels.²⁸

The problem concerning the appropriate action was raised and debated before the Appellate Division in *Commissioner for Inland Revenue v First National Industrial Bank Ltd.*²⁹ The arguments of De Vos and Wessels were rejected, and the Appellate Division held that the position should remain that which it has been since the *Gowar* case. Nienaber AJA summed up the current position in our law as follows:³⁰

“The assertion that the *condictio indebiti* is inapplicable simply because the payment in question was not made in error is, with respect, something of an oversimplification. Whatever may have been the position in Roman-Dutch law ..., our present law appears to have assimilated the basic notion of English law with regard to ‘payments made under duress of goods’ If that classification is correct the *condictio indebiti* is not, of course, confined to the recovery of an *indebitum solutum* which was involuntary because it was paid by mistake; it is now also available when the payment (or indeed any performance), although deliberate, perhaps even advised, was nevertheless involuntary because it was effected under pressure and protest.”

²⁴ *Verrykingsaanspreeklikheid* 172. This assertion concerning the Roman-Dutch position is repeated in *LAWSA* Vol 9 §79.

²⁵ Lambiris *Restitutio in Integrum* 245-6 seems to agree. For an example in support of this approach, see Voet 4.1.26, where he said: “[R]estitution may be prayed against a contract or other transaction made or performed, as when one through fear, fraud, or slip due to mistake has experienced loss in contracting, compromising, paying, standing surety, adiating on inheritance, or other similar way.” (My emphasis).

²⁶ Voet 12.5.1 says: “A *condictio ob turpem causam* is a personal *stricti iuris* action by which is reclaimed something given on account of an act involving baseness on the part of the receiver.” And, further along: “Examples are if one person has given to another ... with a view to something being restored or done which ought as a matter of course to be restored or done.”

²⁷ De Vos *Verrykingsaanspreeklikheid* 172.

²⁸ *Contract* §1182.

²⁹ 1990 (3) SA 641 (A).

³⁰ At 646-7. See too the judgment of Nicholas AJA at 654-5. His opinion may have been the minority one, but on this point Nicholas AJA agreed with the majority judgment of Nienaber AJA.

The learned Judge held that it was unnecessary to decide whether this *sui generis* action under the auspices of the *condictio indebiti* was either an extension or a sub-species of the *condictio indebiti*, or a separate type of *condictio indebiti* that existed on its own³¹ — it was sufficient to say that the *condictio indebiti* was the proper niche into which such cases fitted.

This decision has effectively subdued further debate on the true form an action for repayment because of duress should take.³² The *condictio indebiti* may not originally have been conceived to deal with payments under duress, but this is one of the situations where the South African courts appear to have been quite happy to extend the ambit of the traditional enrichment actions in an *ad hoc* fashion, and to cast the net of liability further than was ostensibly the case in Roman or Roman-Dutch law.³³ The result in an interesting one, from a doctrinal perspective, and a number of issues arise from Nienaber AJA's dictum quoted above. With respect, the first problem with his lordship's statement is that it is certainly inaccurate to say that a payment made by mistake is "involuntary". When a person makes a mistaken payment, the payment is in no sense of the term involuntary at all, and this is not an elemental requirement of a traditional *condictio indebiti*. But this (likely) slip of the pen is hardly as important as the suggestion that the *condictio indebiti* has absorbed "the basic notion of English law" with regard to duress claims, and that the basis of this finding is that these payments are made involuntarily. These rather bald statements provide the springboard for a thorough re-examination of the current position with regard to non-contractual performances entered into under duress in South African law.

9.4 Comparative paradigms

9.4.1 Preliminary comments

The current position in South African law is that litigants and the courts determine whether a payment or transfer was made *sine causa*, and therefore may be reclaimed, by determining whether it satisfies the substantive requirements or grounds of one of the enrichment *condictiones*. In the context of the *condictio indebiti*, the Supreme Court of Appeal seems to be of the opinion that in order to show that a payment or transfer was an *indebitum*, it must have been made in error, or because of duress. What does this mean for the South African law of unjustified enrichment, and what is the most suitable way

³¹ At 647E.

³² See Du Plessis *Compulsion and Restitution* 139. Further confirmation that the *condictio indebiti* is the appropriate action may be found in *Dali and others v Government of the Republic of South Africa and another* [2000] 3 All SA 206 (A) at 210.

³³ See De Vos *Verrykingsaanspreeklikheid* 244-310; Wille's *Principles* 630; LAWSA Vol 9 §75.

for us to understand the operation of this branch of the law, and the impact of something like error or duress under the *condictio indebiti*? In order to try to make sense of the South African position, it is worth comparing the position to the classical paradigms with regard to this branch of the law of obligations. First, there is the German approach, grounded in classical Roman/civilian tradition, where the law of unjustified enrichment is predicated upon the reversal of enrichment where the enrichment has occurred *sine causa*. Unlike South Africa, though, the Germans deal with cases of unjustified enrichment according to one general enrichment action, rather than a patchwork of actions with specific requirements. Secondly, there is the English approach, where there is no general concept of unjustified enrichment or enrichment action to reverse enrichment that has occurred *sine causa*, but the plaintiff must rather prove one of a whole range of “unjust factors” in order to make out a case for restitution. After analysing these competing paradigms, the question that needs to be considered in this chapter is what approach best suits or explains the South African situation, and, more specifically, how do we understand the role of the duress claim in South African law in such cases as a result?

9.4.2 The law of unjustified enrichment in Germany

The German law of unjustified enrichment is somewhat different in its structure to that of South African law. This branch of the German law of obligations also finds its roots in Roman tradition, but differs from South African law in two significant ways. First, like the rest of the German system, the principles of the law of unjustified enrichment are codified, rather than deriving their efficacy from common law. Secondly, when the time came for the codification of the German system of law, under the influence of Von Savigny,³⁴ the Germans chose to favour one codified enrichment action, or general form of *condictio sine causa*,³⁵ when the BGB was enacted in 1900. The law of unjustified enrichment is codified in §812-822 of the BGB. The most important of these is §812(I)(1), which articulates the general enrichment action: “Someone who obtains something without legal ground through performance by another or in another way at his expense is bound to make it over to him.” The general action is heavily based on the principles of the *condictio indebiti*, which has led Zimmermann and Du Plessis

³⁴ For a discussion of the origins of the general enrichment action in Germany, and the way in which this action operates in Germany, see Zimmermann “A road through the enrichment forest? Experiences with a general enrichment action” (1985) 18 *CILSA* 1 at 6ff; Zimmermann and Du Plessis “Grondtrekke en Kernprobleme van die Duitse Verrykingsreg” 1992 *Acta Juridica* 57; Zimmermann and Du Plessis “Basic Features of the German Law of Unjustified Enrichment” (1994) 4 *Restitution LR* 14; Du Plessis *Compulsion and Restitution* 141ff; Zimmermann “Unjustified Enrichment: The Modern Civilian Approach” (1995) 15 *OJLS* 403; Markesinis *The German Law of Obligations Vol I* 711; Zweigert & Kötz *An Introduction to Comparative Law* 537ff.

³⁵ The idea that the German enrichment action amounts to a general *condictio sine causa* is propounded by Zimmermann and Meier “Judicial Development of the Law, *Error Iuris*, and the Law of Unjustified Enrichment — A View from Germany” (1999) 115 *LQR* 556 at 561; Meier “Unjust factors and legal grounds” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 37 at 40.

to describe it as a conflation of the two traditional actions mentioned above.³⁶ The BGB does make provision for two of the other old Roman actions, viz the *condictio causa data causa non secuta* in §812(I)(2), and the *condictio ob turpem vel iniustam causam* in §817(1), but time has shown that because of the broad scope of the general action, these two actions are virtually redundant.³⁷ The result has been that in Germany, §812(I)(1) holds sway, and any enrichment that occurs *sine causa* is automatically considered to be recoverable, subject to a number of specified defences. In fact, the only express limitations are the general defences stipulated in §814 that the plaintiff knew that there was no obligation to perform, or the performance constituted a moral duty.³⁸ This is quite different to the English position, where, as we saw above, a transfer will only be considered to be recoverable if the plaintiff can demonstrate a specific ground for its recovery.

The difficulties faced by the Germans' adoption of a general enrichment action are quite the opposite of those faced by the complicated, casuistic English approach.³⁹ The general action has been decried for being excessively abstract or "excessively broad" by the Germans themselves,⁴⁰ in that it virtually provides no guidelines or limitations on a potential enrichment claim, when read in isolation. As a result, under the influence of the work of two leading German academics, Wilburg and Von Caemmerer, the very broad sweep of §812(I)(1) has been refined in the sense that it is now understood that an enrichment action can be had in German law in four circumstances.⁴¹ These are: (a) where the plaintiff surrendered a performance to a defendant without legal cause (the *Leistungskondiktion*); (b) where the defendant encroached upon the plaintiff's property (the *Eingriffskondiktion*); (c) where the plaintiff incurred expenses improving the defendant's property (the *Verwendungskondiktion*); and (d) where the plaintiff satisfied the defendant's debt (the *Reichgriffskondiktion*). Even this classification has been criticised for its abstract nature, particularly the most important of all these, the *Leistungskondiktion*, which collapses all debate about the numerous potential methods of enrichment

³⁶ Zimmermann and Du Plessis "Basic Features of the German Law of Unjustified Enrichment" (1994) 4 *Restitution LR* 14 at 18.

³⁷ For a full discussion of their redundancy, see Zimmermann and Du Plessis "Basic Features of the German Law of Unjustified Enrichment" (1994) 4 *Restitution LR* 14 at 19-20.

³⁸ There are other particular defences to specific forms of enrichment identified in §815 and §817, which correspond roughly to the South African *condictio causa data causa non secuta* and the *condictio ob turpem vel iniustam causam* respectively. For a discussion of all these defences, see Markesinis *The German Law of Obligations Vol 1* 735.

³⁹ On which, see 9.4.3 below.

⁴⁰ This term is used by Johnston and Zimmermann "Unjustified enrichment: surveying the landscape" in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 3 at 4.

⁴¹ See Zimmermann and Du Plessis "Grondtrekke en Kernprobleme van die Duitse Verrykingsreg" 1992 *Acta Juridica* 57 at 74.

by performance under the one concept of “unjustified performance”, reflecting the field of application of the old *condictiones*. Although there are advantages to a flexible general action, which most Germans do extol, the Germans have themselves accepted that the refinement thereof continues to require attention.⁴² Some are even more critical. In the words of one eminent German jurist, König, “[t]he terminology is confusing, almost each statement is disputed, the solution of trivial questions is becoming ever more complicated, and there is a grave danger of loss of perspective.”⁴³ König himself was in fact tasked by the German Minister of Justice with drafting a new, more coherent, code for the law of unjustified enrichment,⁴⁴ but his proposals have not been accepted. Wilburg and Von Caemmerer’s classification continues to dictate the German understanding of the general enrichment action as a result.⁴⁵

As stated above, the most important of the categories is the *Leistungskondiktion*, which concerns enrichment based on transfer. The orthodox view (articulated by Reuter and Martinek) is that where someone has conferred a benefit upon another intentionally, with a specific purpose in mind, and that purpose has failed, then the *Leistungskondiktion* will lie.⁴⁶ Usually the purpose of the transfer would have been to discharge a debt that was supposed to be due under a contract (*solvendi causa*), although the purpose could be *dandi causa* or *donandi causa* too. Any all of these events, it would have to be determined that the purpose of the transfer had failed. However, there is also a minority opinion (promoted by Larenz and Canaris), which suggests that the question of purpose is irrelevant — the question should simply be whether the performance that has occurred was undue or not, in the best traditions of the principle of unjustified enrichment.⁴⁷

In either event, the most common situation where the performance will be considered to have failed is where a contract has been declared invalid. Where contracts are concerned, it is up to the law of

⁴² Zimmermann “A road through the enrichment forest? Experiences with a general enrichment action” (1985) 18 *CILSA* 1 at 18ff.

⁴³ These are the words of König, translated into English from the original German text of his *Ungerechtfertigte Bereicherung: Tatbestände und Ordnungsprobleme in rechtsvergleichender Sicht* (1985) 15-16 by Johnston and Zimmermann “Unjustified enrichment: surveying the landscape” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 3 at 5.

⁴⁴ See Zimmermann “Unjustified Enrichment: The Modern Civilian Approach” (1995) 5 *OJLS* 403 at 424-5. A full text of König’s draft proposals are reproduced in English from 425ff.

⁴⁵ See Zimmermann *Obligations* 890-1.

⁴⁶ Du Plessis *Compulsion and Restitution* 143-4, and “Fraud, Duress and Unjustified Enrichment” in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 206. He refers to the work of Reuter and Martinek in their *Ungerechtfertigte Bereicherung* (1983) 125, a source unavailable to me.

⁴⁷ See Du Plessis “Fraud, Duress and Unjustified Enrichment” in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 206, referring to the work of Larenz and Canaris in their *Lehrbuch des Schuldrechts* (1994), which was unavailable to me.

contract to determine why the contract was invalid. For example, under §123(I), it can be found that a contract was induced unlawfully by compulsion, and is therefore voidable. Once that was determined, then the law of unjustified enrichment steps in, to deal with the fact that any performance occurring as a result of that ostensible transaction has occurred without legal ground, and the purpose of the transfer has therefore failed. It is not necessary to prove compulsion again in order to make a case for restitution: the performance has simply occurred *sine causa* because of the failure of the contract. But it should be remembered that cases of enrichment by performance do not only occur where contracts are declared void. As Du Plessis points out:⁴⁸

“[I]t should not be ignored that ... duress can also influence the conferring of a benefit outside a contractual context. For example, they may move a person to perform *ex lege* obligations, or even to engage in acts that do not involve performance at all, such as to make a bequest, declare a dividend or grant a licence.”

Even in cases where a non-contractual performance is tainted by duress, the *Leistungskondiktion* is considered to be the appropriate action to bring under German law for relief, since the performance was undue. The reasons why this is so requires some explanation, though. If we accept (as the German system does) that an act of compulsion does not overbear and destroy one’s will, but rather, “deflects” it, this creates some difficulties. For a plaintiff to be entitled to a *Leistungskondiktion* (certainly under the majority view, at any rate), the plaintiff will have to show that he or she made the transfer with a specific purpose in mind, and this purpose has failed. The problem here is that most people acting under compulsion perform with the intention of averting the threat, and the result is usually successful. Therefore, the purpose behind making the transfer has technically been successful! This would suggest that the *Leistungskondiktion* should not be available where a performance under compulsion has occurred. However the Germans have appeared to avoid this sticky issue by arguing that the purpose behind the transfer was to fulfil the obligation that was demanded (*solvendi causa*), and this purpose has failed, as there was no obligation to discharge at all. This seems rather like creation of a convenient legal fiction. As Du Plessis points out, “it seems artificial to say that a person who is so averse to being bound that he has to be illegally forced to [perform] would really have the purpose to fulfil [the] obligation”.⁴⁹ Perhaps it would be better to prefer Larenz and Canaris’s minority view that purpose ought to be irrelevant: provided the transfer occurred without legal ground, this is sufficient to bring

⁴⁸ Du Plessis “Fraud, Duress and Unjustified Enrichment” in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 202.

⁴⁹ Du Plessis “Fraud, Duress and Unjustified Enrichment” in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 208.

the *Leistungskondiktion* into play.⁵⁰

So much for the general application of the *Leistungskondiktion*. Of specific interest is how the question of compulsion relevant to the *Leistungskondiktion* (remembering, of course, that the Germans tend to speak of a broader notion of compulsion, rather than duress)? Under the German system, the relevance of the act of compulsion is very different to that in English law, where the plaintiff has to make out a cause of action in duress before he or she will have an action for restitution. In German law, proof of compulsion (or fraud, or error, for that matter) is not required at this initial stage: all the plaintiff has to show is that the payment or transfer was an *indebitum* under the *Leistungskondiktion*. The Germans, aware of the difficulties with the old Roman requirement of error that attached to the *condictio indebiti*, preferred to scrap the requirement, so it is not necessary for the plaintiff to show that the performance was made in error.⁵¹ The defendant can, though, raise one of the defences contained in §814 of the BGB to the enrichment claim: that the transferor knew that the performance was not due, or the transferor had a moral duty to perform. In our context, the former is the important one — where the person who made the performance knew that the transfer was undue, but nevertheless carried it out, then his or her subsequent claim to have been unjustifiably impoverished will fail. The defence of knowledge therefore absorbs the function of the old error requirement, but provides for a broader, more flexible criterion for determining when a plaintiff should be entitled to a restitutionary claim and when the plaintiff should not. The idea behind this defence of knowledge is that the person who made the transfer should not be entitled to act contrary to his or her previous conduct (*venire contra factum proprium*) and now claim a return of the performance.

Immediately, a potential problem arises. Where an undue performance has occurred under compulsion, the party that made the performance has acted in the knowledge that the performance is undue. As a result, technically the defendant has a defence to the claim under §814. This would result in the absurd situation that one could never have a claim for enrichment where the undue performance was extorted by coercion in German law. The Germans have recognised this potential absurdity, and, on grounds of both policy and principle, have consistently granted the action to the exclusion of §814 in these circumstances. The rationale appears to be that where a person is compelled to perform in some way, that person can hardly be said to be acting contrary to their previous conduct.⁵² The person has had to choose the lesser of two evils, and make the performance in order to avert a potentially greater threat. The person never wanted to perform, but did so because of pressure. Their subsequent claim

⁵⁰ This is the argument of Du Plessis “Fraud, Duress and Unjustified Enrichment” in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 208.

⁵¹ See in this regard Visser *Die Rol van Dwaling by die Condictio Indebiti* 257ff.

⁵² Du Plessis *Compulsion and Restitution* 146.

is therefore consistent with that previous desire not to transfer the money or property.

The result is that the litigation would play itself out in the following way. First, all the plaintiff would have to do is to show that there had been no obligation on him or her to make the transfer. If the defendant raises the defence of §814, then the plaintiff will have to show that he or she acted under compulsion, to rebut the defence. The question of compulsion is only a matter of residual importance, if a §814 defence is raised, rather than being something that has to be proved from the outset to justify a claim for restitution of the performance.

9.4.3 The law of restitution or “unjust” enrichment in England

By way of comparison, the picture of the law of restitution or unjust enrichment⁵³ in English law is very different: so different, in fact, that it inspired Zweigert and Kötz to remark that the Continental lawyer viewing the topic of enrichment in English law “might be entering another world”.⁵⁴ Historically, the English did not speak of a branch of the law known as unjust enrichment at all. Rather, the English dealt with cases of what we would today know to be enrichment in terms of a rag-bag of unconnected forms of action. At best, if any principled understanding of these sorts of claims existed at all, it was based in the idea of “quasi-contract” — that there was a sort-of implied contract between the parties that the money should be paid back in various circumstances.⁵⁵ One could have an action for money had and received (where the payment had been made by mistake, under compulsion, or for a consideration that had failed), an action for money paid (where money had been paid to a third party, from which the defendant had derived a benefit), or an action for *quantum meruit* or *quantum valebat* (to recover reasonable remuneration for services rendered or good supplied by the plaintiff). These actions were pleaded under the name *indebitatus assumpsit*.

The first attempt to put this area of law on a coherent theoretical foundation came in 1760, in the case of *Moses v Macferlan*,⁵⁶ where Lord Mansfield famously stated:

“If the defendant be under an obligation, from the ties of natural justice, the law implies a debt, and gives

⁵³ This area of law has commonly been known as the law of restitution. However, it is now being argued that this term is a misnomer, and that it should be known as the law of unjust enrichment, since unjust enrichment is the legal principle upon which this area of law is based, whereas restitution simply refers to the nature of the remedy. See Birks “Misnomer” in Cornish *et al* (eds) *Restitution, Past, Present and Future* 1.

⁵⁴ Zweigert and Kötz *An Introduction to Comparative Law* 551.

⁵⁵ For a discussion of the history of quasi-contract in English law, see Goff and Jones 5ff; Birks *Restitution* 29ff.

⁵⁶ (1760) 2 Burr 1005, 97 ER 676.

this action, founded in the equity of the plaintiff's case.... [T]he gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

The idea that such claims were based in a principle of "natural justice and equity" ran counter to the English positivist tradition, and was heavily criticised: for example, Scrutton LJ described Lord Mansfield's view as "well meaning sloppiness of thought".⁵⁷ Lord Mansfield's approach was emphatically rejected by the House of Lords in *Sinclair v Brougham*⁵⁸ in 1914.

However, a change of heart was to set in after the Second World War. The initial seeds were sown sporadically in judicial dicta like that of Lord Wright in the case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,⁵⁹ where his Lordship said:⁶⁰

"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another that it is against conscience that he should keep."

The idea that restitutionary claims could be grounded in a principle of unjust enrichment took hold in the 1960s in the pioneering work of Goff and Jones in their seminal *The Law of Restitution*, and was subsequently adopted by Birks in his equally distinguished *An Introduction to the Law of Restitution*. These authorities showed that in an academic sense, the English were beginning to warm to the view that the various forms of restitutionary claims that are available in English law are founded on the basic principle that retention of the benefit would rank as "unjust enrichment". In Birks's famous words:⁶¹

"Nowadays the most important thing to say about the relationship between restitution and quasi-contract is that the term 'quasi-contract' ought to be given up altogether. It has no work to do. Quasi-contractual obligations are simply those common law obligations which arise from unjust enrichment. They are restitutionary in content, and unjust enrichment is their causative event."

However, the battle was not over — the courts still had to be convinced. Things did not look promising

⁵⁷ In *Holt v Markham* [1923] 1 KB 504 at 513.

⁵⁸ [1914] AC 398.

⁵⁹ [1943] AC 32.

⁶⁰ At 61.

⁶¹ *Restitution* 39.

when Lord Diplock stated, in *Orakpo v Manson Investments Ltd*:⁶²

“[T]here is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law.”

But particularly as a result of the influence of the academic sector, the House of Lords finally came around to putting the law of restitution on a sound and principled footing. In *Lipkin Gorman v Karpnale Ltd*,⁶³ the principle of unjust enrichment was finally accepted by the highest court as being the theoretical foundation of all claims based on restitution. Secondly, in *Westdeutsche Landesbank Girozentrale v Islington Borough Council*,⁶⁴ the implied contract fiction was overwhelmingly rejected. These developments were confirmed in *Banque Financière de la Cité v Parc (Battersea) Ltd*,⁶⁵ where the former South African, Lord Steyn, said, “unjust enrichment ranks next to contract and tort as a part of the law of obligations. It is an independent source of rights and obligations”.⁶⁶

The fact that the English base their “law of restitution” on the principle of unjust enrichment sets it apart from the civilian principle of unjustified enrichment. The difference between the two systems becomes apparent when one examines the nature of the general elements of an enrichment claim in English law, which were also formally adopted by the House of Lords in the *Banque Financière* case.⁶⁷ These elements, which were developed mainly in by academic analysis,⁶⁸ were described by Lord Steyn as the following:

- (1) Has the defendant benefited or been enriched?
- (2) Was the enrichment at the expense of the plaintiff?
- (3) Was the enrichment unjust?
- (4) Are there any defences?

⁶² [1987] AC 95 at 104.

⁶³ [1991] 2 AC 548 at 578 (significantly, per Lord Goff).

⁶⁴ [1996] AC 669 at 710.

⁶⁵ [1999] 1 AC 221.

⁶⁶ At 227.

⁶⁷ At 227.

⁶⁸ See Goff and Jones 15; Birks *Restitution* 21; Burrows *Restitution* 7; McMeel *Restitution* 5; Virgo *Restitution* 9.

The most striking difference between the English and the German approach is the replacement of the concept that the enrichment must have occurred *sine causa*, in a general sense, with the idea that the enrichment must have been unjust, in a particular sense.⁶⁹ Before a plaintiff in English law will be entitled to restitution, he or she will have to demonstrate the existence of a specific unjust factor, which justifies the plaintiff's claim. In Burrows's words:⁷⁰

"If the defendant is enriched at the plaintiff's expense restitutionary analysis turns to what is generally regarded as the crucial question — is that enrichment unjust? The factors which the law regards as rendering the enrichment unjust — the 'unjust factors' — can be regarded as the grounds for restitution roughly analogous to the different torts in the law of tort."

The leading taxonomic classification of the various forms of unjust factor is that of Birks. At a basic level, he identifies two classes of enrichment claims: those based on subtraction (where the defendant's enrichment has been subtracted from the plaintiff), or those based on wrongdoing. The second category marks a significant difference between the English approach and a civilian approach, where "restitution for civil wrongs" is not considered to belong in the law of unjustified enrichment at all, but is a matter for the law of delict. By far the most important class of enrichment claims are those based on subtraction, though, and it is upon this class that I shall focus for the purposes of this work. Burrows⁷¹ identifies 11 "autonomous" unjust factors that will point to a case of enrichment by subtraction: mistake (traditionally of fact, not law), ignorance, duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity, ultra vires demands by public authorities, and the retention of the plaintiff's property without his or her consent. There have been a number of attempts to further classify these autonomous unjust factors. Birks proposes that these 11 autonomous factors can be categorised into cases of non-voluntary transfer, cases of free acceptance, and miscellaneous cases of policy-motivated restitution.⁷² In turn, cases of non-voluntary transfer can be divided into two classes: cases of non-voluntary transfer where the plaintiff's judgement in making the performance was vitiated completely by a factor like mistake or duress (non-voluntary transfer: vitiation), and cases of non-voluntary transfer where the plaintiff has exercised his or her judgement, but the performance was

⁶⁹ For a comprehensive analysis of this one fundamental difference, see all the papers in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective*, especially Meier "Unjust Factors and Legal Grounds" 37ff and Krebs "In Defence of Unjust Factors" 76ff.

⁷⁰ Burrows *Restitution* 21. Cf Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227: "Restitutionary liability is triggered by a range of unjust factors or grounds of restitution."

⁷¹ *Restitution* 21.

⁷² Birks *Restitution* 140ff.

conditional or qualified, as in the case of failure of consideration (non-voluntary transfer: qualification). There are difficulties with this classification, though, and it is not uniformly or entirely adopted by others.⁷³ It is not intended to indulge in a comprehensive investigation as to the taxonomy of unjust factors in this thesis, so no more attention will be paid to this debate in this chapter. Rather, the more important question is the status of duress as an unjust factor triggering restitution.

Duress is considered to be one of the hallowed categories of situation in which a plaintiff is entitled to recover any amount by which the defendant has been enriched at the expense of the plaintiff. Where the defendant has induced the plaintiff into conferring a benefit upon him or her by illegitimate threats, then the plaintiff will have a claim for restitution of that benefit. The test for duress where the restitution of a benefit is sought is therefore the same, *mutatis mutandis*, as that which has developed for the purposes of determining whether a contract can be rescinded for duress — has the benefit been conferred or induced as a result of an illegitimate threat?⁷⁴

The English unjust factors approach has been heavily criticised, especially by leading civilians, for its haphazardness and its casuistry. Famously, Zimmermann has remarked:⁷⁵

“It may well be that the compilation of this kind of list is a particularly convenient way of organising the casuistry of the English common law. In comparison with the modern civilian approach, and viewed against the background of the principle of unjust enrichment, it does not, however, appear to be a scheme distinguished by its elegance. In the first place, it is not very tidy.... Secondly, it is not comprehensive. New unjust factors may be recognized. The law remains uncertain. Thirdly, it requires courts to analyse ten or even more specific grounds of restitution. Several of them (mistake, duress, exploitation) throw up formidable problems of delimitation.... Insistence on specific unjust factors does not contribute to the internal economy of the legal system. For it leads to unfortunate duplication of problems. Mistake, in certain circumstances, invalidates the contract. Mistake also provides the basis for a claim for restitution. What is the relationship between these two enquiries? Why deal with one and the same issue in two different contexts?”

⁷³ See slightly different classifications of Goff and Jones 41ff; McMeel *Restitution* 43ff; Virgo *Restitution* 119ff. Burrows *Restitution* 22 rejects these attempts outright, and prefers to deal with all 11 factors autonomously.

⁷⁴ See *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 and *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152. For a full discussion of the law regarding the recovery or restitution of benefits extorted by duress in English law, see Goff and Jones 307ff; Birks *Restitution* 173; Burrows *Restitution* 161; McMeel *Restitution* 88; Virgo *Restitution* 191.

⁷⁵ “Unjustified Enrichment: The Modern Civilian Approach” (1995) 5 *OJLS* 403 at 416. For similar criticisms, see Zimmermann *Obligations* 892ff; Johnston and Zimmermann “Unjustified Enrichment: Surveying the Landscape” in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 3 at 5-6; Meier “Unjust Factors and Legal Grounds” in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 37.

The criticism comes down to a simple matter. Why do the English not accept a principle of unjustified enrichment, à la the civilian model, and focus on whether the performance was made *sine causa*, or was an *indebitum*, rather than requiring positive proof of one of a whole range of autonomous unjust factors? Historically, the English have resisted this view strenuously. Lord Goff, reviewing the development of the law of restitution in the case of *Woolwich Equitable Building Society v Inland Revenue Commissioners*,⁷⁶ sums up the position by saying:⁷⁷

“The law might have developed so as to recognise a *condictio indebiti* — an action for the recovery of money on the ground that it was not due. But it did not do so. Instead, as we have seen, there developed common law actions for the recovery of money paid under mistake of fact, and under certain forms of compulsion.”

But the question that is currently being asked of the English law is whether it might not actually be moving away from the strict unjust factors approach towards a recognition of the idea that performances that are undue, or *sine causa*, are recoverable as a matter of principle.⁷⁸ The matter is certainly controversial, but the first seeds of this possibility were sown in the *Woolwich* case itself, where Lord Goff pointed out, in the very next sentence after the dictum reproduced above, that the appellants in the *Woolwich* case were seeking “a reversal” of the orthodox view that English law did not recognise a form of *condictio indebiti*. The case concerned the legal question whether payments could be recovered in the law of restitution simply where it could be shown that the payment had been made in response to an *ultra vires* demand from an administrative functionary.

The grounds for a restitutionary claim for money paid unjustly to an administrative official in these circumstances in English law up to that time were effectively limited to situations where the payment had been made by mistake of fact, or under duress.⁷⁹ Since mistakes of fact were rare, the main ground for an action in circumstances where an undue payment had been made to an administrative official was duress. This necessitated proof of all the elements to support a duress claim, which could be difficult. Invariably no threat would have been articulated, and a threat would have to be implied from the circumstances, if this were possible. Furthermore, it would have to be shown that the threat was unlawful, and had caused the payment, since there was no reasonable alternative for the aggrieved party but to pay. Although there was no quibble with duress as a factor justifying restitution from the point

⁷⁶ [1993] AC 70.

⁷⁷ At 172.

⁷⁸ See Meier and Zimmermann “Judicial Development of the Law, *Error Iuris*, and the Law of Unjustified Enrichment — A View from Germany” (1999) 115 *LQR* 556.

⁷⁹ An excellent summary of the position at the time may be found in the speech of Lord Goff in *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 164-166.

of view of principle, pragmatically speaking, it was very difficult for a plaintiff to build a winning case. When one considers that the majority of these cases concern payments to authorities, the limitations of the traditional common law grounds were cause for concern: why should an aggrieved party who has made an undue payment to such an official be required to prove all the requirements of mistake or duress before having an action for restitution? Should it not be recognised that where an administrative functionary exercising public powers has unlawfully demanded and extracted a payment, an action for restitution should automatically lie, on the grounds that the demand was *ultra vires*? A number of prominent academics, notably Birks,⁸⁰ Cornish⁸¹ and Burrows,⁸² had made appeals for the English law to be developed to recognise this very fact.

These appeals were answered in *Woolwich*,⁸³ one of the more significant judgments on the English law of restitution in the 1990s.⁸⁴ Inland Revenue, purporting to act in terms of a statutory regulation, had demanded that Woolwich pay approximately £57 million in tax. Woolwich objected to this charge, claiming that the demand was *ultra vires* the relevant tax legislation, but paid it, and then immediately instituted review proceedings to determine whether the demand had been valid. Woolwich was successful in proving the charge was *ultra vires* in the House of Lords.⁸⁵ As a result of this decision, Inland Revenue repaid the principal amount. However, it refused to pay interest on the money, which amounted (by agreement) to £6.73 million. Woolwich instituted further proceedings to reclaim this money.

Under the traditional approach to actions for money had and received, Woolwich was faced with a problem. There had been no implied agreement to repay the money.⁸⁶ Since Woolwich had alleged from the outset that the payment it had made was *ultra vires*, it had not paid by mistake. That left a cause of action in duress. This was held not to be a valid cause of action in the circumstances either.⁸⁷ It was found that the payment had not been made as a result of any implied threat. And even if this were the case, the only possible threat would have been a threat by the Inland Revenue to sue for the money

⁸⁰ *Restitution* 294-299, and “Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights” in Finn (ed) *Essays in Restitution* 161.

⁸¹ “Colour of Office: Restitutionary Redress Against Public Authority” (1987) 1 *Journal of Malaysian and Comparative Law* 41.

⁸² “Public Authorities, *Ultra Vires* and Restitution” in Burrows (ed) *Essays on the Law of Restitution* 39.

⁸³ [1993] AC 70.

⁸⁴ See Burrows *Restitution* 348.

⁸⁵ See *R v IRC, ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400 (HL).

⁸⁶ See the finding of Lord Keith at 151H and Lord Goff at 170.

⁸⁷ Per Lord Keith at 161, Lord Goff at 173, and Lord Jauncey at 192.

plus penalties, which would not have been an unlawful threat, since that course of action would have been entirely legitimate.⁸⁸ As far as Lords Keith and Jauncey were concerned, Woolwich's case therefore had to fail. In their view, it was inappropriate for the House of Lords to develop the law to recognise a new common law remedy, in an area that they felt was the preserve of the legislature.

The majority, on the other hand (Lords Goff, Browne-Wilkinson and Slynn), found for Woolwich, and in the process developed the English common law to establish what has become known as the "Woolwich principle". It was articulated by Lord Goff as follows:⁸⁹

"[M]oney paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an *ultra vires* demand by the authority is *prima facie* recoverable by the citizen as of right."

Lord Goff gave the leading judgment in the case, and it is useful briefly to summarise the reasoning behind his finding that the law in England needed to develop to recognise that *ultra vires* payments should be recoverable as of right. Lord Goff showed that although the common opinion was that restitution for payments was limited to the traditional grounds, there had been cases where powerful arguments for the recognition of a claim for restitution based on an *ultra vires* demand had been articulated by judges in England and in various Commonwealth jurisdictions.⁹⁰ Additionally, his Lordship referred to calls for a recognition of the principle by academics such as Cornish and Birks. Lord Goff felt that the time was right to endorse these arguments, and to recognise that *ultra vires* payments made to public authorities were recoverable. This was so for a number of important reasons. First, it was found that simple justice demanded that if the demand had been *ultra vires*, the money should be repaid as of right.⁹¹ To reinforce his argument, Lord Goff pointed out that it was a fundamental principle of law under the Bill of Rights that taxes cannot be levied without the authorisation of Parliament.⁹² Furthermore, when a demand for payment is made by the state, the other party is faced with the possibility of unpleasant consequences if he or she does not pay — including penalties prescribed by statute — and it is thus difficult for the person to resist paying, especially in the

⁸⁸ Per Lord Keith at 161C, Lord Jauncey at 194, and by implication Lord Goff at 165E-G and Lord Slynn at 204E.

⁸⁹ At 177F.

⁹⁰ His lordship referred to the judgment of Lord Atkin LJ in *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884 at 887; the judgment of Dixon CJ in *Mason v New South Wales* (1959) 102 CLR 108 at 117; the dissenting judgment of Martin B in *Steele v Williams* (1853) 8 Exch 625; and the dissenting judgment of Wilson J in *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 at 169.

⁹¹ At 171G.

⁹² At 172E. In this respect he gave judicial endorsement to the argument to this effect developed by Birks *Restitution* 294ff.

light of the “pay now, argue later” rule generally applicable to tax law. And from the point of view of logic, Lord Goff found that it would be absurd to punish a good citizen, “whose natural instinct is to trust the revenue and pay taxes when they are demanded of him”.⁹³ Finally, his Lordship pointed out that since there was a well-established rule that where the State paid a citizen without authority, that money could be reclaimed from the citizen as of right, it was absurd that the corollary should not be true. In simple terms, so it was stated, the money could be reclaimed since it was paid “for no consideration”.⁹⁴ During the course of his judgment, Lord Goff also referred to a number of cases in other jurisdictions in which leading judicial figures had also argued that payments made in response to *ultra vires* demands ought to be reversed. These included judgments by Holmes J in the American case of *Atchison, Topeka and Santa Fe Railway Co v O’Connor*,⁹⁵ Dickson J in the Canadian case of *Amax Potash Ltd v Government of Saskatchewan*,⁹⁶ and Wilson J in the Canadian case of *Air Canada v British Columbia*.⁹⁷ All this led Lord Goff to the following conclusion:⁹⁸

“[L]ogic appears to demand that the right of recovery should require neither mistake nor compulsion, and the simple fact that the tax was exacted unlawfully should *prima facie* be enough to require its repayment.”

Commentators in England have generally welcomed the decision in *Woolwich* as a significant step in the substantive development of the English law of restitution.⁹⁹ But what has been of more interest from a theoretical perspective is what the decision could mean for the law of unjust enrichment in England. The orthodox view is that the decision created a new “unjust factor” — payments made in response to

⁹³ At 172G.

⁹⁴ At 166 (per Lord Goff) and 197-8 (per Lord Browne-Wilkinson).

⁹⁵ 223 US 280 (1912) at 285-6.

⁹⁶ (1976) 71 DLR (3d) 1 at 10, where Dickson J said: “To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.”

⁹⁷ (1989) 59 DLR (4th) 161 at 169.

⁹⁸ At 173F.

⁹⁹ See Burrows *Restitution* 345; Goff and Jones 321; Beatson “Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the *Woolwich* Principle” (1993) 109 *LQR* 401; McMeel *Restitution* 233; Virgo *Restitution* 422ff, esp at 439; Meier “Unjust Factors and Legal Grounds” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 37 at 62. Jaffey *Restitution* 203ff is not so positive, and suggests that developing the doctrine of duress to encompass such claims might have been more appropriate. This was the approach adopted in the Australian case of *Mason v New South Wales* (1959) 102 CLR 108 in similar circumstances to *Woolwich*.

ultra vires demands by public authorities can be recovered.¹⁰⁰ But saying that a plaintiff is entitled to a restitutionary claim simply where the demand for payment was *ultra vires*, and that simple constitutional justice demands this, since the payment was made “for no consideration”, does not appear too far from saying that the performance can be reclaimed simply because it is undue.¹⁰¹

Further impetus for this line of thinking has come from the leading decisions given during the course of the swaps litigation in the late 1990s. Indeed, Krebs has argued that “the effect of that litigation has been to move English law appreciably closer to German law”.¹⁰² In *Hazell v Hammersmith and Fulham London Borough Council*,¹⁰³ the House of Lords held that the speculative interest rate swaps entered into by local authorities on the financial markets, in an attempt to raise revenue (which had formerly been thought to be completely above board), were in fact *ultra vires*, with the result that these speculative financial transactions were therefore void. The result of this decision was that those parties that had come off worse in the interest rate swaps (whether it be a financial institution or a local authority) sought restitution of their losses. The first case to reach the Queen’s Bench Division was *Westdeutsche Landesbank Girozentrale v Islington LBC*.¹⁰⁴ In that case, Hobhouse J held that restitution ought to be ordered simply on the ground that there had been “no consideration” for the payments, since the swaps were void from the start. As far as he was concerned, the fact that the transaction was void (ie was based on a purported contract that had never in fact existed) was grounds enough for restitution: there was no need for proof of an additional unjust factor. The decision was met with something approaching horror by English commentators, who saw this argument as a completely unprincipled invocation of a form of *condictio sine causa*.¹⁰⁵ Birks argued that in fact the true unjust factor was in fact “failure of consideration”, rather than absence of consideration, since (in this case) the swaps were incomplete. This argument was ostensibly accepted by the Court of Appeal,¹⁰⁶ but there

¹⁰⁰ See Burrows *Restitution* 352; Beatson “Restitution of Taxes, Levies and other Imposts: Defining the Scope of the Woolwich Principle” (1993) 109 *LQR* 401 at 410.

¹⁰¹ See Meier “Unjust Factors and Legal Grounds” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 37 at 64-5.

¹⁰² Krebs “In Defence of Unjust Factors” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 76 at 80. A succinct summation of the nature of the swaps litigation may be found in Krebs’s paper.

¹⁰³ [1992] 2 AC 1.

¹⁰⁴ [1994] 4 All ER 890 (QB).

¹⁰⁵ See especially Birks “No Consideration: Restitution after Void Contracts” (1993) 23 *University of Western Australia LR* 195; Swadling “Restitution for No Consideration” [1994] 4 *Restitution LR* 73.

¹⁰⁶ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 924 (CA). For comment on this point, see Krebs “In Defence of Unjust Factors” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 76 at 82.

was enough room for doubt in the Court of Appeal decision to suggest that Hobhouse J's views were not entirely rejected. Indeed, in the case of *Guinness Mahon v Kensington and Chelsea LBC*,¹⁰⁷ the Court of Appeal found that "absence of consideration" was the simple reason justifying restitution in a case where the swap was not incomplete, but the transaction had been completed.

These decisions were precursors to one of the most significant decisions in the law of restitution handed down by the House of Lords in recent years: *Kleinwort Benson Ltd v Lincoln City Council*.¹⁰⁸ In this case, the aggrieved party sought to recover its money on the ground that payments made during the course of these swaps had occurred in the mistaken belief that these transactions were valid. The problem was that in English law, a mistake of law did not ground a claim for restitution; only a mistake of fact. And since these swaps had occurred in the mistaken belief that the swaps were within the powers of the local authority, the mistake could only be one of law, which was technically not actionable. The House of Lords, following the trend in others jurisdictions,¹⁰⁹ unanimously decided to abolish the distinction between mistakes of fact and law. The thorny issue that did split the court, though, was whether there had been a mistake in these cases. Lords Browne-Wilkinson and Lord Lloyd said not: at the time the payments were made, the legal position was that such transactions were valid. It was only afterwards, in *Hazell*, that it was decided finally that such swaps were *ultra vires* local authorities. At the time of the transaction, it could not therefore be said that the parties were labouring under a mistake of law, and this meant they could not have a claim for restitution. However, the majority (Lords Goff, Hofmann and Hope) rejected this argument. Instead, they accepted the classical declaratory theory of judicial decision-making — that the House of Lords declares what the law is, was, and always has been.¹¹⁰ Viewed in that light, at the time the payments were made, the parties were labouring under a mistaken impression of the law, and, said the majority, were entitled to restitution.

The effect of the decision has really been the following: if it is decided that a transaction is void for invalidity (as occurred with the swaps in *Hazell*), then, in the light of *Kleinwort Benson*, it will be virtually impossible for a litigant faced with a restitutionary claim to be able to deny that the plaintiff was "mistaken". The result is that the mistake of law is not so much the key, as the fact that the transaction upon which the performance was based is a nullity. Again, this seems to be very much akin to a civilian idea that restitution must occur in situations where the performance has occurred *sine*

¹⁰⁷ [1999] QB 215.

¹⁰⁸ [1999] 2 AC 349.

¹⁰⁹ For South Africa, see *Willis Faber Enthoven (Edms) Bpk v Receiver of Revenue and Another* 1992 (4) SA 202 (A).

¹¹⁰ At 377 (per Lord Goff).

causa.¹¹¹ Interestingly enough, both Lord Goff and the Scottish Lord Hope refer extensively to the German approach to unjustified enrichment in their speeches. Lord Hope's comments about the law of unjust enrichment are particularly illuminating. His Lordship stated:¹¹²

"The underlying principle in both [civil law and common law] systems is that of unjust enrichment. The purpose of the principle is to provide a remedy for recovery of the enrichment where no legal ground exists to justify its retention."

The similarities between this reasoning and the civilian approach to unjustified enrichment are indeed striking. And although their views are controversial, Meier and Zimmermann have argued that this may be taken to mean that the future of the English law of restitution or unjustified enrichment lies in moving closer to a civilian approach, where recovery ought to be based on the fact that the transfer was made *sine causa*, or is an *indebitum*.

"Although the English judges might object to these observations, Lord Hope may have just stated openly what *Kleinwort Benson* has in fact achieved: the (re-)introduction of the *condictio indebiti* though the back door of mistake of law."¹¹³

It remains to be seen whether the English law of unjust enrichment will develop in this way, and what the ultimate effects of *Kleinwort Benson* will be. Perhaps the best that can be said at this stage is that the English law of restitution or unjust enrichment continues to be in a state of major flux and development.¹¹⁴

9.4.4 The *condictio indebiti*: the current South African position

¹¹¹ For this argument, see Krebs "In Defence of Unjust Factors" in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 76 at 85 and 99-100; Meier "Unjust Factors and Legal Grounds" in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 37 at 72ff; Meier and Zimmermann "Judicial Development of the Law, *Error Iuris*, and the Law of Unjustified Enrichment — A View from Germany" (1999) 115 *LQR* 556.

¹¹² At 408D.

¹¹³ Meier and Zimmermann "Judicial Development of the Law, *Error Iuris*, and the Law of Unjustified Enrichment — A View from Germany" (1999) 115 *LQR* 556 at 565. See also Johnston and Zimmermann "Unjustified Enrichment: Surveying the Landscape" in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 3 at 28-30.

¹¹⁴ Cf the views of Johnston and Zimmermann "Unjustified Enrichment: Surveying the Landscape" in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 3 at 29. For a polemical review of the current and future position in England (although one that certainly does not espouse a rapprochement with German law) see Hedley *Restitution: Its Division and Ordering*.

The question that needs to be asked after the review of the German and the English approaches to enrichment law is how we understand the operation of the South African law of unjustified enrichment, and in particular, how we conceptualise the impact of an act of duress upon a non-contractual performance under the *condictio indebiti*. The natural starting point ought to be that the South African law, by recognising a Roman-based law of unjustified enrichment, ought notionally to follow a civilian approach. And for the most part, this is true of the South African law of unjustified enrichment, as was shown in Chapter 8.¹¹⁵ Yet Zimmermann and Du Plessis, despite recognising the impeccable civilian traditions of the South African law of unjustified enrichment, have pointed out that some affinities do exist between the South African approach to cases concerning enrichment generally, and the approach that is adopted in English law.

“Two approaches could be followed to distinguish instances of unjustified enrichment from cases ... where the enrichment is based upon a valid transaction or legal provision. It could be stated (as the BGB indeed does) that all cases of enrichment which comply with a set of general requirements are unjustified. Alternatively, a more conservative approach could be adopted, whereby only those cases of enrichment which fit into certain pigeonholes are to be regarded as unjustified. [To qualify this, it is stated in footnotes 4 and 5] South African law still works with the enrichment actions of classical Roman and Roman Dutch law.... The traditional approach in the English ‘law of restitution’ was also to work with ‘various heterogeneous types of claims’ ... based on ‘unjust enrichment’.”¹¹⁶

The *condictio indebiti* is one area where these comments do have particular resonance in South African law. Under the form of the *condictio indebiti* inherited from Justinian’s *Corpus Iuris Civilis*, it was necessary to show that the performance or transfer was, in a general sense, an *indebitum*, or undue, according to the general principle of enrichment. But that in order for a plaintiff to make out a case for a *condictio indebiti*, the compilers of the *Digest* required the plaintiff to prove that the performance had occurred as a result of a justifiable error. Proof of error was, in Zimmermann’s words, “elevated to a core requirement of the plaintiff’s claim”.¹¹⁷ The position in modern South African law is the same.¹¹⁸ But, as was shown in Chapter 8, as well as at the beginning of this chapter,¹¹⁹ the range and scope of the *condictio indebiti* has been extended beyond its traditional task of dealing with mistaken

¹¹⁵ See 8.2 above.

¹¹⁶ Zimmermann and Du Plessis “Basic Features of the German Law of Unjustified Enrichment” (1994) 4 *Restitution LR* 15.

¹¹⁷ Zimmermann *Obligations* 850.

¹¹⁸ See 8.4.6.2 above.

¹¹⁹ See 8.4.6.2 and 9.3.1 above.

performances. Nienaber AJA's comments in *CIR v First National Industrial Bank Ltd* with regard to the *condictio indebiti* are interesting, and bear repeating: "Whatever may have been the position in Roman-Dutch law ... our present law appears to have assimilated the basic notion of English law with regard to 'payments made under duress of goods'"¹²⁰ This mirrors the comments made by Innes CJ in the case of *Union Government (Minster of Finance) v Gowar*.¹²¹

"As a fact the English decisions allowing money paid under duress of goods to be reclaimed are not based upon the principle of what we should call a *restitutio in integrum*; they are examples of relief granted by reason of the quasi-contractual relationship created by the receipt by one person of money which rightfully belongs to another. The actions shape themselves in assumpsit for the recovery of money had and received for the use of the plaintiff.... It seems to me that money wrongly exacted by a possessor of goods from the true owner as a condition precedent to their delivery, and paid by the latter not as a gift, but in order to obtain possession of his own property and with a reservation of his own rights would be recoverable by a *condictio*. As in English law, so in ours, a quasi-contractual relationship would be established which would enable money so paid to be reclaimed."

These dicta have led Du Plessis to comment:¹²²

"South African law, which has retained the *condictio indebiti* in uncoded form, does not only require proof of an undue transfer, but also further factors such as excusable error or certain forms of compulsion (under the influence of the English law of 'payments made under duress of goods')."

This suggests that the current position in our law is the following. Despite the fact that our law of unjustified enrichment is thoroughly grounded in the civilian tradition, and does not generally recognise the English approach of unjust enrichment, nor adopts the general elements of the English law of restitution, when it comes to the *condictio indebiti*, our law, peculiarly, does appear to adopt an approach akin to the English "unjust factors" approach with regard to determining when the action is available. Something like error or duress is an "unjust factor" that has to be proved by an aggrieved party before it may be said that the transfer was "undue", and therefore that restitution is warranted. The result appears to be a curious hybrid of the civilian and common law: a typical feature of legal

¹²⁰ *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 646-7.

¹²¹ 1915 AD 426 at 433-434. The comments about quasi-contract are outdated, and can be ignored for the purposes of the modern law.

¹²² Du Plessis "Fraud, Duress and Unjustified Enrichment" in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 212-3 (my emphasis). Similar views may be found in *LAWSA* vol 9 §79; Joubert *Contract* 107.

institutions in a mixed legal system.¹²³

9.5 Duress and rationality

The discussion in this chapter so far has concerned the law of unjustified enrichment in general in South Africa, and the role of the duress enquiry in cases where non-contractual performances have occurred. But what of the substance of the duress claim? If the current orthodoxy is that duress is a factor that will determine when a non-contractual transfer occurred *indebite*, then the next issue that needs to be considered is why the test for duress where a non-contractual transfer has occurred is so different from that which applies (or, I have argued, should apply) in the law of contract? In Chapter 8 it was shown that the way in which one makes out a case of duress where a non-contractual transfer is concerned diverges significantly from that proposed for the law of contract. It seems strange that the requirements necessary to make out a case of duress or compulsion where a non-contractual transfer is concerned ought to be different from the requirements that one might have to prove in a contractual context. From the review of the current position conducted in Chapter 8, two anomalies strike one immediately: grounding the claim in the idea that the payment was “involuntary”, and the requirement that a protest must be present to support a finding that the payment or transfer occurred under compulsion.

9.5.1 The voluntariness principle

Currently, it is fundamental to a claim for the recovery of payments made under duress that the aggrieved party must show that his or her payment was “involuntary”.¹²⁴ As far as non-contractual performances are concerned, the doctrine of duress in this area thus remains thoroughly embedded in the theory of the overborne will. This approach was absorbed into South African law by De Villiers CJ in *White Brothers v Treasurer-General*, who found authority for this shibboleth in the decisions of the English courts in the mid-19th century, notably *Parker v The Great Western Railway Company*.¹²⁵ This may have been an accurate reflection of the English position at the time, but De Villiers CJ was

¹²³ Cf Du Plessis *Compulsion and Restitution* 140.

¹²⁴ *White Brothers v Treasurer-General* (1883) 2 SC 322 at 351; *Union Government (Minister of Finance) v Gowan* 1915 AD 426 at 436.

¹²⁵ 7 M&G 253 at 293, where Parke B said: “We are of the opinion that the payment was involuntary.”

incorrect in drawing a direct comparison with the English position and the position in Roman-Dutch law, where the doctrine of duress was not predicated upon voluntariness, but rather on the illegitimate conduct of the party who had coerced the payment. The adoption of De Villiers CJ's views in subsequent cases has meant that the doctrine of duress and its effect on a non-contractual performance has been grounded in a completely different jurisprudential foundation to that which generally applies in the law of contract in South Africa.

The philosophical and practical problems with using the overborne will theory as the theoretical basis for the doctrine of duress have already been discussed at length in Chapter 5 of this study,¹²⁶ and so will not be repeated in detail. The theory of the overborne will has now been thoroughly exploded. It is inaccurate to say that the person who makes a payment under threat has “no choice” but to do so. The person is faced with a dilemma, and must actively make an unpleasant choice: to refuse to pay, or to pay in order to acquire his or her property or right, and hope to recover later. To repeat the famous words penned by Holmes J in *Union Pacific Railway Co v Public Service Commission*:¹²⁷

“It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is a characteristic of duress properly so called.”

The voluntariness requirement amounts to a rudimentary philosophical or psychological conclusion rather than an accurate and coherent legal test for duress. De Villiers CJ's attempt to qualify what he meant by the term “involuntary” when he said “[w]here a man is forced by menaces to his person to make payments which he is not legally bound to make, it cannot be said that there is total absence of consent — but, inasmuch as his consent is forced and not free, the payment is treated as involuntary, and therefore subject to restitution”¹²⁸ simply confuses the issue. If the person's consent is not absent, and the person does indeed have to make a choice — either to pay the amount, or not to pay the amount and write the matter off, or seek alternative relief — surely branding the payment as one that is “involuntary” is logically inaccurate? The payment was not made in a state of automatism, but was probably more carefully considered than many financial decisions that people make in every-day life. The voluntariness test deflects the court from the real issues that need to be determined in duress

¹²⁶ See 5.4.1 above.

¹²⁷ 248 US 67 (1918) at 70. See also Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253 at 267, where he said: “[T]he instances of more extreme pressure are precisely those in which the consent expressed is *more* real; the more unpleasant the alternative, the more real the consent to a course which would avoid it.” See too Holmes J's comments in *Fairbanks v Snow* 145 Mass 153 (1887) at 154.

¹²⁸ At 351.

cases.¹²⁹ An analysis of the duress cases in South African enrichment law shows that there is little in the way of a scientific enquiry into the existence or otherwise of duress: the conclusions are, on the whole, rough and ready, and much of this can be traced back to the influence of the voluntariness criterion.

9.5.2 The protest requirement

Under the South African law as it stands, it is only possible to reclaim money or property transferred unjustifiably under duress where it can be shown that the aggrieved party made some unequivocal protest at the time the transfer occurred.¹³⁰ It is submitted that the same principles apply here as to threats to property in the law of contract: the existence of a protest is only of marginal relevance to an enrichment claim for duress, and making proof of an unequivocal protest a requirement of a successful action is palpably erroneous. Windeyer J, in the Australian case of *Mason v The State of New South Wales*,¹³¹ put the matter perfectly when he said:¹³²

“[There is] no magic in a protest; for a protest may accompany a voluntary payment or be absent from one compelled Moreover the word ‘protest’ is itself equivocal. It may mean the serious assertion of a right or it may mean no more than a statement that the payment is grudgingly made.”

The seeds of the requirement were of course planted by De Villiers CJ in *White Brothers v Treasurer-General*. The Chief Justice relied upon three English decisions where the question of protest had been discussed.¹³³ However, in English law the existence of a protest was never in fact considered to be a requirement for a claim for money had and received under duress. Lord Reading CJ, who reviewed the English position in *Maskell v Horner*,¹³⁴ was clear on the matter:¹³⁵

¹²⁹ Cf the views of Atiyah “Economic Duress and the ‘Overborne Will’” (1982) 98 *LQR* 197 at 202.

¹³⁰ See *White Brothers v Treasurer-General* (1883) 2 SC 322 at 351; *Union Government (Minster of Finance) v Gowar* 1915 AD 426 at 434; *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 649.

¹³¹ (1959) 102 CLR 108.

¹³² At 143.

¹³³ These were: *Parker v The Great Western Railway Company* 7 M&G 253, *Parker v Bristol and Exeter Railway Company* 6 Exch 702, and *Ashmole v Wainwright* 2 QB 837.

¹³⁴ [1915] 3 KB 106.

¹³⁵ At 119. See also *Spanish Government v North of England SS Ltd* (1938) 54 TLR 852; Chitty §7-009.

“I doubt whether ... there must be anything in the shape of an express notice or declaration to the defendant of the plaintiff’s intention to keep alive his right to recover. It is clear ... that no express words are necessary and that the circumstances attending to the payments and the conduct of the plaintiff when making them may be sufficient indication to the defendant that the payments were made with the intention of closing the transaction.”

What happened in the *White Brothers* case, though, is that De Villiers CJ happened to cite a few cases where a protest had been made on the facts, and divined from this a general requirement that a protest had to have been made, as a matter of law. This finding was, from the point of view of principle, misconceived. In Du Plessis’s words, De Villiers CJ “‘imported’ his own invention — the protest requirement”.¹³⁶

The same problems with a requirement of protest that pertain to the law of contract apply in this context. Why should a failure to protest mean that there is no duress?¹³⁷ Proof of protest may assist in providing inferential evidence of duress in borderline cases, but it is submitted that this is about as far as the utility of a protest can be stretched. In confrontational situations it may be wiser to keep quiet, rather than to antagonise the other party any further with complaints. And why should the aggressor be entitled to escape responsibility for his or her actions due to the fact that the party faced with a threat failed to complain? Making a protest a requirement could also have the effect of reducing the protest to a formality, rather than a heartfelt objection, which would deprive the protest of any real meaning.¹³⁸

As a result, it is submitted that the existence of an unequivocal protest ought no longer to be required where a plaintiff seeks to reclaim a payment made under duress in South African law. Duress cases ought to be treated on the basis of the general elements pertinent to the doctrine. Protest should, at most, be of evidentiary value in assisting a court to determine whether the payment or transfer occurred under duress.

9.5.3 Rationality

¹³⁶ Du Plessis *Compulsion and Restitution* 135-6.

¹³⁷ It is worth remembering that Dwyer J in his dissenting opinion in *White Brothers v Treasurer-General* (1883) 2 SC 322 at 335-6 made this very point.

¹³⁸ All these issues were discussed in Chapter 7 above. For authorities, see *Universe Tankships of Monrovia Inc v International Transport Workers Federation* [1983] AC 366 at 400E; *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials llc (The Alev)* [1989] 1 Lloyd’s Rep 138 at 146; *Murphy v The Brilliant Co* 83 NE 2d 166 (1948); Dalzell “Duress by Economic Pressure II” (1942) 20 *North Carolina LR* 341 at 382n288 and “Duress by Economic Pressure I” (1942) 20 *North Carolina LR* 237 at 244 and 252; Halson “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 *LQR* 649 at 667; Bigwood “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto LJ* 201 at 258; Furmston (ed) *Butterworths Common Law Series: The Law of Contract* 697.

The respective divergence between the approach to duress cases where a contract is induced, and where a non-contractual payment has occurred in South African law, and especially the continued application of the voluntariness criterion as the basic test for duress in enrichment law, is plainly undesirable, if one adopts the view that legal decision-making ought to be a rational exercise. Brownsword, in a passage redolent of Dworkin's philosophy of law and adjudication, has written that "law aspires to be ... a seamless web, each precedent, each statute, fitting into a coherent mosaic of doctrine and principle".¹³⁹ As far as the topic of this study is concerned, it is submitted that there is no reason why one ought to treat cases of duress so differently in these two areas of law in South Africa, when they concern the same issue, and the same term — duress — is usually used to describe the way in which the contract or payment was induced. It is my opinion that there ought to be no fundamental distinctions drawn between the two, even if the circumstances in which the duress claim operates may be slightly different, and may need to be contextualised, depending upon whether the claim concerns the inducement of a contract or the return of a non-contractual transfer. Indeed, it is submitted that makes sense for there to be one doctrine of duress recognised across both areas of law. If this is to be the case, as I am arguing, then the doctrine, as it is currently understood across these two areas of law in South Africa, certainly fails to satisfy Brownsword's basic aspiration.

The importance of the doctrine of duress being a rational doctrine was briefly touched upon in Chapter 5,¹⁴⁰ in the context of developing a coherent doctrine for the law of contract alone, but requires a more thorough examination at this point. The Constitutional Court in *S v Makwanyane* has emphasised that any State action, or any rule or doctrine of the law, must be "capable of being analysed and justified rationally".¹⁴¹ Brownsword, contextualising and building upon Nozick's pre-eminent philosophical discussion of the nature of rationality,¹⁴² has argued that for the law, or, more specifically, an area of law, to be rational, it should satisfy the requirements of formal, instrumental and substantive rationality. Formal rationality requires that legal doctrines should not be contradictory.¹⁴³ Contradiction

¹³⁹ Brownsword "Towards a Rational Law of Contract" in Wilhelmsson (ed) *Perspectives of Critical Contract Law* 246. My thanks go to Professor Tony Bradney of the University of Leicester for referring me to this source. He referred to this source himself in his article "Duress, Family Law and the Coherent Legal System" (1994) 57 *MLR* 963 at 964.

¹⁴⁰ See 5.2.2 above.

¹⁴¹ *S v Makwanyane* 1995 (3) SA 391 (CC) at para [156] (per Ackermann J). The learned judge proceeded to say: "The idea of a constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with the core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the principles of the Constitution." (My emphasis).

¹⁴² Nozick *The Nature of Rationality*, especially from 133.

¹⁴³ Brownsword *Contract Law: Themes for the Twenty-First Century* 210; Furmston (ed) *Butterworths Common Law Series: The Law of Contract* 146. Brownsword does write in the context of the law of contract, but

most commonly exists where the application of two different doctrines to one set of facts produces differing results. Occasionally, though, contradictions may be found in the articulation and application of one doctrine itself. This contradiction compromises the utility and credibility of the doctrine from the outset.

Secondly, doctrines of law ought to satisfy the requirements of instrumental rationality.¹⁴⁴ In a generic sense, for a doctrine to be instrumentally rational it must be capable of guiding action — in other words, the doctrine should ideally be constructed so that the doctrine can provide clear guidelines for where legal boundaries lie, and how people ought to conduct themselves in society. If this is the case, then the doctrine should serve the particular purpose for which it exists. Brownsword equates instrumental rationality in its generic sense with the fundamental procedural characteristics of a proper legal system proposed by Lon Fuller:¹⁴⁵ that laws should apply generally, they should be promulgated, they should apply prospectively, they should be clear, consistent, endure without frequent change, they should not require the impossible, and they should be administered consistently in practice. This generic rationality dovetails with specific instrumental rationality: that the doctrine ought to “fit”, or be compatible with, the general area of law in which the doctrine is expected to operate. This simply means that the doctrine must not be anomalous when located in its broader jurisprudential and jurisdictional context.

Lastly, a doctrine of law should be substantively rational.¹⁴⁶ This means that the substantive reasons for the existence of the doctrine should be plausible, that the principles underpinning the doctrine should be legitimate, and the doctrine should operate in such a way that its effect on the parties to a legal dispute concerning the particular doctrine is substantively fair. The three categories of rationality are divided out for analytical purposes: in practice, there will naturally be a degree of overlap across the boundaries of all three categories. For example, a legal doctrine that is internally contradictory will not be able to serve as a clear guide to action, will in all likelihood sit uncomfortably in the wider context of the branch of law in which it is supposed to operate, and will inevitably create confusion about the principles that underpin the doctrine. All this will compromise the doctrine’s substantive legitimacy or value.

As the law currently stands, the doctrine of duress that applies across the law of contract and the law of unjustified enrichment in South Africa serves as a classic example of a doctrine that is not

his views have a wider application.

¹⁴⁴ Brownsword *Contract Law: Themes for the Twenty-First Century* 215; Furmston (ed) *Butterworths Common Law Series: The Law of Contract* 150.

¹⁴⁵ See Fuller *The Morality of Law* 38ff.

¹⁴⁶ Brownsword *Contract Law: Themes for the Twenty-First Century* 221; Furmston (ed) *Butterworths Common Law Series: The Law of Contract* 154.

rational in the sense discussed above. First, the doctrine is internally contradictory. The elements necessary to prove a case of duress in a contractual context, and the types of factual situations that the doctrine covers in that area of law, are entirely different to the requirements to make out a case of duress where a non-contractual transfer was coerced. Secondly, the doctrine is not instrumentally rational. Rather than providing one clear, consistent institution that is uniformly applicable and thus capable of giving clear guidance to the ambit of the doctrine, the doctrine currently provides a conceptual muddle in South African law. This is so both in contract law, in enrichment law, and, more significantly, when the application of the doctrine to the two branches of law are viewed side-by-side. The knock-on effect of all this is that there is confusion about the principled basis for the existence of the doctrine, and the true substantive elements of a duress claim. This divergence between the doctrine of duress in the law of contract and the law of unjustified enrichment in South African law is plainly undesirable. If the legal system is going to utilise the doctrine of duress in both areas of law, then as a matter of principle the doctrine should be uniformly articulated, and consistent in its content and construction. Bradney, writing with regard to inconsistencies across the doctrine of duress in English contract law and family law, has said: "Factual circumstances may alter the application of concepts, but the same word must always speak of the same concept."¹⁴⁷

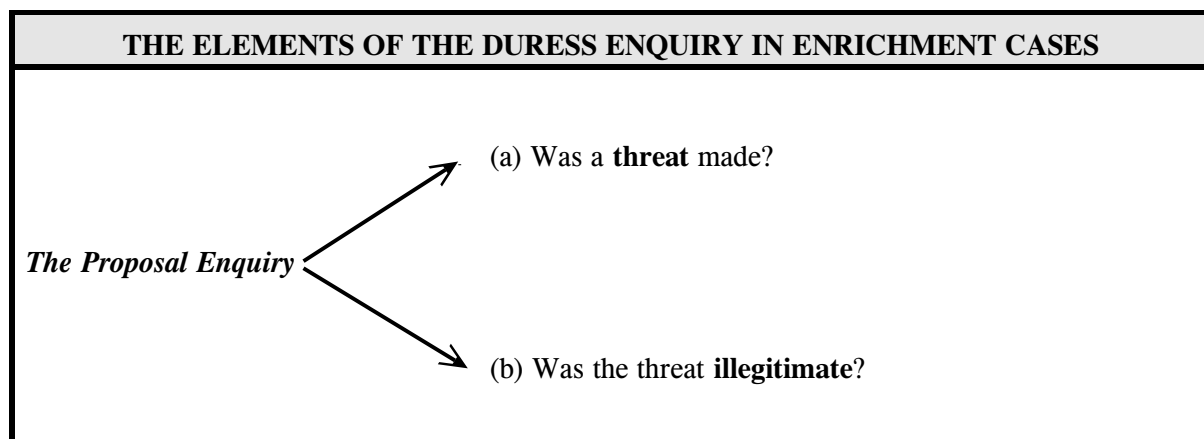
9.5.4 A uniform test for duress

In the interest of having a rational, coherent and philosophically defensible doctrine of duress in the South African law of obligations, it is submitted that in South African law we ought to take the step of adopting a uniform test for duress. I submit that the modern test for duress that I argued should apply in the law of contract can and should also be adopted to resolve duress cases where payments and transfers have been made outside the bounds of contract. The contexts may be different, and, as Bradney states, factual circumstances may alter the specific application of the concept of duress across the law of contract and the law of unjustified enrichment, but it is submitted that the term "duress", and the modern test for duress advocated in this thesis, is flexible enough to embrace all forms of coercion, especially in a commercial context. It is here where South African law can learn a great deal from the common law jurisdictions, even if our law of unjustified enrichment is civilian in its basic foundations. A uniform approach has been adopted in common law jurisdictions, where there is no difference in principle between the way in which the doctrine of duress is understood and applied, either in contract or in cases where the restitution of a non-contractual performance is at issue. In Halson's words, these

¹⁴⁷ Bradney "Duress, Family Law and the Coherent Legal System" (1994) 57 *MLR* 963 at 965.

jurisdictions have seen the development of a “unified theory of duress”.¹⁴⁸ Although this has been a relatively recent development in Commonwealth jurisdictions like England, Canada and Australia,¹⁴⁹ which coincided with the rise of a more modern test for duress in these jurisdictions in the 1970s and 1980s, this unitary approach has been followed in the United States for well over 100 years.¹⁵⁰

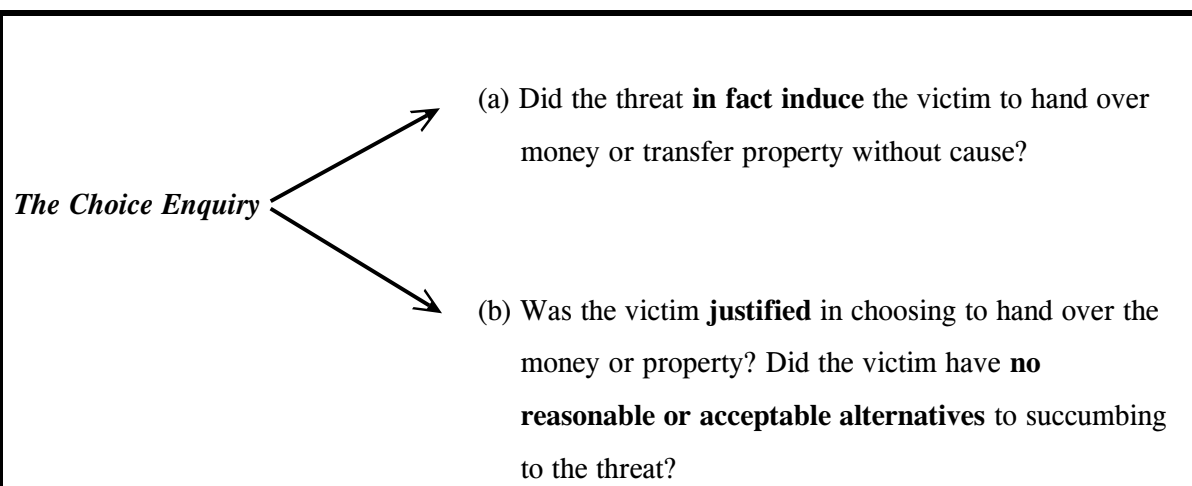
The elements of the test in these jurisdictions are, *mutatis mutandis*, the same as those proposed for the law of contract, and can be illustrated, with the necessary contextualised amendments, as follows:



¹⁴⁸ Halson “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 *LQR* 649 at 658.

¹⁴⁹ In English law see *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] AC 366 at 384C (per Lord Diplock) and 400C (per Lord Scarman); *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 at 165. English commentators are of the view that this unitary approach to dealing with cases of duress in the law of obligations is the best approach. See Goff and Jones 307ff; Birks *Restitution* 174ff; Burrows *Restitution* 161ff, esp at 165-6; McMeel *Restitution* 88ff; Virgo *Restitution* 192ff; Jaffey *Restitution* 180ff; Beatson “Duress, Restitution and Contract Renegotiation” in *The Use and Abuse of Unjust Enrichment* 95ff. In Canada see *Eadie v Township of Brantford* (1967) 63 DLR (2d) 561; Sutton “Duress by Threatened Breach of Contract” (1974) 20 *McGill LJ* 554; Fridman “Duress in the Canadian and English Law of Restitution: A Comparison” (1987) 11 *Dalhousie LJ* 47.

¹⁵⁰ In the United States, see *Radich v Hutchins* 95 US 210 (1877); *Union Pacific Railway Co v Public Service Commission* 248 US 67 (1918). For comment, see especially Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253, esp at 288ff, and also Durfee “Recovery of Money Paid Under Duress of Legal Proceedings in Michigan” (1917) 15 *Michigan LR* 228; Dalzell “Duress by Economic Pressure I” (1942) 20 *North Carolina LR* 237 at 243; Sutton “Duress by Threatened Breach of Contract” (1974) 20 *McGill LJ* 554 at 563 and, from a philosophical perspective, Wertheimer *Coercion* 172 and 308.



9.5.4.1 The proposal enquiry

9.5.4.1.1 A threat must have been made

The first requirement is that the aggrieved party must have been faced with a demand to pay that was backed up by a threat of some kind. The concept of a threat has been thoroughly canvassed in Chapter 6 above, and so that analysis will not be repeated here. The precedents show that in the cases concerning non-contractual transfers, the existence of a threat will often have to be implied from the facts and circumstances. A threat will not always be explicitly or overtly articulated.¹⁵¹

9.5.4.1.2 The threat must be illegitimate

Once again, the same basic principles with regard to the determination of the illegitimacy of the threat that applied in the law of contract could apply here. The question is whether the threat was *contra bonos mores*. It is not only threats that are wrongful per se that will qualify. Any prima facie legitimate threat made for an improper purpose will also be considered illegitimate. The doctrine of abuse of rights is particularly relevant to duress cases in the field of enrichment law. Like in contract, where a threat is used to coerce a person into making a payment or transferring property to which the aggressor is not entitled, it will generally be found that the threat was made for an improper purpose, and will therefore

¹⁵¹ There is no need for a threat to be express; it may be implied. See *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 828H; *Hotz v Standard Bank* 1907 Buch AC 53 at 64; *R v Zonele and others* 1959 (3) SA 319 (A) at 329; *S v Mbele* 1963 (1) SA 257 (N) at 260; *S v Gokool* 1965 (3) SA 461 (N) at 464-5. For a potential example, see the facts in *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) and the comment by Lewis “Unjustified Enrichment” in 1990 *Annual Survey of South African Law* 125.

be illegitimate. Quoting Lord Scarman in *Universe Tankships Inc of Monrovia v ITWF*.¹⁵² “the nature of the demand that the pressure is applied to support” will therefore be as relevant and important to determining whether or not the proposal of the aggressor was illegitimate in pure enrichment cases as it is in the law of contract.

The type of threats that are commonly coupled with a demand for payment are confined to a relatively narrow band. Traditionally, the most common form of threat was a threat to withhold the person’s property, or goods, so depriving the person of access thereto.¹⁵³ In cases where one person threatens to withhold another person’s property without any legal cause in order to extract some payment out of them (eg without the power to exercise a lien, hypothec or any other right of retention over the property), the threat will be unlawful per se. Cases of this nature are usually decided on the basis of the laws of property and security, and not on the basis of duress.¹⁵⁴ Most of the “duress of goods” cases concern officials extracting payments by making such threats in situations where original or subordinate legislation provides for these officials to exercise such powers,¹⁵⁵ or, more rarely, cases where a private person threatens to exercise some form of valid *ius retentionis* over the property of another. These sort of threats will usually not be unlawful per se. Rather, the court will find that the threat was illegitimate only in circumstances where it was made in order to coerce the aggrieved party into paying something that was not in fact owed. The demand could have been designed deliberately to extract some form of undue benefit out of the aggrieved party, or the unlawful demand could have been made merely as a result of a failure on the part of an official to understand his or her powers, or to a failure to have interpreted the empowering provisions properly. Either way, the fact that the demand was unlawful or *ultra vires*, coupled with a threat to withhold property, will invariably result in a finding that the actions of the aggressor were unlawful. This principle of law is reinforced by a common-sense interpretation of the property clause of the Bill of Rights. Section 25(1) of the Constitution states: “No-one may be deprived of property except in terms of law of general application,

¹⁵² [1983] AC 366 at 401A-B. In Note “Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis” (1968) 53 *Iowa LR* 892 at 914 it is stated that there is “the necessity for a test which focuses on the relationship between the contractual demand and the threatened action.”

¹⁵³ In South Africa see *White Brothers v Treasurer-General* (1883) 2 SC 322; *Benning v Union Government (Minister of Finance)* 1914 AD 420. In England see *Astley v Reynolds* (1731) 2 Str 915; *Lindon v Hooper* (1776) 1 Cowp 414.

¹⁵⁴ The only cases where duress is referred to in this context are *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 (SR) and *Hamilton Paneelkloppers v Nkomo* 1991 (2) SA 534 (O).

¹⁵⁵ For example, in *Benning v Union Government (Minister of Finance)* 1914 AD 420 a customs official claimed that Benning’s floor-surfacing machine was a “domestic machine” in terms of the Customs Tariff Book (Class IV), and was therefore dutiable. In *Hopkins v The Colonial Government* (1905) 22 SC 424 the railway official demanded an extra fee in terms of the Railway Tariff Book. The sort of legislation that is relevant in this regard is the various forms of tax legislation, and an act like the Customs and Excise Act 91 of 1964.

and no law may permit arbitrary deprivation of property.” The word “arbitrary” has been interpreted by the Constitutional Court in the recent case of *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services*¹⁵⁶ to refer to those situations where the law relied upon to support the demand does not provide sufficient reason for the particular deprivation of property in that situation, or is procedurally unfair.¹⁵⁷ While various forms of legislation, administrative power, and indeed provisions of the common law concerning rights of retention, exist for a perfectly legitimate and reasonable purpose, any threat to withhold property that is coupled with a demand that is either extortionate or *ultra vires* will not be justifiable in terms of s25(1), and will be classified as illegitimate, as well as being unconstitutional.

In Chapter 8 it was shown that, in South Africa, it is not only payments made under duress to property that can be reversed. In addition, where an official of some kind threatens not to perform a public duty unless some undue payment is made, this will also amount to unlawful conduct for the purposes of the duress enquiry.¹⁵⁸ Effectively, the official threatens to deny the aggrieved party something to which that person is legitimately entitled as of right, without charge, or at a lesser charge than was demanded. This sort of threat is *contra bonos mores*, since the official acts in violation of his or her rights and duties. From a practical perspective, such threats can very often have dire implications for the person’s economic interests, and these cases thus shade into the broader category of economic duress, although they do have characteristics that lead to them being classified as a category on their own.

In Anglo-American jurisdictions, such cases have historically been called *colore officii* cases,¹⁵⁹ a term that is not widely used in South Africa.¹⁶⁰ The leading definition of a threat *colore officii* is that

¹⁵⁶ 2002 (7) BCLR 702 (CC).

¹⁵⁷ At 740A-B. This case concerned the attempt by the Revenue Service to exercise statutory liens over certain motor vehicles purchased on credit terms by certain debtors of the Revenue Service in terms of s114 of the Customs and Excise Act 91 of 1964. The vehicles that had been seized were still owned by Wesbank under the terms of the credit-sale contract between the parties.

¹⁵⁸ The leading case in South Africa is *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 435, 440-1 and 454. See too *De Beers Mining Co v The Colonial Government* (1886) 5 SC 155.

¹⁵⁹ For an in-depth discussion of the *colore officii* lines of cases in Anglo-American law, see the excellent analysis in Goff and Jones 323-327. This section refers to virtually every *colore officii* case decided in the Commonwealth common law jurisdictions, as well as some of the leading American cases. In Anglo-American law there has been some debate about whether *colore officii* cases fall under the doctrine of duress, or constitute a different species of coercion. Cf *Burrows Restitution* 164 and 173. In South African law they do fall under the duress doctrine.

¹⁶⁰ One case where the term was used is *Miller and others v Bellville Municipality* 1973 (1) SA 914 (C) at 921H.

of Windeyer J in the Australian case of *Mason v The State of New South Wales*:¹⁶¹ “[E]xtortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty.” The fact that such conduct is illegitimate, and can provide grounds for a finding of duress, has been recognised for centuries in Anglo-American law, as was stated by Willes J in the Victorian English case of *Great Western Railway v Sutton*:¹⁶²

“[W]hen a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*,¹⁶³ or action for money had and received.”

Although the reference to public officials in these *colore officii* cases naturally suggests that it refers to the conduct of civil servants, the principle does extend wider than that, to organisations that might technically be private, but which perform some form of public function. In English law, for example, courts have reversed payments made under threat *colore officii* in situations where an arbitrator has fixed an unjust fee illegitimately, and threatens to withhold his or her award until he or she is paid, as well as reversing payments made to common law carriers in monopolistic positions.¹⁶⁴ Furthermore, one interesting area where threats *colore officii* have had an important role to play in American law, is where excessive payments have been made to utility companies, in response to threats to shut off “public” utilities such as electricity or gas.¹⁶⁵ It is submitted that there is no reason why South African law could not stretch to recognise similar actions by quasi-public bodies, or private bodies performing public functions, as threats *colore officii*, should the need arise.¹⁶⁶

The third major form of threat in these cases is threats to sue and/or impose penalties in the event of a failure by the other party to satisfy the demand. These threats again shade into the category of

¹⁶¹ (1959) 102 CLR 108 at 141.

¹⁶² (1868-9) LR 4 HL 226 at 249.

¹⁶³ The reference to the *condictio indebiti* by Willes J is intriguing in the context of the debate in the last few years in English law about whether the general principle of unjustified enrichment exists in English law, the extent of the influence of civilian law on the English law of restitution, and also whether a general form of *condictio indebiti* exists in English law.

¹⁶⁴ All the authorities may be found in Goff and Jones 324-5.

¹⁶⁵ For a discussion of the position in American law with regard to the utility cases, as well as a vast number of case authorities, see Dalzell “Duress by Economic Pressure I” (1942) 20 *North Carolina LR* 237 at 243. The closest example in South Africa is *Port Elizabeth Municipality v Uitenhage Municipality* 1971 (1) SA 724 (A), concerning the supply of electricity, but in the end, that case was not decided on the basis of duress.

¹⁶⁶ Threats by private bodies providing public services has not been a problem in South Africa mainly as a result of the fact that service delivery has traditionally been the preserve of para-statal. But with increasing privatisation of such organisations, the time may come where such issues may have to be faced in this country.

economic duress, since they concern patrimonial interests at their core. In English law, this has generally been considered to be problematic for a duress claim, since threats to sue and claim penalties in terms of a statute are legitimate threats.¹⁶⁷ This degree of reluctance to consider such threats as illegitimate may be as a result of the relatively restricted approach to lawful act duress in England.¹⁶⁸ It is submitted that in South Africa there is no reason to treat these threats in any other way than according to the general test. While threats to sue or impose penalties may be lawful per se, where such threats are coupled with a demand that is *ultra vires*, and the person is required to pay something that is not in fact due, this will render the proposal illegitimate. In such cases it is not difficult to satisfy the requirements of the proposal enquiry; the difficulty comes rather in determining whether the aggrieved party ought to have succumbed to the illegitimate proposal, rather than refusing to pay and fighting the matter in the civil courts. That is a matter for the choice enquiry, though.

9.5.4.2 The choice enquiry

9.5.4.2.1 The threat must have induced a payment or transfer that was undue

The first issue of importance under the choice enquiry is whether the payment or transfer was in fact induced by the illegitimate proposal made by the other party. The *sine qua non* or “but-for” test of factual causation should apply.¹⁶⁹ This question will usually not be one of great significance, and it is really a matter of common sense whether, but for the threat, the demand would have been complied with, and the money paid or property transferred, when it was in fact not due.

9.5.4.2.2 The person had no reasonable alternative but to succumb

The mere fact that the illegitimate threat induced the payment will not be enough to justify a finding of duress. The second question under the choice enquiry is whether the person making the payment was justified in doing so. The test, which can again be described as a test of legal causation, is whether the person was put in a position where he or she had no reasonable alternative but to make the payment in the circumstances. Justice Field put the matter thus in the American Supreme Court case of *Radich v*

¹⁶⁷ See especially the comments of Burrows *Restitution* 349, with reference to Lord Goff’s views on the effect of such threats in *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 165F.

¹⁶⁸ Cf the views to this effect of Steyn LJ in *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 (CA) at 718-9.

¹⁶⁹ For a full discussion, see Chapter 7 above. In *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 (SR) at 690E, Quènet J utilised this test, saying: “[J]udicial pressure, urgent and irresistible, was applied; but for that circumstance, Bird would not, as a matter of probability, have delivered up possession.” (My emphasis).

“[T]here must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment ... from which the latter has no other means of immediate relief than by making the payment.”

The kind of issues that a court would have to take into consideration in determining whether or not the person had other means of relief are similar to those in contract. These are issues like: whether taking legal advice could have averted the problem; whether it would have been an option to take legal action against the other party; whether the party making the demand is in such a powerful position that the threat cannot easily be resisted; whether penalties can be imposed for a failure immediately to comply with the demand; and whether time is of the essence with regard to the acquisition of the property or right that is being held. In addition, the position of the party making the threats is also a consideration: for example, where the party making the demand for payment is a public official exercising public powers, this will be important, as it may be that the demand (for example, by a tax official) cannot easily be resisted. Where it is found that there were reasonable alternatives available, the payment may be construed as a payment designed to compromise or settle the matter, and would not be able to be challenged on the grounds of duress.¹⁷¹ On the other hand, where no reasonable alternatives existed, the payment will be justified, and a case of duress will be proved.

The American Supreme Court case of *Union Pacific Railway Co v Public Service Commission*¹⁷² is a good example of a case where the submission to an illegitimate proposal was found to be justified. The Union Pacific Railway Co had sought a certificate from the Missouri Public Service Commission for the issue of bonds to secure the company for expenditure on the main interstate public railway line that the company administered, and which ran through Missouri. Under the law of Missouri, a certificate from the Public Service Commission was an administrative prerequisite to the issuing of valid bonds: any bonds issued without a certificate were virtually worthless commercially, and the possessors of these bonds being subject to stringent financial penalties. The Public Service Commission refused to issue a certificate for the bonds unless Union Pacific paid almost \$11 000 in fees. Union Pacific

¹⁷⁰ 95 US 210 (1877) at 213.

¹⁷¹ Cf *Henderson v Folkestone Waterworks Co* (1885) 1 TLR 329; *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 165E-F in England, and *Sargood Brothers v The Commonwealth* 11 CLR 258 in Australia.

¹⁷² 248 US 67 (1918). Another example is that of *Atcheson, Topeka and Santa Fe Railway Co v O'Connor* 223 US 280 (1912), where the plaintiff was faced with a demand for an undue payment of tax, and was faced with the threat of legal proceedings, as well as the immediate forfeiture of his business if he did not pay. It was held by Holmes J that the plaintiff had had no real choice but to pay to protect his business, and it was found that the payment had been made under duress.

disputed these charges, but paid in any event, desperately needing the money to fund the running of the railway line, so that the railway line could continue to function properly and service all the states it traversed. It then took action for restitution of the money, claiming it had paid under duress. Having found that the demand for the payment of about \$11 000 was *ultra vires*, and therefore that the threats were illegitimate, the Supreme Court held that in the circumstances, Union Pacific had had no reasonable alternative but to pay the amount immediately, in order to get a certificate that would allow it to access valuable bonds that could be used to cover costs, and ensure the interstate railway line continued to function as normal. In Holmes J's words, Union Pacific validly "chose the lesser of two evils";¹⁷³ the other option of refusing to pay and exercising legal options to challenge the Public Service Commission would have caused delays that would have crippled the functioning of the railway line. This option was therefore held not to be an acceptable one in the circumstances. As duress was proved, the Public Service Commission was ordered to repay Union Pacific its money.

Although the important question of determining whether the party who made the payment had any acceptable alternative to doing so is not traditionally seen as an element of the duress enquiry in cases concerning non-contractual transfers, the requirement has in fact been referred to by the courts in South Africa,¹⁷⁴ and has occasionally been considered in determining whether a case of duress has been made out. In *Lilienfield and Co v Bourke*,¹⁷⁵ Lilienfield and Co had been induced to pay certain municipal rates and taxes over the property which it was leasing by a threat that its lease would be cancelled if it did not pay the taxes. The court held that this was not a payment made under duress, as the threat was not immediate, and the company could quite easily have established that it was not in fact its duty to pay such rates simply by getting legal advice on the point.¹⁷⁶ Another case in which it was found that alternative options to payment were available, which scuppered the duress claim, is *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd*.¹⁷⁷

On the whole, though, the fact that in enrichment cases the doctrine of duress is grounded in the voluntariness principle, not to mention the ever-present spectre of the protest requirement, has meant that in South African law, these critical questions of causation and acquiescence have seldom been canvassed as incisively as they ought to have been by the courts. It is submitted that if the test for duress proposed above were to be adopted, it would make the resolution of such cases far more logical,

¹⁷³ At 70.

¹⁷⁴ See *Kilroe v Bayer* 1915 CPD 717 at 719-20; *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 (SR) at 690E; *Miller and another v Bellville Municipality* 1973 (1) SA 914 (C) at 920H.

¹⁷⁵ 1921 TPD 365.

¹⁷⁶ At 370-2.

¹⁷⁷ 1996 (4) SA 1151 (T) at 1155J.

not to mention satisfactory from the perspective of the need to do justice in good faith between the parties in terms of the law of unjustified enrichment.¹⁷⁸

9.6 Excursus: performances made under protest

The focus of the discussion thus far has been on the doctrine of duress as a factor which justifies a finding that a performance is *sine causa*, and which entitles a plaintiff to a *condictio indebiti*. Duress has thus been recognised as a second factor, over and above the classical error factor, which allows a litigant to claim a *condictio indebiti*. To reinforce the finding that things like error or duress constitute factors justifying the conclusion that a performance has occurred *sine causa*, it appears as if the law has developed to recognise a third, additional factor that may potentially justify a *condictio indebiti*: that the payment was made under protest outside the bounds of duress.

9.6.1 Early developments

In the discussion so far, the question whether money may be reclaimed if it was paid under protest has been discussed merely as a component of the broader question whether payments made under duress may be reclaimed. Under South African law as it stands, it will not be possible for the aggrieved party to show that the payment was made under duress unless it is proved that the payment was accompanied by a protest. The protest requirement is thus but one building block in making out a cause of action based on duress. To say that one has made a payment “under protest”, and no more, will not equate to a payment under duress. It has been argued above that this requirement is completely inappropriate in the context of duress cases, and should be jettisoned.

However, this does not mean that making a payment “under protest” will be a nugatory or useless gesture, or that the party who made the payment in this manner will necessarily be deprived of an

¹⁷⁸ One need look no further for authority on this point than the words of Pomponius quoted in the *Digest*: “For it is by nature fair that nobody should enrich themselves at the expense of another.” *D* 12.6.14 (Watson’s edition). The Romans grounded their equitable actions and rules in the law of obligations in one key principle that became foundational to the classical Roman law, and the law of obligations in all civilian-based systems: the principle of good faith. It is submitted that the principle of good faith may be described as the principle that underpins the law of unjustified enrichment as a branch of the law of obligations, and, in a contextualised sense, sustains the doctrine of duress as a factor justifying a remedy for the restitution of payments or transfers made *indebite* in South African law. Of course, the principle operates in a different sense to the way it operates in contract, but what is important to remember is that the good faith principle is not one that is exclusive to the law of contract. The importance of the principle of good faith to the law of unjustified enrichment as a branch of the law of obligations has been summarised by the German Federal Court of Justice as follows: “[U]njustified enrichment claims are based upon equity and hence they are governed, specifically, by the principle of good faith.” BGHZ 36, 232 at 235. The translation of the original German is that of Zimmermann *The Law of Obligations* 835n6, who approves of this view.

action. In fact, the law has developed to the point where a payment has been made “under protest”, this will allow an aggrieved party to institute an action to reclaim money that was not in fact due, quite apart from mistake or duress. Indeed, in *Venter NO v Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council*,¹⁷⁹ Flemming DJP has described the necessity of making out a case of duress as a technical straitjacket that may often be an unnecessary hindrance in cases where an aggrieved party seeks to reclaim an undue payment, but who cannot prove the payment was made because of a *bona fide* mistake.¹⁸⁰ But this development has been circuitous, and the precise nature and scope of this action remains a matter of some debate. Since this matter has not been examined in any detail by any other South African authorities, it will be examined fully here, for the sake of clarification and completeness.

The seeds of this development may be found in the judgment of De Villiers AJA in *Union Government (Minister of Finance) v Gowar*.¹⁸¹ Unlike his colleagues Innes CJ, Solomon JA and Wessels AJA, De Villiers AJA asserted that Mrs Gowar’s claim for repayment of transfer duty in that case did not have to be decided in terms of the doctrine of duress at all. Rather, he felt that her problem fell squarely within the traditional ambit of the *condictio indebiti*.¹⁸²

“Now, in my opinion, it is not necessary to consider whether in the present case the *actio quod metus causa* would lie, or whether the extraordinary remedy of *restitutio in integrum* could be resorted to, for where money has been paid under protest, the *condictio indebiti* lies.”

De Villiers AJA’s primary authority for this viewpoint was to be found in the title of the *Digest* devoted to the *condictio indebiti*, and in particular a passage extracted from the writing of Ulpian.¹⁸³ Munro’s translation of the passage is the following:¹⁸⁴

¹⁷⁹ 1998 (3) SA 1076 (W).

¹⁸⁰ At 1080E-F.

¹⁸¹ 1915 AD 426.

¹⁸² At 444.

¹⁸³ D 12.6.2.pr.

¹⁸⁴ CH Munro *The Digest of Justinian* Vol II 306. I have chosen to depart from the standard Watson’s edition for a particular reason. That is, that Munro’s version includes a translation of the clause “negotium enim contractum est inter eos”. In Watson’s edition of the *Digest*, Book Twelve was translated by Professor Birks. Birks’s translation of the Latin is as follows: “If a man makes a payment on the condition that if it turns out not to be owed or to be caught by the *lex Falcidia* it must be given back, an action will lie for its recovery.” Birks did not translate the clause “negotium enim contractum est inter eos” at all. The significance of this clause for legal developments in South Africa will become apparent as this section unfolds.

“If a man pays on the understanding that if it should prove not to be due, or it should turn out to be a case where the *lex Falcidia* applies, the money should be returned, an action for the return will be in place, as there is a contract concluded between the parties.”

De Villiers AJA was not concerned with the *lex Falcidia*, but was more interested in the first situation described by Ulpian. He interpreted Ulpian’s words to mean that it will be possible to reclaim a payment made under protest, when the facts show that the protest resulted in some understanding between the parties that the payment was conditional — ie that the other party would repay the money if it was subsequently proved that the money was not in fact due. Although ordinarily the *condictio indebiti* will fall away if a payment is made knowingly and voluntarily, this, said De Villiers AJA, will not apply to someone who has paid under protest, and, by doing so, has obtained a form of implied assurance that the money will be repaid if it should be proved that the payment was not due. He cited a number of common law authorities whose interpolations of the Roman writers support, to a greater or lesser extent, his views.¹⁸⁵ De Villiers AJA concluded his judgment as follows:¹⁸⁶

“The result of the authorities therefore is ... if a person pays a debt not due knowingly and voluntarily he is not able to recover. But if he pays under protest he is entitled to recover, for the protest is inconsistent either with the idea of a gift or of a compromise between the parties. The other party was not bound to accept money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due: in the language of the Digest, the *negotium* between the parties is a *contractus*.”

Even though De Villiers AJA’s opinion was a minority one, the seeds of his theory soon began to germinate in the Provincial Divisions. Not more than a few weeks after judgment in the *Gowar* case was handed down, Juta JP (who had been on the Appellate Division panel in the *Gowar* case, but who had returned to his duties at the Cape) was faced with a case concerning a payment under protest in the matter of *Wilken v Holloway*.¹⁸⁷ The facts were such that it was not remotely possible to make out a case of duress or mistake. In the premises, Juta JP fell back on De Villiers AJA’s suggestion that a payment under protest alone could be recovered if it could be shown that by accepting the payment, the person agreed that he or she would return it if he or she subsequently discovered it was not due. In Juta JP’s

¹⁸⁵ At 445, he cites Donellus 14.14.52; Voet 12.6.6; Gothofredus *ad D* 6.2.2; Gluck *ad Pand* 12.7; Pothier *Pand* §34. Voet’s passage is worth recording. He said: “If a payor is in doubt whether or not he is indebted, there is still room for a reclaim. Hence also it was sometimes provided by express covenant that if the payment should have been shown not to have been due it should be returned.” (My emphasis).

¹⁸⁶ At 445-6. The emphasis is my own.

¹⁸⁷ 1915 CPD 418. A little-known fact is that Sir Henry Juta was in fact a nephew of Karl Marx. See Zimmermann and Visser *Southern Cross* 129.

words, a “tacit agreement”¹⁸⁸ arises in these circumstances between the person paying under protest and the person receiving the money, that it can be recovered if it is not due. Moreover, he agreed with De Villiers AJA’s view that the appropriate action in such a case was one framed in terms of the *condictio indebiti*. But since no such conditional understanding could be inferred from the facts of the case, the plaintiff’s claim was ultimately unsuccessful.¹⁸⁹

De Villiers AJA’s approach also received some support from Wessels JP (also back at work in the Transvaal Provincial Division, and coincidentally, of course, also a member of the panel in *Gowar*’s case) in an obiter dictum in *Lilienfield and Co v Bourke*.¹⁹⁰ The case turned on the duress question, so the question of conditional payments under protest was not before the court. Nevertheless, Wessels JP analysed what De Villiers AJA had said in the *Gowar* case before agreeing that a payment under protest could be actionable, if the protest resulted in an understanding that the payment was conditional:¹⁹¹

“The learned Judge [De Villiers AJA] shows clearly when dealing with the passages quoted from the Digest that what was meant was that if a person says ‘I will pay you now subject to the condition that if it is afterwards found that this payment was not due, then we will consider it as if no payment had been made.’ If the word protest is used as an abbreviation of that form of expression, if it is used to mean a payment under the condition that if it is found that the payment was not due it must be handed back, I have no quarrel with what was said by the learned Judge.”

In *Gluckman v Jagger and Co*,¹⁹² Watermeyer J perpetuated the trend. As far as he was concerned, an action in terms of the *condictio indebiti* could be instituted in three circumstances: where the transaction was tainted by mistake, or duress, or where a conditional payment is made under protest:¹⁹³

“The form of action which he [Gluckman] instituted was the *condictio indebiti*. As a general rule this action is available whenever a man pays money which is not due if he pays it by mistake or under duress or when it is made a condition of the payment that if it is found not to be due it is to be returned.”

This was certainly the most explicit judicial affirmation up to that point of the situations in which the

¹⁸⁸ At 422.

¹⁸⁹ At 423.

¹⁹⁰ 1921 TPD 365. Cf too *Brakpan Municipality v Androulakis* 1926 TPD 658.

¹⁹¹ At 370.

¹⁹² 1929 CPD 44.

¹⁹³ At 47. The emphasis is mine.

condictio indebiti could be brought, and that a conditional payment under protest constituted one of those situations. Once again, however, the facts in the *Gluckman* case did not support a finding of this nature, and so Watermeyer J was unable to put his views on the law to work in a practical fashion.

In fact, it was to be a long time before a case came before the courts where De Villiers AJA's thesis could be implemented. The opportunity finally came the Appellate Division's way in *Port Elizabeth Municipality v Uitenhage Municipality*.¹⁹⁴ The case concerned the Uitenhage Municipality's attempt to reclaim an increased electricity tariff that the Port Elizabeth Municipality had imposed upon its sister Municipality. The Uitenhage Municipality had paid the tariff, but had protested at the time, and expressly reserved its rights to reclaim the money if it were subsequently found that the increase had been unlawfully demanded. Thereafter, the Uitenhage Municipality commenced legal proceedings to determine the validity or otherwise of the extra tariff that had been charged. Its claim was ultimately successful, as the Appellate Division held that the increase had been effected for reasons not contemplated in the relevant statutory regulation. The final question that was faced by the court was whether the Uitenhage Municipality was entitled to a refund of the money it had paid to the Port Elizabeth Municipality.

Counsel for the respondents submitted that the money could be recovered on the basis of the *condictio indebiti*, either because of duress, or (in the words of Wessels JP in *Lilienfield's* case) because the money had been paid subject to the condition that it would be recoverable if it were subsequently found not to be due.¹⁹⁵ Muller AJA rejected the allegation of duress as being without substance, holding that the payments were not made under threat (ie to withhold the supply of electricity) but rather to obtain the benefit of a discount allowed by the Port Elizabeth Municipality in the event of prompt payment.¹⁹⁶ However, the learned Judge held that a *condictio indebiti* could be instituted, and that the money was recoverable, on the basis that it had been paid subject to the condition that it would be recoverable if it was later found not to be due.¹⁹⁷ Muller AJA cited the dicta of both De Villiers AJA in the *Gowar* case, and Wessels JP in the *Lilienfield* case in support of this ruling. On examining the evidence, Muller AJA held that the respondents had not only denied liability and protested when making payment, but had, by "express stipulation"¹⁹⁸ reserved the right to reclaim the money. Since the Port Elizabeth Municipality had noted these protests, but did not object to the respondent's reservation of its rights, "[i]t must, therefore, I think, be regarded as having by implication agreed to accept the

¹⁹⁴ 1971 (1) SA 724 (A).

¹⁹⁵ At 741E.

¹⁹⁶ At 741E-F.

¹⁹⁷ At 741F.

¹⁹⁸ At 742A.

monies subject to the reservations made”.¹⁹⁹ As a result, the Appellate Division held that the payments in excess of the original tariff that had already been made could indeed be recovered by the Uitenhage Municipality.

A new principle of law had finally emerged from the chrysalis of judicial suggestions in earlier cases. The Appellate Division had recognised (not only as a possibility, but now as a matter of law) that one can infer from the nature of the protest that a form of agreement had been reached in terms of which the plaintiff could be permitted to recover money paid when it was in fact not due. The question of duress was not relevant to this enquiry, since the payment in such cases is made without any fear of goods being detained or rights being withheld. The protest is made simply to reserve any rights to the money that may accrue if the payment is shown later not to be due. Yet, much like the arrival of a tiny butterfly into the world, this innovation met with little fanfare. Comment on the case was generally confined to matters of interpretation of statutes and administrative law.²⁰⁰ Even De Vos in his monumental *Verrykingsaanspreeklikheid* mentions the case only in a footnote.²⁰¹ It was only in the case of *CIR v First National Industrial Bank Ltd*²⁰² that the scope and limits of the new cause of action were discussed in greater depth by the Appellate Division, in a case that was to split the court.

9.6.2 *CIR v First National Industrial Bank Ltd*

The facts of this case were as follows. There was a disagreement between the parties about whether a certain auto-card scheme run by the Bank constituted a “credit card scheme”, and therefore attracted stamp duty.²⁰³ Although the Bank was adamant that the scheme was not dutiable, it resolved to pay the relevant amount “under protest” when ordered to do so by the Commissioner, in order to avoid having to pay possible penalties that the Commissioner could impose.²⁰⁴ The Commissioner accepted payment in this fashion. Having paid, the Bank formally reclaimed the money. The Commissioner rejected the claim. Thus, the Bank launched an application to have the money repaid to it in the courts.

¹⁹⁹ At 742C.

²⁰⁰ Goldblatt “Constitutional and Administrative Law” in 1971 *Annual Survey of South African Law* 7; Tager “General Principles of Interpretation of Statutes” in 1971 *Annual Survey of South African Law* 477.

²⁰¹ De Vos *Verrykingsaanspreeklikheid* 172n2.

²⁰² 1990 (3) SA 641 (A). For another review of the case, see Du Plessis *Compulsion and Restitution* 137.

²⁰³ In terms of s3 as read with Schedule 1 of the Stamp Duties Act 77 of 1968. See the judgment at 644C.

²⁰⁴ The payment was made together with a covering letter which said (at 644E): “As we have not yet finalised the matter with the authorities, in order to avoid any penalty in terms of the new s19 of the Stamp Duties Act, 1968 (as inserted by the Revenue Laws Amendment Act, 1984) we hereby make payment, under protest, of stamp duty in respect of the ... debit entries to our Auto Card holders.”

The majority judgment was written by Nienaber AJA (with whom Corbett CJ, Botha and Kumleben JJA concurred). The majority held that an action for restitution based on duress could not be entertained, since they felt there was no evidence that there had been any threat made against the bank by the Commissioner. Nienaber AJA then cited the *Port Elizabeth Municipality* case as authority for the fact that the element of protest attached to a payment could, quite apart from the matter of duress, mean that another cause of action could lie for restitution of the payment. But it was at this point that Nienaber AJA departed significantly from his judicial predecessors. Previous judges had all been quite happy to hold that in a situation where it could be implied from a protest that the parties had agreed that the payment was conditional, the action for repayment was one to be prosecuted in terms of the *condictio indebiti*. Nienaber AJA disagreed. As far as he was concerned, the cause of action in such cases was one for specific performance of the implied contract, and not an enrichment action.²⁰⁵

“It [a protest] could serve as the basis for an agreement between the parties on what should happen if the contested issue is tested and resolved in favour of the *solvens*. Such an agreement would indeed create a new and independent cause of action.”

Nienaber AJA held that there were three provisos attached to the existence of such an independent cause of action. First, there had to be an agreement between the parties that the payee would return the money if it was later discovered that it was not due. Secondly, the agreement to repay had to be one subject to the condition that it should first be found that the payment was not due before any repayment could be claimed. Thirdly, the existence of such an agreement will have to be obvious from an examination of the negotiations and correspondence between the parties: mere evidence that a protest was made would not, on its own, be sufficient.²⁰⁶

The majority criticised the findings of some of the earlier cases, especially the dictum in *Gluckman v Jagger* cited above, concerning the basis of this cause of action.²⁰⁷ They held that where such an agreement may be implied, the cause of action is now no longer the *condictio indebiti*, but the contract itself. Secondly, the condition does not attach to the payment by the debtor (as was stated in *Gluckman*’s case) but to the agreement to make restitution. The majority held that where a public official demands payment under a statute, and the debtor pays “under protest”, the most likely inference that can be

²⁰⁵ At 649I.

²⁰⁶ For the discussion of these three provisos, see 651B-E of the judgment. For the law on tacit contracts, see *Standard Bank of South Africa Ltd v Ocean Commodities Inc and others* 1988 (1) SA 276 (A) at 292B-C; *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd and Vornier Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 164-5; *Muller v Pam Snyman Estate Agents* 2001 (1) SA 313 (C); *Kerr Contract* 354; *Christie Contract* 92ff.

²⁰⁷ At 651C-D.

drawn is that an implied agreement has been concluded that if the payment is not due, a refund can be claimed.²⁰⁸

In conclusion, the majority of the court held, in favour of the Bank, that they were prepared to assume that the parties had indeed reached such an agreement.²⁰⁹ This was so not because the Bank and the Commissioner had expressly reached such an agreement, but because the payments were made “under protest”, ie the payments were made during the course of a heated and ongoing debate about the correct interpretation of the statute that governed the matter, and the Commissioner, being a public official acting under the enabling powers conferred upon him by statute, would have known that if he were proved to be wrong about the duties, he would be obliged to refund the money.²¹⁰ As a result, the majority found that the Bank was entitled to restitution of the money it had paid to the Commissioner.

In a powerful dissenting judgment, Nicholas AJA disagreed with the conclusion of the majority on three points, two of which are relevant to our enquiry. These were the findings of the majority that: (a) the cause of action in this case was not the *condictio indebiti*; and (b) the Bank’s claim was based upon a new and independent cause of action in contract.

Nicholas AJA commenced by discussing whether the *condictio indebiti* was in fact the appropriate action in such cases. He conducted a thorough and exhaustive analysis of all the relevant authorities from the *Digest*, the Roman-Dutch law, through to the judgments of the courts in South Africa on the matter, which I have discussed above. He placed great store on the fact that in *D 12.6.2* it is stated that if someone pays money over on the understanding that, if it should be discovered that the payment was not due, that person may reclaim it under the auspices of the *condictio indebiti*. Nicholas AJA pointed out that in the *Gowar* case, De Villiers AJA relied on this passage of the *Digest* to conclude that a payment made knowingly and voluntarily, but under protest, was recoverable by means of a *condictio indebiti*,²¹¹ and that De Villiers AJA had found explicit support for this principle in the writings of both Gluck²¹² and Voet.²¹³ It was also pointed out that the principle had indeed subsequently been approved by two very eminent judges — Jutta JP in *Wilken v Holloway*,²¹⁴ and Wessels JP in *Lilienfield and Co*

²⁰⁸ At 652E.

²⁰⁹ At 652G.

²¹⁰ At 652B-D.

²¹¹ At 656A-B.

²¹² *Ausführliche Erläuterung der Pandecten* Vol 13 s384. See *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 445.

²¹³ Voet 12.6.6.

²¹⁴ 1915 CPD 418.

v Bourke,²¹⁵ as well as by the Appellate Division in *Port Elizabeth Municipality v Uitenhage Municipality*.²¹⁶

In the face of such considerable and consistent authority, Nicholas AJA held that the appropriate action in a case such as that before the court must be a *condictio indebiti*. But what of the majority's view that the *condictio indebiti* was not the relevant action, but the action was one based upon an independent implied contract? Nicholas AJA conceded that there was an implied agreement of sorts reached between the parties.²¹⁷

“[The Bank] was tendering payment under protest, by which clearly it meant with reservation of its right to institute an action for repayment (*condicere, repetere*). The Commissioner, by accepting payment subject to that reservation, must be taken to have agreed thereto. In the words of *D 12.6.2, negotium enim contractum est inter eos*. But for such a contract, the Bank could, if it sued for repayment, have been met with an exception of no cause of action.²¹⁸”

But the learned judge held that the majority had misconstrued the nature and effect of this agreement:²¹⁹

“The contract which was made was not independent, but was ancillary or subsidiary to the *condictio indebiti*: it did not create a substantive right but recognised that the Bank had the procedural right to seek a *condictio* (or *repetitio*) despite the fact that the *solutio* was being made voluntarily and with knowledge that it was made *indebite*.”

Nicholas JA's point is a subtle, yet significant one. This claim is not grounded in contract, but is one predicated on principles of unjustified enrichment. By making the payment under protest, and thereby reserving the right to claim repayment of the money should it subsequently be found not to be due, the Bank ensured that they would not be barred from instituting a claim for a *condictio indebiti*, on the basis that it had paid the money freely and voluntarily. The Commissioner, by accepting payment on these terms, impliedly agreed to the Bank's reservation of this right. This right to institute action for restitution was not an independent substantive right. The Commissioner, by accepting the payment, never undertook to do anything, nor made any promise to pay anything. Rather, the Commissioner

²¹⁵ 1921 TPD 365.

²¹⁶ 1971 (1) SA 724 (A).

²¹⁷ At 658B-C.

²¹⁸ Of course, any payment made *scienter*, or knowingly, without mistake, duress or reservation of rights, bars a claim in terms of the *condictio indebiti*.

²¹⁹ At 658G-H.

impliedly agreed to recognise the Bank's procedural right to challenge the legality of the payment in court, and to seek restitution should the court, in any such action, find that the money was not due. Ultimately, the implied agreement was one that made the payment conditional — it was necessary in order to ensure that the right to institute a *condictio indebiti* was not lost.

The role of a protest in these circumstances, as well as the identification of the basis of a litigant's action where a payment is made under protest, has thus been thrown into a state of some uncertainty as a result of the *CIR* case. Not only was there dispute in the case itself as to whether the protest entitles the aggrieved party to an enrichment or a contractual action, but the case also departs quite significantly from the trends in previous precedents, in that the majority plumped for the view that the action is contractual.

Although there have been very few reviews of this particular case, those who have been disposed to comment on the decision are unanimously of the view that the minority opinion of Nicholas AJA is the better one. Eiselen and Pienaar describe the “independent contract” argument of the majority as highly artificial,²²⁰ and Du Plessis states that it “smacks of fiction”.²²¹ Both Lewis²²² and Cassim,²²³ in addition to their disapproval of the independent contract approach of the majority, criticise the majority for rejecting the notion that a duress argument could have applied on the facts of the case. Lewis submits that since the Commissioner had a right to impose heavy penalties for late payment of the money that he had demanded (10% of the principal amount per month), this was a very real and persuasive motivation for making the payment immediately. Although no overt threat to impose penalties was made by the Commissioner, Lewis suggests that such a threat could easily have been implied.²²⁴ If this were the case, she submits that the payment could have been reclaimed by a *condictio indebiti* for duress. This approach would have meant that the court could have avoided the doctrinal difficulties in which it ultimately became entangled.

By way of comparison, the “implied contract” argument endorsed by the majority of the Appellate Division in *CIR v First National Industrial Bank Ltd* has also been mooted in English law. The one English case that stands as authority for this argument is the decision of the Court of Chancery in *Sebel Products Ltd v Commissioners of Customs and Excise*.²²⁵ But this decision virtually stands on its own.

²²⁰ Eiselen and Pienaar 138(c).

²²¹ Du Plessis *Compulsion and Restitution* 139.

²²² Lewis “Unjustified Enrichment” in 1990 *Annual Survey of South African Law* 125.

²²³ Cassim “Economic duress in the law of unjust enrichment in USA, England and South Africa” (1991) 24 *CILSA* 37 at 69.

²²⁴ She states, quite rightly, at 125: “One does not take risks with the fiscus.”

²²⁵ [1949] Ch 409.

Commentators do not consider it to be a significant argument for restitution, and it is seldom mentioned.²²⁶ Moreover, it is interesting to note that although the approach was referred to by the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners*,²²⁷ the decision of Vaisey J in *Sebel's* case was criticised by Lord Goff on the basis that the learned judge in that case may have stretched the facts a little too far to find an implied agreement.²²⁸ Lord Keith even went so far as to say he did not accept the implied contract theory as a proposition of law.²²⁹ The status of the implied contract argument as a factor justifying restitution is thus unclear in English law: although the principle appears to exist, there is little authority for it, and the sentiments about it in modern times have been negative.

As far as South African law is concerned, it is my view that Nicholas AJA's view is the correct one, and that the implied contract argument is not appropriate. This is a classical example of a situation where the *condictio indebiti* should lie, since the performance has been discovered to have been made *indebite*. The plaintiff, by protesting and reserving his or her rights, ensures that he or she can defeat the error requirement, and reclaim that which was transferred *sine causa*. There is no need to create a fictional implied contract — this is not a situation where the law of contract needs to encroach hegemonically. The law of unjustified enrichment provides the appropriate action and justification for the aggrieved party's remedy.

9.7 A re-analysis of the position

The question that needs to be considered in this final section is whether it is justifiable to understand the operation and application of the *condictio indebiti* in this traditional way; ie as an enrichment action that is available where a performance has occurred *sine causa* as a result of one of a particular set of factors like error, duress or (potentially) protest.

9.7.1 The suitability of an “unjust factors” approach?

²²⁶ Goff and Jones 226 describe this as a situation where there is “a contract for repayment”, but only discuss it in 3 lines. The only other authorities that mention it appear to be Birks “Misnomer” in Cornish *et al* (ed) *Restitution Past, Present, Future* 1 at 19; Jaffey *Restitution* 204.

²²⁷ [1993] AC 70.

²²⁸ At 165-6. This is also the view of Birks “Misnomer” in Cornish *et al* (ed) *Restitution Past, Present, Future* 1 at 19.

²²⁹ At 151. See too Goff and Jones 226n3.

9.7.1.1 Doctrinal difficulties

The first, and most glaring, doctrinal problem with this approach is that the South African law of unjustified enrichment is generally based on civilian principles that bear virtually no resemblance to the modern English law of restitution or unjustified enrichment. There is certainly no precedent in the civil tradition for requiring proof of unjust factors before an undue benefit can be restored. Of course, South Africa has a mixed legal heritage, and many areas of our law have a hybridised nature. The question is whether this is an area which ought to be viewed in a hybridised sense, and where a conflation of civilian and common law approaches constitutes the best way of understanding how the *condictio indebiti* ought to function in our law.

To this end, the Zimmermann's comments about the nature of the English law of unjust enrichment, which were quoted above,²³⁰ bear repeating.

"It may well be that the compilation of this kind of list is a particularly convenient way of organising the casuistry of the English common law. In comparison with the modern civilian approach, and viewed against the background of the principle of unjust enrichment, it does not, however, appear to be a scheme distinguished by its elegance. In the first place, it is not very tidy.... Secondly, it is not comprehensive. New unjust factors may be recognized. The law remains uncertain. Thirdly, it requires courts to analyse ten or even more specific grounds of restitution. Several of them (mistake, duress, exploitation) throw up formidable problems of delimitation.... Insistence on specific unjust factors does not contribute to the internal economy of the legal system. For it leads to unfortunate duplication of problems. Mistake, in certain circumstances, invalidates the contract. Mistake also provides the basis for a claim for restitution. What is the relationship between these two enquiries? Why deal with one and the same issue in two different contexts?"²³¹

Apart from the general doctrinal difficulties of trying to mix a civilian and an English approach under the *condictio indebiti*, Zimmermann identifies another key difficulty with an "unjust factors" approach that certainly affects the way the *condictio indebiti* currently operates in South Africa. That is the problem of untidiness, with the consequent "formidable problem of delimitation".

9.7.1.2 The overlap between duress and other factors potentially justifying a *condictio indebiti*

²³⁰ See 9.4.3 above.

²³¹ "Unjustified Enrichment: The Modern Civilian Approach" (1995) 5 *OJLS* 403 at 416. For similar criticisms, see Zimmermann *Obligations* 892ff; Johnston and Zimmermann "Unjustified Enrichment: Surveying the Landscape" in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 3 at 5-6; Meier "Unjust Factors and Legal Grounds" in Johnston and Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* 37.

The relationship between transfers made under duress, and other factors justifying a cause of action for recovery in South African law, throws up real problems of delimitation. I shall use duress as the basis for examining the problem. Although it is not always the case, a large proportion of the duress cases discussed in Chapter 8 and in this chapter concern non-contractual payments made to a public or quasi-public official, or a person operating in a representative capacity in terms of statutory powers. It can safely be stated that the bulk of duress cases in this area of law concern payments to administrative functionaries of this kind. The question that needs to be addressed is how these duress cases relate to, or even overlap with, different factors that have also been held, in a parallel fashion, to justify a *condictio indebiti* in similar situations.

9.7.1.2.1 Payments made under protest

For a start, in Chapter 8 and 9.6 above, it has been shown how the traditional approach to duress claims (requiring proof of protest) and a (potential) third, independent factor of protest, muddles our understanding of the application of the *condictio indebiti* quite substantially. This much can be seen from the case law, where courts indiscriminately refer to a cause of action in duress, or based on protest outside the bounds of duress, in similar circumstances. This distinction was even drawn (although this fact is not often noticed) in the various judgments in *Union Government (Minister of Finance) v Gowar*.²³² Appreciating that a protest has no significant substantive role to play in cases of duress would be a start in untangling these two factors from one another, but factually, the potential for overlap remains if a case for duress can be made out in circumstances where a protest or reservation of rights has occurred (as was the case in *Gowar*).

9.7.1.2.2 Payments made in error

Another argument that could *prima facie* be used to claim a *condictio indebiti* for repayment, where money had been paid in response to an unlawful demand from a public or quasi-public functionary, is that the payment had been made excusably, in the erroneous belief that it was owing. Traditionally, the problem with this argument was two-fold. First, in most of the cases discussed above concerning either duress or protest, the person who has made the payment has alleged from the outset that the payment was undue, which jeopardises a claim that the payment was made by mistake. Secondly, and more importantly, a claim under the *condictio indebiti* was limited to situations where there had been a

²³² 1915 AD 426.

mistake of fact; a mistake of law was not actionable.²³³ Since payments in these cases are often made under the impression that the demand of the administrative functionary was validly made according to an empowering statute, this would constitute a mistake of law, and would non-suit the aggrieved party. This was the reason why De Villiers CJ rejected arguments that the payments made in the leading duress of goods cases of *White Brothers v Treasurer-General*²³⁴ and *Benning v Union Government (Minister of Finance)*²³⁵ could be reversed for mistake. By way of comparison, exactly the same problem faced litigants in English law who might have thought that they could reclaim such payments on the ground of mistake. (The traditional position in English law was fully canvassed by Lord Goff in *Woolwich Equitable Building Society v Inland Revenue Commissioners*.²³⁶)

The distinction drawn between mistakes of law and fact has been heavily criticised throughout the world, and in the last fifteen years has been uprooted and discarded in most jurisdictions, including Canada,²³⁷ Australia,²³⁸ and, most recently, England.²³⁹ South Africa has been no different: as was stated in Chapter 8 above, the distinction was abandoned by the Appellate Division in 1992 in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*.²⁴⁰ Technically, this means that there is more scope for claiming a *condictio indebiti* in South African law for mistake, in circumstances where a payment has been made in response to a demand from a public official, than there was in the past.²⁴¹ This will be so particularly where the payment was made in response to the demand from the official, and then it

²³³ See *Rooth v The State* (1888) 2 SAR 259. For a discussion of the difference between mistakes of law and fact, see De Vos *Verrykingsaanspreeklikheid* 182-3; Visser *Die Rol van Dwaling by die Condictio Indebiti* 235-253; *Wille's Principles* 637.

²³⁴ (1993) 2 SC 322 at 349. In that case his lordship described the difference between a mistake of fact and law as follows, citing Vinnius: "Error ... is twofold, being either of fact or law. An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not. On the other hand, when a person is truly acquainted with the existence or non-existence of the facts, but is ignorant of the legal consequences, he is under an error of law."

²³⁵ 1914 AD 420.

²³⁶ [1993] AC 70 at 165.

²³⁷ *Air Canada v British Columbia* (1989) 59 DLR (4th) 161.

²³⁸ *David Securities Pty Ltd v Commonwealth of Australia* (1992) 109 ALR 57.

²³⁹ *Kleinwort Benson Ltd v Lincoln City Council and others* [1999] 2 AC 349.

²⁴⁰ 1992 (4) SA 202 (A). See 8.4.6.2 above.

²⁴¹ Cf the views of Virgo *Restitution* 426 on the English position. He says: "With the abolition of the mistake of law bar by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* there is much greater scope for the plaintiff who has made an *ultra vires* payment to a public authority to obtain restitution by reference to an established ground of restitution, namely mistake. This is because many cases involving *ultra vires* payments ... arise because the plaintiff was mistaken as to the law since typically he or she believed that he or she was liable to pay the money to the public authority."

is subsequently discovered that the demand was unlawful, whether because the statute itself was *ultra vires*, or the statute was misconstrued.²⁴² The views of Wilson J in the Canadian case of *Air Canada v British Columbia*²⁴³ are instructive:²⁴⁴

“Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make his payments ‘under protest’.”

In the Zimbabwean case of *Ellis NO v Commissioner of Taxes*,²⁴⁵ Gubbay CJ in fact stated that in his opinion, had the case of *CIR v First National Industrial Bank Ltd* been decided after *Willis*’s case, this could have resulted in First National Bank succeeding in its claim on the basis that its payment to the Revenue Service was paid by mistake of law.²⁴⁶ It is interesting to compare the facts of *Willis* with those in *CIR v First National Industrial Bank Ltd*, as the two cases are quite similar.²⁴⁷ Robert Enthoven and Co (Pty) Ltd had made payments to the Receiver of Revenue in terms of a tax directive issued by the Receiver, in terms of s60(1)(f) of the Insurance Act.²⁴⁸ The section was somewhat ambiguous, in that it was not clear whether it required a tax to be paid on policies underwritten by Lloyd’s only, or on all policies that were sold by the business. The financial manager of Robert Enthoven & Co (Pty) Ltd had queried the tax directive, which stated that tax had to be paid on all business of the company, and suggested that the Receiver had incorrectly interpreted the section. The Receiver rejected his argument. Since the section was somewhat ambiguous, the financial manager accepted that his interpretation was

²⁴² It is submitted that in South African law there ought to be no difference drawn between a demand made in terms of an *ultra vires* statute and a demand in terms of an *intra vires* statute, but which is misconstrued. Cf the views of Visser “Error of Law and Mistaken Payments: A Milestone” (1992) 109 *SALJ* 177 at 181. This was a distinction drawn by the majority in the Canadian case of *Air Canada v British Columbia* (1989) 59 DLR (4th) 161.

²⁴³ (1989) 59 DLR (4th) 161.

²⁴⁴ At 169.

²⁴⁵ 1995 (4) SA 265 (ZS).

²⁴⁶ At 278G. Cf the views of Visser “The Role of Judicial Policy in Setting the Limits of a General Enrichment Action” in Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett* 342 at 362.

²⁴⁷ For a discussion of the case, see Visser “Error of Law and Mistaken Payments: A Milestone” (1992) 109 *SALJ* 177.

²⁴⁸ Act 27 of 1943 (subsequently repealed).

incorrect, and the tax was paid. In 1985 Robert Enthoven and Co (Pty) Ltd merged with another company to form Willis Faber Enthoven (Pty) Ltd. After the merger, the new company decided to attack the validity of the payments, on the basis that the payments were made under a mistake of law. The Appellate Division held that the payments made by Robert Enthoven and Co (Pty) Ltd were recoverable under the *condictio indebiti* for mistake, and it did not matter that the mistake was one of law.

Although Gubbay CJ's conclusion about the *CIR* case being decided on the basis of mistake is attractive, and it is not to be disputed that the scope for claiming a *condictio indebiti* for mistake in such circumstances has certainly increased, it is submitted that Gubbay CJ's view oversimplifies the issue slightly. The problem with some cases where a payment is made to an official in response to a demand that is subsequently discovered to be *ultra vires* is that the person making the payment objected to the validity of the demand from the outset, was absolutely certain that the demand was wrong, but paid for reasons of expediency. *CIR v First National Industrial Bank Ltd* was just such a case, as was the English case of *Woolwich Equitable Building Society v Inland Revenue Commissioners*.²⁴⁹ In such cases the payment is not made under a mistaken illusion at all (either of law or fact), let alone a mistake that was excusable.

The result is that although the scope of the mistake claim has been widened, this will only apply to payments made as a result of a *bona fide* mistake of law, as in *Willis*'s case, where the financial manager accepted the decision of the Receiver as being correct, and paid the tax in the mistaken belief that the Receiver's interpretation was correct, and his interpretation was wrong. Wilson J in the *Air Canada* case was quick to qualify her comments quoted above in this respect by saying:²⁵⁰ "Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid subject to the statutory obligation to do so." Barriers to a *condictio indebiti* for mistake will remain in place for the litigant that disputed the validity of the demand by the official from the outset.

9.7.1.2.3 Payments made in response to an *ultra vires* demand

There is no authority in South African case law as to whether an aggrieved party would succeed in a claim for repayment of money paid in response to an *ultra vires* demand, without more needing to be proved (eg mistake, duress or protest). In a number of cases the High Court has recognised that the

²⁴⁹ [1993] AC 70. See *Virgo Restitution* 433.

²⁵⁰ At 169.

condictio indebiti may be instituted to reclaim *ultra vires* payments,²⁵¹ and this principle was confirmed by the Appellate Division in *Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd.*²⁵² But these cases concern situations where the payment was *ultra vires*; the problem in this line of cases was that officials like executors, trustees or liquidators had made payments to creditors that were *ultra vires*, in that the legislation under which they were purporting to act did not in fact allow them to make such payments, or that the payments that were made were undue. Effectively, these were cases where payments had been made by mistake. In none of these cases is the question whether an undue payment made in response to an *ultra vires* demand canvassed.

By way of comparison, up until the early 1990s there was a similar lack of authority about this cause of action in English law, but this ground for restitution was recognised in the leading case of *Woolwich Equitable Building Society v Commissioners of Inland Revenue*²⁵³ discussed above.²⁵⁴ From a point of view of delimitation or overlap, it is interesting to note that the facts of the *Woolwich* case were strikingly similar to the facts in the South African case of *CIR v First National Industrial Bank Ltd*²⁵⁵ discussed earlier under the section on protest.²⁵⁶

The *Woolwich* decision has not been referred to in South African case law, although interestingly enough, this ground for restitution has been absorbed into Zimbabwean law by the Zimbabwe Supreme Court in *Ellis NO v Commissioner of Taxes*.²⁵⁷ A preliminary question that deserves some consideration is whether or not South African law could be developed to recognise its own *Woolwich* principle: that a *condictio indebiti* ought to lie for payments made in response to a demand from a public or quasi-public official that is found to have been *ultra vires*, and were therefore made *indebite*.

On the face of it, there appears to be no reason why this development could not potentially occur. The reasoning behind this answer is very similar to the reasoning used by Lord Goff in the *Woolwich*

²⁵¹ See *Van Wijk's Trustee v African Banking Corporation* 1912 TPD 44; *CCA Little & Sons v Liquidator R Cumming (Pvt) Ltd (in Liquidation)* 1964 (2) SA 684 (SR); *Amalgamated Society of Woodworkers of SA v Die 1963 Ambagsaalvereniging* 1967 (1) SA 586 (T); *WP Koöperatief Bpk v Louw* 1995 (4) SA 978 (C); *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D). See also Wessels *Contract* §3642, and Carey Miller "Condictio Indebiti — Overpayment by a Trustee on Insolvency" (1983) 100 *SALJ* 183.

²⁵² 1997 (2) SA 35 (A).

²⁵³ [1993] AC 70.

²⁵⁴ See 9.4.3 above.

²⁵⁵ 1990 (3) SA 641 (A). Du Plessis *Compulsion and Restitution* 137n163 describes *CIR v First National Industrial Bank Ltd* as "the South African equivalent of *Woolwich*". Provided this statement is confined to the similarities in the nature of the factual dispute in the two cases, the statement is accurate. From a legal perspective, the way in which the respective courts dealt with a similar problem ended up being rather different.

²⁵⁶ See 9.6.2 above.

²⁵⁷ 1995 (4) SA 265 (ZS).

case, but would need to be framed in the context of South African law. First of all, from the widest perspective of principle, it seems to be a matter of common sense, not to mention fairness, that a person who had paid money in response to an *ultra vires* demand, has a right to reclaim that money. The whole basis of the law of unjustified enrichment in South Africa is to allow persons a remedy of restitution where a transfer of value has been made from one person to another without legal cause. One can hardly think of a more simple example of a situation where an obligation to re-transfer a payment ought to exist than where a payment has been made in response to an *ultra vires* demand by a public official. The fact that these cases do concern demands made by some public or quasi-public functionary exercising public powers make the argument all the more compelling, in that the problem concerns basic Rule of Law issues. When one analyses the *Woolwich* decision, one can see that the basic rationale for the relief that was granted in that case was the violation of the principle of legality. As Gubbay CJ succinctly put it, in his incisive analysis of the *Woolwich* decision in the Zimbabwean case of *Ellis NO v Commissioner of Taxes*:²⁵⁸ “[T]he true rationale of the relief ... was the nullity of the demand that flowed from its *ultra vires* or unlawful nature.” Beatson has argued in the same fashion that the decision in *Woolwich* “[gave] primacy to the principle of legality and the need to ensure adherence to the jurisdictional limits of power”.²⁵⁹

This rationale translates very comfortably into the South African constitutional context. South Africa, like most democratic states, is a constitutional state that is based upon the idea of the *Rechtsstaat*, or the state that operates according to the Rule of Law.²⁶⁰ This much is patently clear from section 1(c) of the Constitution, which states: “The Republic of South Africa is one, sovereign, democratic state founded on the ... supremacy of the constitution and the rule of law.” The fact that South Africa is a constitutional state with a justiciable Bill of Rights means that the concept of legality that underpins the political and constitutional structure is a normative one. In Baxter’s words:²⁶¹

“Legality in this sense connotes much more than a mere technique of government: it is a principle of *just* government. As a basic principle of the legal system, it requires fairness, equality before the law and freedom

²⁵⁸ 1995 (4) SA 265 (ZS) at 272D-E.

²⁵⁹ Beatson “Finessing substantive ‘public law’ principles into ‘private law’ relations” 1997 *Acta Juridica* 1 at 17. See too “Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the *Woolwich* Principle” (1993) 109 *LQR* 401.

²⁶⁰ For a discussion of these concepts in the South African political context, see Mathews “The Rule of Law — A Reassessment” in Kahn (ed) *Fiat Justitia: Essays in Honour of Oliver Deneys Schreiner* 294; Baxter *Administrative Law* 77. See generally Marsh “The Rule of Law as a Supra-National Concept” in Guest (ed) *Oxford Essays in Jurisprudence* Ch 9; Raz *The Authority of Law* Ch 11; Jowell “The Rule of Law Today” in Jowell and Oliver (eds) *The Changing Constitution* 3.

²⁶¹ Baxter *Administrative Law* 78.

from arbitrary administrative action.”

These principles are expressly articulated in the administrative justice clause of the Bill of Rights. Section 33(1) states: “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.” As far as the question of legality is concerned, any lawful administrative action must comply with certain requirements:²⁶² the authority must be properly constituted; the actor must be empowered to act; the act must be performed according to the guidelines of fact and procedure contained in the relevant empowering legislation; the exercise of the power must be reasonable; and the exercise of the power must be fair. Any administrative act that does not comply with these requirements will be considered *ultra vires*, and can be struck down for that reason. In *Estate Geekie v Union Government*,²⁶³ Milne AJ said:²⁶⁴

“In considering whether the proceedings of any tribunal should be set aside on the grounds of illegality or irregularity, the question always appears to resolve itself into whether the tribunal acted *ultra vires* or not.”

The doctrine of *ultra vires* thus mirrors the principle of legality:²⁶⁵ the fact that an administrative act was *ultra vires* constitutes the general ground for a court setting aside the act in South African law. This all suggests that South African law could easily recognise a *Woolwich* principle, which constitutes a specific application of the *ultra vires* doctrine, or the doctrine of legality. Since this principle has not yet been recognised in South Africa, the common law of unjustified enrichment would require development. Over and above the policy reasons that provide support for such a development, there is also the Constitutional injunction contained in s39(2) of the Bill of Rights that the courts must develop the common law in order to “promote the spirit, purport and objects of the Bill of Rights”. The primary importance of the legality doctrine in s1(c) and s33(1) of the Constitution suggest that the development of the law of unjustified enrichment, to recognise that a payment made in response to an *ultra vires* demand by a public or quasi-public official should be returned as of right, would certainly satisfy the constitutional test for the development of the common law.

9.7.1.3 The overlap between justifying factors — a recapitulation

²⁶² The list that follows is a summary of the specific principles of legality articulated by Baxter *Administrative Law* 301.

²⁶³ 1948 (2) SA 494 (N).

²⁶⁴ At 502.

²⁶⁵ Baxter *Administrative Law* 307.

The sections above has illustrated that there can be a significant degree of overlap between the different factors that might justify the restitution of money paid unjustifiably, especially in the situation where an undue payment is made to an administrative official. Some courts have preferred to find justification for the return of the money in the doctrine of duress. Others have preferred the idea that making the payment under protest makes the payment conditional, and justifies restitution if the payment is found to be undue. It may be possible to argue that the payment was made by mistake, under the wider and more flexible mistake doctrine. Others have plumped for the view that the facts may show an implied contract to repay if it is found that the payment was undue, and the action is to be brought for specific performance under that implied contract. Finally, there has been the recognition in the 1990s in some jurisdictions of the view that a payment made in response to an *ultra vires* demand can be recovered without more ado. Commentators have criticised the findings of a particular court that one factor is determinative, claiming that the cases should have been decided in terms of one of the other factors. One can take the case of *CIR v First National Industrial Bank Ltd*²⁶⁶ as an example. The majority chose to resolve the case on the basis of the implied contract argument. The minority preferred the idea that the payment could be reversed under the *condictio indebiti* as a conditional payment made under protest. Both Lewis and Cassim have argued that the case ought to have been decided on the basis of duress.²⁶⁷ Gubbay CJ in *Ellis NO v Commissioner of Taxes*²⁶⁸ argued that it could have been decided on the basis of mistake, a view also adopted by Visser.²⁶⁹ And an English lawyer would probably have said that the case was tailor-made for the application of the *Woolwich* principle, a view advanced by Du Plessis.²⁷⁰ All this illustrates quite clearly the untidiness and the “formidable problems of delimitation” that Zimmermann identified as going hand-in-hand with this approach to enrichment cases.

9.7.2 The *condictio indebiti* — an alternative understanding

It is submitted that while what has been discussed may be a more orthodox view of how the *condictio indebiti* operates in South African law, there may be an alternative, or better, way of understanding how it operates in the context of non-contractual performances, and how error, duress and protest impact

²⁶⁶ 1990 (3) SA 641 (A).

²⁶⁷ Lewis “Unjustified Enrichment” in 1990 *Annual Survey of South African Law* 125; Cassim “Economic duress in the law of unjust enrichment in USA, England and South Africa” (1991) 24 *CILSA* 37 at 69.

²⁶⁸ 1995 (4) SA 265 (ZS) at 278G.

²⁶⁹ “The Role of Judicial Policy in Setting the Limits of a General Enrichment Action” in Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett* 342 at 362.

²⁷⁰ *Compulsion and Restitution* 139.

upon this *condictio*. The impetus for this alternative view comes from the civilian tradition, and can go some way towards dealing with some of the difficulties of the more orthodox approach discussed above.

The first, fundamental issue that needs to be dealt with is the whole operation and basis of the *condictio indebiti* itself. In Chapter 8 it was shown that the *condictio indebiti* has traditionally been applicable to situations where an undue performance has occurred in error, or by mistake.²⁷¹ Error is therefore a factor that has to be proved by the plaintiff in order to show that the transfer that he or she made was an *indebitum*. Yet historical analyses have shown that the error requirement is one of the most controversial and debated features of the law of unjustified enrichment in the civil tradition.²⁷² Both Visser and Zimmermann have shown that in classical Roman law, while error was a requirement of the *condictio indebiti*, it was not in fact a positive element that had to be proved by the plaintiff before the plaintiff could have a case. Rather, the plaintiff had simply to establish that an undue performance had been made; in these circumstances, it would be presumed that the performance had occurred in error, unless the defendant could raise the defence (rebutting the presumption) that the plaintiff had known, at the time that the performance had occurred, that the performance was not due. As Zimmermann states:²⁷³ “Thus, it was not so much the plaintiff’s error which made the *condictio indebiti* applicable; it was rather his knowledge, at the time of rendering performance, which barred the claim.” Knowledge was therefore the key defence — for, as is stated in *D* 50.17.53, a payment with knowledge that the payment is not technically due is treated as a donation, and cannot be recovered on grounds of unjustified enrichment.

It appears, however, that the compilers of the *Digest*, in their efforts to interpolate the mass of source-material, changed this position, and appear to have elevated error to a requirement that the plaintiff had to prove in order to succeed in his or her claim.²⁷⁴ But those authorities who have conducted the historical investigation show that the sources in the *Digest* are contradictory, which has provided the impetus for the centuries old debate about whether error should be a requirement at all — a problem that has perpetually bedevilled the application of the *condictio indebiti*. The requirement that the error had to be one of fact and not law was also introduced by the compilers of the *Corpus Iuris Civilis*, in an attempt to distinguish between what sort of errors were reasonable, and what sort of errors

²⁷¹ See 8.4.6.2, and *La Riche v Hamman* 1948 AD 648 at 656.

²⁷² For comprehensive analyses, see Zimmermann *Obligations* 849-50; De Vos *Verrykingsaanspreeklikheid* 24ff; and especially Visser *Die Rol van Dwaling by die Condictio Indebiti* 66ff and “Die grondslag van die *condictio indebiti*” (1988) 51 *THRHR* 492.

²⁷³ Zimmermann *Obligations* 850. See too Visser *Die Rol van Dwaling by die Condictio Indebiti* 320; Schulz *Classical Roman Law* 616, referring to *D* 12.6.1.1 and 12.6.26.3.

²⁷⁴ *D* 22.3.25.pr, and Zimmermann *Obligations* 850, Visser *Die Rol van Dwaling by die Condictio Indebiti* 321-2.

were not. Many of the problems associated with the error requirement were caused by the problem of trying to determine whether the mistake was one of fact or law. This difficult dichotomy has been swept away by the decision in *Willis Faber Enthoven (Edms) Bpk v Receiver of Revenue and another*,²⁷⁵ as was shown in Chapter 8. As an aside, it has been conclusively shown by Visser that the requirement that the error had to be excusable (which has consistently been found to be a requirement for the *condictio indebiti* in South Africa²⁷⁶) never formed part of Roman law (nor Roman-Dutch law) at all, but was an invention of the German Pandectists of the 19th century, who were trying to find an alternative approach to the error of fact/law dichotomy.²⁷⁷

By way of comparison, all the difficulties (both historical, structural and factual) posed by the error requirement proved so problematic for the Germans that when the BGB was enacted, it was decided to abandon the error requirement completely, and effectively to revert to the classical Roman position.²⁷⁸ In terms of §812 of the BGB, a transfer can be re-claimed if it was undue, in a general sense. However, in terms of §814, the defendant has a defence of knowledge — if he or she can show that the plaintiff knew that the performance was not due, and nevertheless carried it out, the plaintiff will be denied the right to recover. The defence of knowledge therefore takes over the role of the error requirement, and places the burden on the defendant to rebut the presumption that a transfer that is undue may, in the ordinary course of events, be reclaimed.

Visser has very convincingly argued for a similar conceptualisation of the *condictio indebiti* in South African law. The advantages of this approach are its impeccable historical credentials, the fact that it had many supporters in medieval times and in the 16th and 17th centuries, and that it is congruent with the leading modern civilian German approach. He has argued that the whole basis of the *condictio indebiti* should be seen quite simply as “the absence of a *causa retinendi* due to the fact that the object of the performance had failed”.²⁷⁹ The key question is therefore whether the performance that has occurred is an *indebitum*. Error (or any other factor, for that matter) ought not to be a requirement that the plaintiff has to prove before he or she can succeed in instituting the *condictio indebiti*. Rather, we should revert to the classical Roman position (which equates to the modern German position): the entitlement to recover an *indebitum* should be assumed, unless the defendant can rebut this by showing

²⁷⁵ 1992 (4) SA 202 (A).

²⁷⁶ See *La Riche v Hamman* 1948 AD 648 at 656 and *Willis Faber Enthoven (Edms) Bpk v Receiver of Revenue and another* 1992 (4) SA 202 (A) at 224.

²⁷⁷ Visser *Die Rol van Dwaling by die Condictio Indebiti* at 69-70 and 184-5 and “Error of Law and Mistaken Payments — A Milestone” (1992) 109 *SALJ* 177 at 183-4. See too Eiselen and Pienaar 127.

²⁷⁸ For a full analysis, see 9.4.2 above, and Zimmermann and Du Plessis “Basic Features of the German Law of Unjustified Enrichment” (1994) 4 *Restitution LR* 14 at 21.

²⁷⁹ Visser *Die Rol van Dwaling by Die Condictio Indebiti* 323-4.

that he or she had knowledge that the performance was undue, and nevertheless proceeded with it. Again, by way of comparison, Evans-Jones has argued convincingly that in Scottish law, as a legal system heavily influenced by the civilian tradition, the error requirement should be rejected in favour of a knowledge defence.²⁸⁰ He criticises those who argue (from an English perspective) that mistake is a “factor” that has to be proved by a plaintiff in Scottish law before a *condictio indebiti* will lie.

If this approach were to be adopted, it could significantly alter the way in which the *condictio indebiti* understands concepts like duress, protest and even the concept of *ultra vires* payments. Currently, things like duress or protest are generally treated as factors that justify a finding that the performance was an *indebitum*. But factors like duress or even protest certainly do not sit comfortably with the “requirement” of error that currently exists in the *condictio indebiti*. Trying to justify their existence under the *condictio indebiti* by saying that such transfers are “involuntary”, and therefore constitute a performance made “in error”, is unsupportable. This has resulted in some severe criticism of the idea that these cases fit into the niche of the *condictio indebiti*, as was shown above.²⁸¹

But if Visser’s approach were to be adopted, then sense can be made of the position. As in German law, the whole basis of the *condictio indebiti* would be that the object of the performance has failed, and therefore the performance was made *indebite*. There is, of course, an onus placed on the plaintiff to show that the transfer did occur *indebite*. Very often this would be because the demand that induced the performance was *ultra vires*. The plaintiff would have to show no more than this in order to discharge his or her onus. The defendant would be bound, in terms of the basic principle of unjustified enrichment, to return the performance, unless he or she could put forward a defence that could rebut the appearance that the transfer had occurred *indebite*. The most powerful tool that the defendant would have would be the knowledge defence — in the words of §814 of the BGB, that the plaintiff knew that the performance was not due. If this defendant is incapable of doing this, then it is taken as read that the performance occurred in error, and the plaintiff is entitled to recover. Failing to prove the knowledge defence thus absorbs the function formerly performed by the positive error requirement. The idea behind this defence of knowledge is that the person who made the transfer should not be entitled to act contrary to his or her previous conduct (*venire contra factum proprium*) and now claim a return of the performance.

But what of cases of duress, or cases where the plaintiff has protested when making the performance, in reservation of his or her rights? In these cases, the performance is clearly made in the knowledge (or, at the very least, in the strong belief) that the performance was undue. Again, the German approach can provide an answer. First, I shall deal with cases of duress.

²⁸⁰ Evans-Jones “Some Reflections on the Condictio Indebiti in a Mixed Legal System” (1994) 111 *SALJ* 759.

²⁸¹ See 9.3.1 above.

As stated above, where an undue performance has occurred under duress, the party that made the performance has acted in the knowledge that the performance is undue. As a result, technically the defendant would have a defence to the claim. This would result in the absurd situation that one could never have a claim for enrichment where the undue performance was extorted by coercion in South Africa. But an exception must be made, on grounds of both principle and policy. The rationale for this would be twofold. First, that where a person is compelled to perform in some way, that person can hardly be said to be acting contrary to their previous conduct.²⁸² The person has had to choose the lesser of two evils, and made the performance in order to avert a potentially greater threat. The person never wanted to perform, but did so because of illegitimate pressure. The subsequent claim is therefore consistent with that previous desire not to transfer the money or property. Secondly, performing under duress is inconsistent with the idea that the plaintiff made the transfer with a specific purpose in mind, and this purpose has succeeded. If one argues that the purpose behind the transfer was to fulfil the obligation that was demanded (*solvendi causa*), and this purpose has failed, since there was no debt due, and it was coerced by duress, then surely there was no obligation to make the transfer at all, and the defence of knowledge cannot avail the defendant. This approach would, of course, accord with the orthodox view in German law, proposed by Reuter and Martinek.²⁸³

Similar arguments would apply in a situation where a payment had been made under protest, where the plaintiff had reserved his or her rights to challenge the validity of the payments that were being demanded. When the plaintiff does challenge the validity of the payments, and succeeds, he or she has demonstrated that the payment was an *indebitum*. But the payment was made despite the belief that the payment was not due. Again, the defendant could potentially raise the defence of knowledge to rebut the plaintiff's claim. But on grounds of policy and principle, the defence would have to fail. First of all, the object of the performance (the satisfaction of a debt: *solvendi causa*) has been defeated. But the problem comes in the fact that despite his or her protestations, the plaintiff did make the performance, despite knowing, or at the very least strongly believing, it was not owed. Here is where the plaintiff's reservation of rights becomes significant, and the impeccable reasoning of Nicholas AJA in *CIR v First National Industrial Bank*, which bear repeating, justifies the plaintiff's claim:²⁸⁴

“[The Bank] was tendering payment under protest, by which clearly it meant with reservation of its right to institute an action for repayment (*condicere, repetere*). The Commissioner, by accepting payment subject to

²⁸² Du Plessis *Compulsion and Restitution* 146.

²⁸³ See 9.4.3 above. Of course, on Larenz and Canaris's minority view, purpose ought to be irrelevant: provided the transfer occurred without legal ground, this is sufficient to bring the *Leistungskondiktion* into play, and duress would override the knowledge defence automatically.

²⁸⁴ *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1996 (3) SA 641 (A) at 658B-C.

that reservation, must be taken to have agreed thereto. In the words of *D* 12.6.2, *negotium enim contractum est inter eos*. But for such a contract, the Bank could, if it sued for repayment, have been met with an exception of no cause of action.²⁸⁵

But, as the learned judge correctly (in my opinion) pointed out, the majority in the *CIR* case misconstrued the nature and effect of this agreement by arguing that a separate implied contract had been created, which meant the plaintiff's claim was based in contract, not under the *condictio indebiti*, in terms of the law of unjustified enrichment.²⁸⁶

“The contract which was made was not independent, but was ancillary or subsidiary to the *condictio indebiti*: it did not create a substantive right but recognised that the Bank had the procedural right to seek a *condictio* (or *repetitio*) despite the fact that the *solutio* was being made voluntarily and with knowledge that it was made *indebite*.”

This claim is therefore not grounded in contract, but is one predicated on principles of unjustified enrichment, and which fits quite happily under this view of the *condictio indebiti*. By making the payment under protest, and thereby reserving the right to claim repayment of the money should it subsequently be found not to be due, the plaintiff ensures that he or she will not be barred from instituting a claim for a *condictio indebiti*, on the basis that he or she had paid the money despite knowing it was not due. The protest and reservation of rights is necessary to rebut the knowledge defence, and to ensure that the right to institute a *condictio indebiti* is not lost.

If this view of the operation of the *condictio indebiti* were to be accepted, it would mean that some of the factual and doctrinal difficulties associated with the “unjust factors” approach that currently seems to govern the application of the *condictio indebiti* might be contained, and contained in a way that is congruent with the civilian principles that underpin our law of unjustified enrichment in South Africa. Of course, developments along these lines would in all likelihood be required if South African law were, at some point, to adopt one general enrichment action, like the Germans and the Dutch. But in the absence of this development, what has been proposed above may be a better, and more principled method of understanding how the *condictio indebiti* operates in South African law.

9.8 Conclusion

²⁸⁵ Of course, any payment made *scienter*, or knowingly, without mistake, duress or reservation of rights, bars a claim in terms of the *condictio indebiti*.

²⁸⁶ At 658G-H.

This concludes the review of the position with regard to the doctrine of duress as it applies to the recovery of non-contractual performances in the law of unjustified enrichment. In the absence of the recognition of a general enrichment action in South African law, a comprehensive analysis of the *condictio indebiti*, and its nature and scope, was undertaken, after discussions of the world's two leading enrichment paradigms — the German approach to unjustified enrichment as codified in the BGB, and the English law of restitution or unjust enrichment. It was shown that although the South African law of unjustified enrichment is civilian, both in terms of origin and in respect of basic principle, it appears that where the *condictio indebiti* is concerned, and partly as a result of the error requirement under the *condictio indebiti*, the orthodox view is that this action has taken on something of an English character, in that certain forms of “factor” like error, duress or protest will justify a finding that the *condictio indebiti* will lie. In this light, the rationality of the current approach to duress cases where non-contractual performances are concerned (as discussed in Chapter 8) was reviewed, and an alternative approach was suggested, which draws the doctrine into line with the approach proposed for the law of contract. Returning to the *condictio indebiti* in a broader sense, the difficulties with adopting a form of unjust factors approach were fully discussed. It was finally proposed that the nature, scope and application of the *condictio indebiti* could be far better understood if the whole theoretical basis of the *condictio indebiti* was revised to remove the idea that certain substantive “requirements” have to be proved before the *condictio* will lie. Rather, the basis for the application of the *condictio indebiti* should be that no *causa retinendi* exists for the performance, subject to the defence of knowledge. However, for reasons of policy and principle, the defence of knowledge would be overridden in cases of duress and protest.

Chapter Ten

Remedies

“Extreme remedies are very appropriate for extreme diseases.”

Hippocrates *Aphorisms* i.

10.1 Outline

In the bulk of the thesis thus far, the question as to what a person has to prove in order to establish duress as a cause of action has been discussed, both where duress induces a contract and where duress induces a non-contractual performance of some kind. A cause of action may be defined as the relevant factors that have to be proved by a person before that person will be entitled to obtain legal relief of some kind.¹ Once the aggrieved party has proved that he or she has a cause of action, the aggrieved party will then claim relief, in the form of a remedy. Lambiris defines a legal remedy as follows:²

“In South African law the concept of a legal remedy may be described as consisting of the particular type of relief which a court has the power to order in favour of a litigant, or the type of relief which the law allows an aggrieved party to avail himself without necessarily having recourse to litigation.”³

In this chapter, I shall examine the remedies that are available to a party in circumstances where he or she has established duress as a cause of action. The first section concerns the remedies that are available where a person has proved that the contract was induced by duress, either as a plaintiff or as a

¹ There are two commonly cited definitions of a “cause of action” in South African case law. The first comes from *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16 at 22: “... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court.” The second may be found in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637: “[T]he entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim.” Lambiris *Restitutio in Integrum* 2-3 defines a cause of action as “the legal ground which entitles a plaintiff to ask a court for relief or to avail himself of relief.” Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 203 defines a cause of action as: “[T]he form in which the law casts the substantive conditions that have to be shown to exist by the plaintiff in order to qualify for relief.”

² Lambiris *Restitutio in Integrum* 2.

³ In certain circumstances a legal remedy will be available without the necessity for the party concerned having to seek an order of court. The most obvious example is the election to rescind a contract. This issue will be discussed at 10.2.2 below.

defendant. The relevant remedies are those of rescission, restitution, and damages. The second section will concern the nature of the restitutionary action that is available where it has been proved that a non-contractual performance has been induced by duress.

10.2 Remedies where a contract has been induced by duress

10.2.1 General background

The most important remedies available to a person that can prove that his or her contract was induced by duress are those of rescission and restitution. The nature and scope of the remedies of rescission and restitution has been a matter of some debate in South African law. The first controversial issue can be dealt with relatively swiftly. There have been two situations in which the courts have described a claim for rescission and restitution for duress as one which is made in terms of the *actio quod metus causa*.⁴ This reflects a very Roman position: in classical Roman law the *actio quod metus causa* provided for a nullification of a *stricti iuris* contract and a restitutionary remedy for duress. But the use of this term in South African law is inappropriate, seeing as the classification of contracts *stricti iuris* has long since fallen away, and the *actio quod metus causa* did not even form part of the Roman-Dutch law of the Netherlands in the 16th and 17th centuries. There is no need to treat the remedies of rescission and restitution on account of duress any differently from other situations where the law allows rescission and restitution, nor to give such a claim a special name.

The second controversial question has been whether the extraordinary Roman-Dutch remedy of *restitutio in integrum*, which combined both rescission and restitution in one,⁵ forms part of South African law, and provides the general basis for such relief. In *Tjollo Ateljees (Edms) Bpk v Small*,⁶ Van den Heever JA expressed the opinion that the Roman-Dutch remedy of *restitutio in integrum* had not been absorbed into South African law at all. In a famous dictum, the learned judge said:⁷

“[B]ut I am not at all sure that there is room for *restitutio* in the developed law or that the remedy is useful today. We are inclined to pay lip service to a quaint expression and an old institute which is meaningless today.... We do not petition for *restitutio in integrum* to relieve us from the obligations induced by fear, force

⁴ *Salter v Haskins* 1914 TPD 264 at 266; *Van den Berg & Kie Rekenkundige Beampptes v Boomprops* 1028 BK 1999 (1) SA 780 (T) at 784F.

⁵ See Voet 4.1.21, and for a full discussion, 3.4.3 above.

⁶ 1949 (1) SA 856 (A).

⁷ At 871-2.

or fraud. We raise these negations of free volition as direct defences or causes of action.... Why then retain an antediluvian fossil which slipped into the realms of *justae causae* for restitution *per incuriam* and which moreover has no authentic legal justification?”

This declaration has been criticised by Lambiris, who asserts that the order of *restitutio in integrum* developed by the Roman-Dutch lawyers does form part of South African law.⁸ In particular Lambiris states that this remedy retains its Roman-Dutch character in that its combined effect is to rescind the original contract and provide for restitution of any performance made in terms of the contract. In his opinion, it is necessary to go to court in order to acquire a judicial order before the contract can properly be said to have been rescinded, and before restitution may occur.⁹

Lambiris’s views are controversial, and are not generally supported. It appears rather that Van den Heever JA’s views have won the support of the majority of South African commentators, and, more pertinently, the courts. Most authorities now argue, correctly, it is submitted, that the nature and scope of the remedy of *restitutio in integrum* in Roman-Dutch law was unique to that time,¹⁰ and that we in South Africa do not recognise *restitutio in integrum* in its Roman-Dutch guise. In South African law, rescission and restitution are now understood to be two distinct (yet related) remedies, each with their own characteristics and requirements.¹¹

10.2.2 Rescission

Where a contract has been induced by duress, the contract is voidable at the option of the aggrieved party.¹² The party who has been subjected to the coercive act thus has an election either to stand by the

⁸ Lambiris *Restitutio in Integrum* 193ff.

⁹ Lambiris *Restitutio in Integrum* 182 and 198ff.

¹⁰ Judge Gane, writing in his translation of Voet (*The Selective Voet* Vol 1 576) says: “The remedy of restitution, in the wide sense in which the word is used by Voet and other writers of Roman-Dutch law, is peculiar to that law.”

¹¹ See *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (A) at 732C-D; Christie *Contract* 330; Van der Merwe *et al Contract* 101-2; O’Brien “Restitutio in integrum by onbehoorlik verkreë wilsooreenstemming” 1999 *TSAR* 646 at 652; Lubbe “The assessment of loss upon cancellation for breach of contract” (1984) 101 *SALJ* 616 at 634. Kerr *Contract* can be considered to endorse this approach by implication, since he treats rescission and restitution in separate places in his book (for “Rescission” see 285-288, and “Restitution” see 329ff). This section will be confined to the salient features of these two remedies, as far as they are relevant to duress cases: to undertake a detailed analysis would merely repeat the work done by O’Brien in his comprehensive LLD thesis on these remedies.

¹² In South Africa see *Broodryk v Smuts* NO 1942 TPD 47 at 53; *Smith v Smith* 1948 (4) SA 61 (N) at 67-8; *Savvides v Savvides and others* 1986 (2) SA 325 (T) at 329B-C, and see Kerr *Contract* 319; Christie *Contract* 358; *LAWSA* Vol 5(1) §151; Joubert *Contract* 105; Van der Merwe *et al Contract* 100; Lambiris *Restitutio in*

contract, or to have the contract set aside. This power to rescind is contractual in nature,¹³ in that it flows naturally from the violation of the requirement of good faith that underpins the law of contract, and which in turn provides the philosophical framework for the substantive doctrine of duress.¹⁴ The decision to rescind is a unilateral act; the power to rescind lies in the hands of the aggrieved party.¹⁵ Provided the other party is prepared to accept the rescission, the contract will end once the election is made.¹⁶ In cases where the defendant disputes that the election to rescind was valid, it may be necessary to seek confirmation that the rescission was a valid one from a court. But the court's decision in this regard is merely confirmatory. In *Lebedina v Schechter and Haskell*¹⁷ Greenberg J stated: "It seems to me that it is the defrauded party's repudiation which puts an end to the contract and the Court merely decides that this party was entitled to put it to an end." The case was one concerning fraud, but the same principle applies *mutatis mutandis* to duress.

The election must be made within a reasonable period of time, and is final: one is not entitled to change one's mind at a later time.¹⁸ What amounts to a reasonable period of time will depend on the facts and circumstances of each case. If one fails explicitly to indicate one's desire to rescind the contract within a reasonable period of time, whether by words or conduct, this will lead to the inference being drawn that one has elected to stand by the contract, or the contract will be considered to have been ratified. In addition to time, other factors like whether one has, as time has passed, performed in terms of the agreement, and whether *bona fide* third parties have acquired rights as a result of the

Integrum 196. In England see *Pao On v Lau Yiu Long* [1980] AC 614 at 634; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 383, 400; *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 at 168; Chitty §7-039; Treitel 375; Anson 271. In the United States see *United States v Bethlehem Steel Corporation* 315 US 289 (1941); *Restatement, Second, Contracts* §175. In Canada see *Gordon v Roebuck* (1990) 64 DLR (4th) 568. In Australia see *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40. In Germany see §123(1) BGB; Markesinis *The German Law of Obligations Vol 1* 209. In the Netherlands see 3.44(1) NBW.

¹³ Visser "Rethinking Unjustified Enrichment" 1992 *Acta Juridica* 203 at 223.

¹⁴ Cf the view of O'Brien *Restitutio in Integrum* 209ff and "Restitutio in integrum by onbehoorlik verkree wilsooreenstemming" 1999 *TSAR* 646 at 652-5.

¹⁵ In *Feinstein v Niggli* 1981 (1) SA 684 (A) at 698-9 the Appellate Division referred to the plaintiff's "right to rescind". See too *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) at 832H, where the court said "the owner ... must exercise his right to rescind."

¹⁶ *Davidson v Bonafede* 1981 (2) SA 501 (C) at 505A; Christie *Contract* 334; Van der Merwe *et al Contract* 100.

¹⁷ 1931 WLD 247 at 252.

¹⁸ *Bowditch v Peel and Magill* 1921 AD 561 at 572-3; *Frost v Leslie* 1923 AD 276 at 279; *Feinstein v Niggli* 1981 (2) SA 684 (A) at 697-99; *Thomas v Henry* 1985 (3) SA 889 (A) at 895-8.

contract may be relevant to this decision.¹⁹ In such circumstances one will be considered to have waived one's right to rescind, or (to use another legal term employed in this context) the contract will be considered to have been ratified.

Applying this rule to duress cases, if, after the immediate threat is removed, the person willingly performs the obligations imposed on him by the contract; accepts any performance by the other party; or makes no effort to escape the terms of the contract within a reasonable time after it was induced, that person may be considered to have ratified the contract. The result will be that the person will not be entitled to avoid the agreement, should he or she then attempt to do so. This rule, which was part of Roman and Roman-Dutch law,²⁰ was adopted in South Africa in the case of *Carruthers v Van der Venter*.²¹ Carruthers sued Van der Venter for £938 10s, being the purchase price of a one-third portion of a farm which Carruthers alleged Van der Venter had purchased at an auction sale. It became clear at the trial that the sale contract had been induced by duress, in that Carruthers had been forced (by the auctioneer and the plaintiff's agent) both into bidding for the lot, and signing a deed of sale containing terms very different to those announced before the auction. However, the court held (albeit reluctantly) that the sale was valid, and Carruthers was entitled to his money. This was so because Van der Venter did not immediately complain, or attempt to escape the contract. In fact, Van der Venter arranged for a surveyor to survey the lot and clearly demarcate it from other adjoining lots which had been sold, asked friends for a loan to help him pay for the property, and ultimately took possession of the property. Hodges CJ (Watermeyer and Cloete JJ concurring) held that by his conduct the defendant had ratified the transaction,²² and had thereby waived his right to impugn the manner in which the sale was first concluded. The court granted judgment for the plaintiff, but, interestingly, took the unusual step of expressly denying the plaintiff his costs, due to the fact that the agreement had been unfairly induced by duress in the first place. This was a very innovative way of achieving a balance between law and justice on the facts of the case.

A more modern example of a contract entered into under duress being ratified may be found in the English case of *North Ocean Shipping Co Ltd v Hyundai Construction Ltd*.²³ It was quite clear on the

¹⁹ See *Atlas Diamond Mining Co (Bultfontein Mine) Ltd v Poole* (1882) 1 HCG 20 at 32 and 35; *Berkmeyer v Woolf* 1929 CPD 235 at 241.

²⁰ See C 2.19(20).2 and 4; Voet 4.2.16; Van Leeuwen CF 1.4.41.5. Pothier *Obligations* §21 said: "If, after the violence is at an end he approves the contract whether expressly, or tacitly ... the vice is purged."

²¹ (1862) 4 Searle 96. See too *Schana v Control Instruments (Pty) Ltd* (1991) 12 ILJ 637 (IC) at 643; *Frye/Glasshopper* [1999] 4 BALR 406 (CCMA) at 408.

²² At 99, 101.

²³ [1979] 1 QB 705. Another example of ratification in the context of economic duress in English law may be found in *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303 (CA). For authority for the view that a contract entered into under duress may be ratified in the United States, see *Restatement, Second, Contracts*

facts that the shipbuilders had induced a modification of the original contract for the construction of a ship by threatening improperly to terminate the contract in a situation which left the North Ocean Shipping Co with no reasonable alternative but to succumb, and to agree to pay 10% more for the ship. Economic duress was undoubtedly proved on the facts.²⁴ Despite this, the plaintiffs were denied relief. The modified agreement was consented to on the 28th of June 1973. The court held that the coercive threat effectively continued to operate until the ship was finally delivered on the 27th of November 1974. But it took North Ocean until the 30th of July 1975 to launch proceedings for rescission of the modified contract — a period of over eight months. During that eight month period North Ocean never objected about what had happened, and it had also put the ship into service immediately. Mocatta J held that this lengthy delay meant the inference could be drawn that the contract had been ratified.²⁵

The *North Ocean* case does show that a coercive threat may endure for a lengthy period, and a court will not simply look at the date when a threat was initially made in order to determine whether a contract induced by duress has been ratified. In the case of *Smith v Smith*,²⁶ a claim that a marriage entered into under duress had been ratified failed for just this reason. It was argued that where a woman was forced under duress by her fiancée and his father to enter a contract of marriage, and had then lived for a period of six weeks with her spouse as husband and wife, this conduct ratified the marriage contract. This argument was rejected on the basis that since she continued throughout this period to live with her husband, and in her father-in-law's home, she was subject to the same pressures that were responsible for the conclusion of the marriage in the first place.²⁷ It was only when she left the common home that she was able to escape the coercive environment. The fact that she launched proceedings immediately after that meant that there was no ratification. The court held that the marriage could be annulled.

A discussion of *Smith's* case leads naturally into the final issue with regard to rescission. The same rules and principles that apply to rescission in the context of contract generally also apply where a

§174(b). In Canada see *Gordon v Roebuck* (1990) 64 DLR (4th) 568 at 573, where the aggrieved party did not take steps to avoid the contract allegedly entered into under duress for over a year after entering into it. His duress plea failed.

²⁴ At 719F.

²⁵ At 720-1. Another case where it could have been said that the contract was ratified (had duress been proved) was *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] 530 (QB, Technology and Construction Court) at 547-8. See Bigwood "Economic Duress by (Threatened) Breach of Contract" (2001) 117 *LQR* 376.

²⁶ 1948 (4) SA 61 (N). See too *Scholtz v Scholtz* 1997 JDR 0556 (SE).

²⁷ At 68.

marriage concluded under duress is annulled.²⁸ But there is one additional requirement in annulment cases. Although the aggrieved party has the election whether or not to resile from the marriage, just like in any other contractual situation, the aggrieved party to the marriage will in addition have to bring an application to court to get the marriage formally annulled by decree.²⁹ Once the decree has been obtained, the marriage is annulled with retrospective effect to the date of the marriage ceremony. The law treats the parties as if they had never been married.³⁰ Any ante-nuptial contract entered into by the parties will also be rescinded.

10.2.3 Restitution

In circumstances where the contract has not yet been performed in any way, the only remedy that the aggrieved party will desire is one of rescission of the contract.³¹ But if any performance has already been rendered in terms of the contract which has now been rescinded, the aggrieved party will, in addition, be entitled to claim restitution of that performance.³² Restitution therefore amounts to a separate remedy that only becomes relevant once the exercise of the election to rescind the contract has been made. The main goal behind the remedy is to restore the *status quo ante* — in other words, to restore both parties to the position they would have been in had the contract never been entered into. As a consequence, when the plaintiff claims an order of restitution of money or property which was handed over to the defendant pursuant to the contract, he or she is expected to tender to make restitution of what he or she has received in return. The rationale behind this rule is that the plaintiff would be unjustifiably enriched by being entitled to claim restitution as well as keeping what he or she had

²⁸ For cases in which a marriage was declared voidable for duress in South Africa, see *Smith v Smith* 1948 (4) SA 61 (N) discussed above, and *Dhlamini v Dhlamini* 1953 NAC 266.

²⁹ See *Wells v Dean-Willcocks* 1924 CPD 89 at 92; *Ex Parte Oxtun* 1948 (1) SA 1011 (C) at 1014-5; *Ex Parte Van Loggerenberg* 1951 (1) SA 771 (T); *Family Law Service* para A52; Sinclair *The Law of Marriage* 401.

³⁰ *B v S* 1916 CPD 109 at 112-3; *Smith v Smith* 1948 (4) SA 61 (N) at 68; Sinclair *The Law of Marriage* 402 and 410-11.

³¹ For examples of cases where an order seeking confirmation of the rescission of an unperformed agreement was sought by way of action, see *Broodryk v Smuts NO* 1942 TPD 47; *Savvides v Savvides and others* 1986 (2) SA 325 (T); *Ex Parte Coetzee et Uxor* 1984 (2) SA 363 (W).

³² In England see *B&S Contracts & Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* 1989 (1) All ER 641 (QB); *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 at 165; Anson 271; Goff and Jones 307; Birks *Restitution* 174. In the United States see *Restatement, Second, Contracts* §376; *Austin Instrument Inc v Loral Corporation* 272 NE 2d 533 (1971). In Germany see §812 BGB; Markesinis *The German Law of Obligations Vol 1* 718.

received. In *Feinstein v Niggli*³³ Trollop JA observed:³⁴

“The object of the rule is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations. Hence, generally a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the representee is able and willing to restore completely everything that he has received under the contract. The reason is that otherwise, although the representor has been fraudulent, the representee would nevertheless be unjustly enriched by recovering what he has parted with *and* keeping and not restoring what he in return has received, and the representor would correspondingly be unjustly impoverished to the latter extent.”

Although the quote refers directly to fraud as a cause of action, the same would apply in duress cases. But the rule that the plaintiff must tender restitution before his or her own claim will be supportable is not infrangible. On equitable grounds our courts have allowed the plaintiff to receive restitution when the plaintiff is not in a position to restore what he or she had received. These exceptions to the usual rule of reciprocal restitution are:³⁵ where the thing has perished or been destroyed due to an innate defect;³⁶ where an item of property was received, but has been disposed of in a way that was contemplated by both parties, and the proceeds of that disposition are tendered;³⁷ where property is lost due to *vis maior* or *casus fortuitus*;³⁸ and where the value of the thing has deteriorated due to fair wear and tear.³⁹

Support for the view that restitution constitutes a separate remedy with its own underlying justifications and requirements may be found in *Johnson v Jainodien*,⁴⁰ where Friedman J said:⁴¹

“The claim for *restitutio in integrum* ... is a contractual remedy flowing from the cancellation of the contract.

³³ 1981 (2) SA 684 (A).

³⁴ At 700F-H. Cf *Hall-Thermotank (Natal) (Pty) Ltd v Hardman* 1968 (4) SA 618 (D) at 828, where Henning J said: “The basis of *restitutio in integrum* is the equitable doctrine that no one is permitted to enrich himself unjustly at the expense of another.”

³⁵ These exceptions are scrutinised in *Harpur v Webster* 1956 (2) SA 495 (FC) at 499-500.

³⁶ *Marks Ltd v Laughton* 1920 AD 12 at 21; *Theron v Africa* (1893) 10 SC 246.

³⁷ *Rau v Venter's Executors* 1918 AD 482.

³⁸ *Hall-Thermotank (Natal) (Pty) Ltd v Hardman* 1968 (4) SA 618 (D) at 833.

³⁹ *Feinstein v Niggli* 1981 (2) SA 684 (A) at 700-701; *African Organic Fertilizers and Associated Industries Ltd v Sieling* 1949 (2) SA 131 (W).

⁴⁰ 1982 (4) SA 599 (C).

⁴¹ At 605F (my emphasis).

The fraud which induced plaintiff to enter into the contract rendered the contract voidable at his instance; plaintiff's election to cancel gave rise to a claim for *restitutio in integrum* which involved a repayment of the purchase price against return of the vehicle."

The statement was again made in the context of a fraud case, but the same principles apply equally to duress cases. Two interesting points emerge from this dictum. First, this shows how different the South African position is to that of Roman and Roman-Dutch law. In South Africa the term *restitutio in integrum* describes the situation where a party claims a return of any performance which he or she has made under the contract, which has now been rescinded. In other words, the term *restitutio in integrum* describes relief in the form of restitution only. This is common practice in our courts.⁴² This is very different to the position in Roman and Roman-Dutch law, where *restitutio in integrum* was the name for the extraordinary remedy that combined both rescission and restitution in one. The result would appear to be that the courts in South Africa are utilising the Latin term *restitutio in integrum* not in any technical or historical sense, but simply as a convenient term to describe the remedy of restitution.⁴³ *Restitutio in integrum* has, to all intents and purposes, been reduced to the status of a descriptive tag, or a name, and should not be understood to refer to the Roman and Roman-Dutch remedies of that name.

The second interesting point raised in Friedmann J's statement is the learned judge's assertion that this remedy is a contractual remedy.⁴⁴ Friedmann J is not alone in this regard. A number of commentators, including De Vos,⁴⁵ Eiselen & Pienaar,⁴⁶ Lubbe & Murray⁴⁷ and Van der Merwe *et al*⁴⁸ make the same statement, either expressly or by implication. It is submitted, with respect, that this assertion is not accurate. The election to rescind the contract has brought the contract to an end — the contract no longer exists. As a result, the remedy of restitution cannot by definition be a contractual

⁴² Some recent examples include *Macs Maritime Carrier AG v Keeley Forwarding and Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D) at 390A; *Goldroad Properties (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1996 (4) SA 1151 (T) at 1154E; *Chegutu Municipality v Manyora* 1997 (1) SA 662 (ZS) at 666A.

⁴³ See *Baker v Probert* 1985 (3) SA 429 (A) at 439C. Visser "Rethinking Unjustified Enrichment" 1992 *Acta Juridica* 203 at 211 holds the same view.

⁴⁴ See too *Probert v Baker* 1983 (3) SA 229 (D) at 233B-C; *Baker v Probert* 1985 (3) SA 429 (A) at 439A-B; *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC) at 743H. This view is also found in the relevant chapter in *Wille's Principles* 448 (although it will be seen below that the author of that chapter, Visser, has subsequently changed his mind).

⁴⁵ *Verrykingsaanspreeklikheid* 158-9.

⁴⁶ Eiselen and Pienaar 170.

⁴⁷ Farlam and Hathaway 321.

⁴⁸ *Contract* 100.

remedy. Rather, it is submitted that restitution ought to be recognised as a developed form of enrichment remedy. The idea that restitution is an enrichment remedy has prevailed on the continent in both Germany and the Netherlands,⁴⁹ and is now the commonly recognised rationale for this sort of remedy in English law⁵⁰ and American law.⁵¹ Perhaps the best example to refer to for comparative purposes is the German law. In terms of §123(1) of the BGB, if it can be proved that duress (*Drohung*) induced a transaction, that transaction may be rescinded. Once the transaction is rescinded for duress, then the contract is declared void retroactively. The result is that any performance that has occurred in terms of the now defunct contract occurred without legal ground. This invokes the *Leistungskondiktion* of §812(1) of the BGB: “A person who, though an act performed by another, or in any other manner, acquires something at the expense of the latter without any legal ground, is bound to return it to him.”⁵² It should be noted, though, that the Germans do not describe this as *restitutio in integrum*: the Germans did away with this remedy, and instead §812 provides for a general enrichment remedy, based largely on a generic version of the *condictio indebiti*. Technically §814 of the BGB would seem to bar the enrichment remedy in German law, since it states that the victim is not entitled to relief if, at the time of the performance of the contract, the victim knew that he or she was not obliged to perform. In circumstances where a victim acts under duress he or she knows subjectively that the performance was not due. However, German law recognises cases of compulsion as a policy-based exception to this, and a claim is not barred.⁵³

⁴⁹Art 6:203 NBW.

⁵⁰ The orthodox view is that restitutionary claims in English law are based in the doctrine of unjustified enrichment. See *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 AC 548; *Woolwich Equitable Building Society v Commissioners of Inland Revenue* [1993] AC 70 at 196-7; Goff and Jones 11-15. On duress specifically, see *Dimskal Shipping Co SA v International Transport Worker's Federation* [1992] 2 AC 152 at 165; Anson 271; Beatson “Duress as a Vitiating Feature in Contract” (1974) 33 *Cambridge LJ* 97 at 106 and “Duress, Restitution and Contract Renegotiation” in *The Use and Abuse of Unjust Enrichment* 95ff. For a discussion of the English approach and its relevance to South African law, see Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 203 at 212-5.

⁵¹ See *Restatement, Second, Contracts*, Introductory note before §370; Dawson “Economic Duress — An Essay in Perspective” (1947) 45 *Michigan LR* 253 at 282-88 and “Duress through Civil Litigation I” (1947) 45 *Michigan LR* 571.

⁵² For a discussion of the German position, see Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 203 at 215-218; Markesinis *The German Law of Obligations Vol 1* 718; Krebs “In defence of unjust factors” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 76 at 86; Du Plessis “Fraud, duress and unjustified enrichment: a civil-law perspective” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 194 at 202ff.

⁵³ See Du Plessis “Fraud, duress and unjustified enrichment: a civil-law perspective” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 194 at 204 and 213.

Both Visser⁵⁴ and O'Brien⁵⁵ have argued at length that the remedy of *restitutio in integrum* in South Africa is an enrichment remedy in this mould, and their views have received the support of both Christie⁵⁶ and Hutton.⁵⁷ Since we have reached the point in our law where rescission and restitution are seen as separate remedies, describing restitution as an enrichment remedy makes sense. The key definitional feature of an enrichment remedy is the reversal of a benefit that was received *sine causa*. In a situation where an executed or partly executed contract has been rescinded, the contract has failed, and so any performance has by definition been made *sine causa*: no *causa retinendi* exists.⁵⁸ Furthermore, to prevent either party being enriched or impoverished, both parties are expected to restore reciprocally what both had received. It has already been shown in the quote cited earlier that the Appellate Division in *Feinstein v Niggli* have recognised that this rule is grounded in the equitable need to avoid unjustified enrichment.⁵⁹ Perhaps the best way to conclude this debate is by quoting the words of Visser, which are endorsed by O'Brien, and which, it is submitted, are correct:⁶⁰

“It would be to the advantage of South African law if this remedy [restitution] were accepted for what it is. It is quite simply unwise to continue to refuse recognition of its enrichment function, for then the courts are caught in a situation where they have to apply an equitable remedy with completely uncertain parameters.”

If we recognise in South Africa that restitution is an enrichment remedy, then one further question needs to be canvassed. What sort of enrichment remedy is it? The problem is, of course, that South African law does not yet recognise the existence of a general enrichment action,⁶¹ and we continue to utilise the

⁵⁴ Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 203 at 211-225.

⁵⁵ O'Brien *Restitutio in Integrum* 183ff; “Restitutio in integrum by onbehoorlik verkreeë wilsooreenstemming” 1999 *TSAR* 646 at 655ff.

⁵⁶ *Contract* 336n118.

⁵⁷ “Restitution after breach of contract: rethinking the conventional jurisprudence” 1997 *Acta Juridica* 201 at 222n92.

⁵⁸ Cf the interpretation of the application of the *Leistungskondiktion* in cases of duress in German law adopted by Du Plessis “Fraud, duress and unjustified enrichment: a civil-law perspective” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 194 at 207-8.

⁵⁹ A full analysis of all the similarities and differences between *restitutio in integrum* and the traditional enrichment remedies falls beyond the scope of this work. In addition, this issue has already been fully canvassed by both Visser and O'Brien. The work of these two authors can be consulted should a fuller exposition be required.

⁶⁰ Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 203 at 223, endorsed by O'Brien *Restitutio in Integrum* 197.

⁶¹ See the discussion at 8.2.2 and 9.2 above.

old Roman enrichment actions, particularly the *condictiones*. Visser inclines to the view that we should simply acknowledge that *restitutio in integrum* should be added to the list of the recognised enrichment remedies. This is not to say that we have a “new” enrichment remedy that never existed before; rather, the true nature of *restitutio in integrum* should finally be recognised and appropriately categorised.⁶² On the other hand, O’Brien suggests that restitution of this sort can be accommodated under the traditional *condictiones* that already exist, and that *restitutio in integrum* ought not to be granted separate status. Interestingly enough, he utilises Visser’s ground-breaking work on the nature of the *condictio indebiti* to support this argument. Visser has argued that the true theoretical basis of the *condictio indebiti* is not the fact that a payment was made by mistake, but rather the fact that the performance that has been made is *sine causa* because the purpose behind the transaction has failed.⁶³ As a result, there is no *causa retinendi* for the performance, and it must be restored. O’Brien states that if this approach is to be accepted,⁶⁴ then it seems natural to conclude that because of the failure of the contract that has now been rescinded, the restitutionary remedy really ought to be one framed in terms of the *condictio indebiti*.⁶⁵ In the alternative, he suggests that the *condictio sine causa specialis (ob causa finitam)* could be invoked, although he concedes that this would have the same effect as the *condictio indebiti*.

While O’Brien’s opinions may have theoretical merit, in my opinion Visser’s view is to be preferred, for pragmatic reasons. It is submitted that it would be too radical a step to expect the courts to drop the remedy of *restitutio in integrum*, and replace it with the *condictio indebiti*. While it may be true that the characteristics of *restitutio in integrum* are similar to those of the *condictio indebiti*, the retention of *restitutio in integrum* seems desirable to deal with the specific situation where restitution must occur after a contract has been rescinded. That the separate actions might overlap in some senses need not be a problem — O’Brien himself concedes that there are situations where a number of traditional *condictiones* overlap.⁶⁶ But more significantly, Visser’s views with regard to the abandonment of the error requirement of the *condictio indebiti* have not been adopted by the courts,⁶⁷

⁶² Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 224.

⁶³ Visser *Die Rol van Dwaling by die Condictio Indebiti* 223-5 and 298ff; “Error of Law and Mistaken Payments: A Milestone” (1992) 109 *SALJ* 177 at 184-5.

⁶⁴ Eiselen and Pienaar 127 support Visser’s approach.

⁶⁵ O’Brien *Restitutio in Integrum* 197-200; “Restitutio in integrum by onbehoorlik verkreeë wilsooreenstemming” 1999 *TSAR* 646 at 662.

⁶⁶ O’Brien *Restitutio in Integrum* 200.

⁶⁷ In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and another* 1992 (4) SA 202 (A) at 224C-D Visser’s views were referred to, but the Appellate Division chose to retain the error requirement. In an obiter dictum in *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA) at 489B the Supreme Court of Appeal seems to have perpetuated this view.

which creates a stumbling block to O'Brien's argument. From a pragmatic perspective, it is probably best to retain *restitutio in integrum* as a separate remedy in the meanwhile, and simply to recognise its true nature, rather than abandon it, particularly in the light of the fact that one general enrichment action has not yet been recognised in South African law. Of course, were South African law to recognise one general enrichment action in the future, such a debate would fall away.

Having argued that restitution is an enrichment remedy, the remaining controversial question with regard to restitution for duress in particular can be resolved. That question is whether Wessels was correct in submitting that damage must be proved before the party may claim restitution on account of duress. Wessels said the following:⁶⁸

“Unless the person who made a contract under duress has been damaged, no action for restitution will lie (Voet 4.2.17). Thus, if a creditor by a threat extorts from his debtor money which is legally due to the creditor, no action for restitution can be brought by the debtor (Voet *ibid*).”

Wessels has not been alone in proposing this requirement. In *Kruger v Sekretaris van Binnelandse Inkomste*,⁶⁹ Jansen JA said, “if the person who was coerced suffered no damage, then he is not entitled to restitution”.⁷⁰ Jansen JA also cited Voet⁷¹ as authority for his view. The example that Wessels quotes indicates that Wessels was referring to some form of patrimonial loss when he spoke of “damage”. The idea that damage of this kind has to be proven before a restitution claim will lie has been heavily criticised, mainly on the basis that the purpose of restitution is not to compensate an aggrieved party for patrimonial loss, but rather to allow both parties to be restored to their respective positions, before the agreement was concluded and performed.⁷² In *Wille's Principles* it is stated:⁷³

“The statement is sometimes encountered that loss or damage is an essential element of duress even for *restitutio in integrum*, confuses the delictual with the contractual aspects of the problem. Duress is a delict entitling the victim to delictual damages on proof of patrimonial loss – whether he elects to uphold or rescind the contract. *Restitutio in integrum* is a contractual remedy, however, based on defective consent, not

⁶⁸ Wessels *Contract* §1191.

⁶⁹ 1973 (1) SA 394 (A).

⁷⁰ At 410F. This is a translation of the original Afrikaans “as ’n gedwongene geen skade ly nie, is hy ook nie op restitusie regverdig nie”.

⁷¹ Voet 4.2.17.

⁷² Kerr *Contract* 323n437; Farlam and Hathaway 364-5. Contra Lambiris *Restitutio in Integrum* 285-90.

⁷³ *Wille's Principles* 448.

wrongful infliction of harm, and is therefore in principle available whether or not harm has resulted from entry into the contract.”

Aside from the reference to restitution being a contractual remedy, it is submitted the quote makes the appropriate point. This requirement of damage is neither relevant nor appropriate in cases where restitution is sought by the aggrieved party after the contract has been rescinded because of duress. The aggrieved party merely wishes to reclaim any performance which that party has made in terms of the contract. There is no similar requirement in cases where a contract is induced by a misrepresentation, and the plaintiff seeks restitution. If the person has suffered patrimonial damages, he or she is entitled to claim those in terms of the law of delict. But the question is irrelevant to the remedy of restitution.

To conclude this section, the relevance of the restitutionary remedy in two special contractual contexts (marriage and employment) must be examined. The restitutionary consequences applicable to the law of contract generally are also relevant in situations where a marriage has been annulled. The two parties to the marriage, which has been annulled on account of duress, are to be restored, where it is practically possible, to the same position they would have been in had they never been married. If the marriage was in community of property, each party is to be restored to the financial position he or she would have been in had there been no marriage.⁷⁴ In marriages out of community of property, which are subject to ante-nuptial contracts in South Africa, since the ante-nuptial contract has been rescinded, any marriage settlements made in terms of the ante-nuptial contract may be reclaimed. The annulment of the marriage also has consequences for the status of the parties. Naturally enough, the parties no longer have marital status — their unmarried status is restored. In addition, if either the husband or the wife or both were minors at the time of the marriage, and have not yet reached the age of majority when the marriage is annulled, their minor status will be restored. One concession that has been granted by Parliament is that the legitimate status of any children born of a voidable marriage will not be affected by the marriage being annulled.⁷⁵ From what has been said above, it should be clear that an annulled marriage is not treated like a divorce in South African law, and the personal and proprietary consequences of divorce do not apply to voidable marriages.

Finally there is the situation that applies in employment law, where a former employee can prove that he or she has been constructively dismissed as a result of an act of duress. Section 193 of the Labour Relations Act provides for the remedies of reinstatement or re-employment in such circumstances:

⁷⁴ *H v H* (1906) 23 SC 609.

⁷⁵ See s6 of the Children’s Status Act 82 of 1987.

“(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may —

- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
 - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal;...
- (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless —
- (a) the employee does not wish to be reinstated or re-employed;
 - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
 - (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

The Labour Relations Act does not define the terms reinstatement and re-employment, but the two concepts are self-evidently distinct. Grogan⁷⁶ defines reinstatement to mean that the employee is restored to his or her original position, as if no dismissal had occurred, and the period of service had remained unbroken. This order has the character of a restitutionary order, in that the parties are to be returned to their original positions. But it is *sui generis*, in that this is not the normal situation where a contract is rescinded, and restitution of performance is ordered. Rather, an intervening act (a resignation, most commonly) is rescinded on the grounds that it was improper, and amounted to a constructive dismissal. The result is that the previous contract regains its efficacy, as if it had never been terminated.

Re-employment means that the employment contract is deemed to have ended, but now resumes from the date of the decision of the labour tribunal to order re-employment. Of course, the Act makes it clear that such an order is not cast in stone, and can be avoided where the former employee does not wish to be re-employed, or such an order would be intolerable. Should re-employment be appropriate, a new contract is created (under the auspices of a judicial order), and a new employment relationship flows from this. This sort of remedy is unique to employment law, and is not to be found in any other form of special contract.

Of course, subsection 2 does make it clear that an award of either reinstatement or re-employment will not be compulsory, and will not be awarded if the employee has no desire to return to the employer's organisation; the circumstances behind the dismissal mean that the employment relationship has broken down irretrievably; it would not be reasonably practicable for the employee to return, or if the dismissal was procedurally unfair. It is likely that in most cases of constructive dismissal for duress, few employees would wish to be reinstated, or re-employed and would, in most cases, not seek such

⁷⁶ *Workplace Law* 116.

an award.⁷⁷ But the Act does stipulate that one can be re-employed in another suitable position in the organisation, and not necessarily in the original post, which may make the prospects of re-employment more attractive than otherwise might have been the case, especially where the employer is a very large and complex corporation, with many distinct divisions.

⁷⁷ In neither *Unilong Freight Distributors (Pty) Ltd v Muller* 1998 (1) SA 581 (A) nor *Haupt/Feltz Factoring cc t/a Fashion Sellout & Clothing Warehouse* [2000] 11 BALR 1242 (CCMA) did the complainant seek reinstatement. Rather, they claimed compensation.

10.2.4 An award of damages

Since an act of duress which induces a contract can also be considered to be a delictual act,⁷⁸ the aggrieved party is entitled to seek compensation in delict for any patrimonial loss which he or she has suffered as a result of the contract.⁷⁹ Whereas the enrichment remedy of restitution is designed to restore the *status quo ante* with regard to any performance that has occurred between the parties, a delictual remedy entitles the aggrieved party to claim any additional consequential loss that has been suffered as a result of the duress.⁸⁰ One proviso to the success of a delictual claim is that all the elements of a delict in South African law will have to be proved.⁸¹

There is still some uncertainty in South African law as to the precise description of this action. Occasionally our courts have referred to the old Roman *actio quod metus causa*, but without ever deciding explicitly that the action has a place in our law of delict.⁸² In other cases, judges have referred, in general terms, to an “action for damages”, without giving the action a precise name.⁸³ At this point in time, there is no clarity in the case law on this point. Modern writers tend to speculate about the continued existence of the *actio quod metus causa* purely in the context of a delictual claim for duress. The general consensus amongst these writers is that a delictual *actio quod metus causa* no longer exists in South African law, and that a delictual claim for patrimonial loss arising from an act of duress falls

⁷⁸ See *Savvides v Savvides and others* 1986 (2) SA 325 (T) at 329D; Olivier “Onregmatige Vreesaanjaging” (1965) 28 *THRHR* 187; Van der Merwe *et al Contract* 86; Christie *Contract* 359; De Wet and Van Wyk *Kontraktereg* 49.

⁷⁹ The position is the same in other jurisdictions. In England, Lord Scarman said in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] AC 366 at 400B that “duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss.” See too Chitty §7-040; Anson 271. In the United States see Note “Duress as a Tort” (1925) 39 *Harvard LR* 108; Note “Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis” (1968) 53 *Iowa LR* 892.

⁸⁰ See Du Plessis “Fraud, duress and unjustified enrichment: a civil-law perspective” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 194 at 221n123.

⁸¹ In addition to the elements already covered in the two-pronged test for duress, the requirements of fault in the form of intention and patrimonial loss will have to be proved. The requirements for such a claim are to be found in the case of *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A). The case is a negligent misrepresentation case, but the principles apply *mutatis mutandis* to duress.

⁸² In *Salter v Haskins* 1914 TPD 264 at 266 Gregorowski J used the term *actio quod metus causa*, as did De Villiers AAJA in *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 444.

⁸³ *Freedman v Kruger* 1906 TS 817; *Block v Dogon, Dreier and Co* 1910 WLD 330; *Steiger v Union Government* (1919) 40 NLR 75.

under the general principles of the *actio legis aquiliae*.⁸⁴ While I agree with these views, some further clarification is required, since the use of the term *actio quod metus causa* as well as the concentration on its delictual nature appears to be misdirected. The *actio quod metus causa* applied only to contracts *stricti iuris* in Roman law, and of course this category of contracts disappeared in the Middle Ages. The Roman-Dutch authorities recognised this matter: it appears quite clear that the *actio quod metus causa* did not exist in Roman-Dutch law as either a cause of action or even a convenient term. Therefore by definition the *actio quod metus causa* has no place in South African law. Furthermore, although the Roman *actio quod metus causa* did originally have a penal character, in practice the main rationale behind the action became restitutionary, rather than penal. As a result, the nature and scope of the *actio quod metus causa* in Roman law cannot simply be equated with the modern South African law of delict.⁸⁵ In my opinion, it is not appropriate to refer to the defunct *actio quod metus causa* in South African law at all. In addition, there seems to be no need to create a special tort of duress. In line with the generalised approach to delict in South Africa, cases of this nature can be dealt with quite satisfactorily by applying general delictual principles.

In situations where the aggrieved party has suffered some form of patrimonial loss, the aggrieved party will be entitled to claim damages calculated to put him in the position he would have been in had the delict not been committed; in other words, damages designed to compensate his negative *interesse*. The position is thus the same *mutatis mutandis* as that which applies in situations where a contract has been induced by a fraudulent or negligent misrepresentation.⁸⁶ The delictual remedy may be claimed whether the person elects to stand by the contract, or to decides to claim rescission and restitution.⁸⁷ For example, in *Steiger v Union Government*,⁸⁸ the plaintiff claimed an order of rescission and restitution, as well as delictual damages for wrongful dismissal. Additionally, it may be possible to seek damages for an *iniuria*. The obvious example is where the threat was one of civil action or criminal prosecution.

⁸⁴ Van der Merwe and Olivier *Die Onregmatige Daad* 230; McKerron *The Law of Delict* 10; *LAWSA* Vol 8(1) §20; Van der Walt and Midgley *Delict* §20.

⁸⁵ Cf Du Plessis “Fraud, duress and unjustified enrichment: a civil-law perspective” in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 194 at 221.

⁸⁶ *Trotman and another v Edwick* 1951 (1) SA 443 (A) at 449B-C; *Erasmus v Davis* 1969 (2) SA 1 (A) at 9A; *De Jager v Grunder* 1964 (1) SA 446 (A) at 448; *Scheepers v Handley* 1960 (3) SA 54 (A) at 58E; *Ranger v Wykerd and another* 1977 (2) SA 976 (A) at 991B; *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 570E. For an analysis of the question of damages in the law of misrepresentation, see Lötze “Wanvoorstelling: berekening van skadevergoeding” (1997) 60 *THRHR* 231, 412.

⁸⁷ Authorities who support the view that both restitution and damages may be claimed are De Wet and Van Wyk *Kontraktereg* 214; Joubert *Contract* 246; Harker “The nature and scope of rescission as a remedy for breach of contract in American and South African law” 1980 *Acta Juridica* 61 at 107-112; Kerr “Some problems concerning the beginning and ending of contracts” (1989) 106 *SALJ* 97 at 108.

⁸⁸ (1919) 40 NLR 75. The case was heard by way of exception to the pleadings, and the question whether Steiger had a remedy in damages was not dealt with by the court.

In such cases, the threat may amount to vexatious litigation or malicious prosecution. For example, in *Block v Dogon, Dreier and Co*,⁸⁹ which concerned a threat of criminal prosecution, a claim for damages was instituted, although it was unsuccessful. But this remedy is most attractive in situations where the party does not wish to rescind the agreement, or where the nature of the agreement was such that rescission is a *brutum fulmen*. Interestingly enough, there are up to this point no cases in South African law where an award of damages for patrimonial loss has been awarded as a result of a contractual arrangement being induced by duress. The only instances in which such claims have been entertained by the courts are in a purely delictual context: where a threat of harm caused an aggrieved party to suffer patrimonial loss, but which was unassociated with the inducement of a contract. In *Sievers v Bonthuys*,⁹⁰ the plaintiff sued the defendant for £20, being the damage he claimed he had suffered as a result of his inability to transport his ostriches across Bonthuys's land to an auction sale. The road across Bonthuys's land was a public road, but Sievers alleged that Bonthuys had refused to let Sievers through, and had threatened to sue Sievers for £200 if he used that route. Sievers claimed that he turned back as a result of this intimidatory act. Although the court recognised the possibility that a delictual remedy could exist in cases of intimidation, this particular claim was dismissed, since the plaintiff was unable to prove that any threat had been made, and as a consequence, this was not a case where duress had been proved on the facts.

On the other hand, the plaintiff was successful in claiming damages to the tune of £6 in the case of *Hamlyn v Acton*.⁹¹ This quantum represented the costs incurred by the appellant in transporting his oxen and wagons back to the farm Gaikaford (from whence they had come). The respondent (a veterinary officer) had forced Hamlyn to abort his journey by claiming that Hamlyn's oxen were incorrectly branded, and that he would have Hamlyn prosecuted if he did not return home immediately. All this occurred in the presence of a police officer. In fact, Acton had no legal right to make such a demand of Hamlyn. The court held that this unwarranted threat of criminal prosecution amounted to duress, and the appeal against a decision of the magistrate's court to award damages was dismissed.

The fact that there have been no such delictual claims instituted as a result of a contract being induced by duress is really symptomatic of the fact that the duress doctrine has barely developed to the extent that duress of goods is recognised, and economic duress is not recognised in principle at all. If economic duress is to be recognised in our law, then it is submitted that this sort of remedy might become more attractive to litigants who have been induced into concluding a deleterious contract by economic duress, or have similarly been induced into modifying a contract in a way that is financially

⁸⁹ 1910 WLD 330 at 333. It was held that no damages were proved.

⁹⁰ 1911 EDL 525.

⁹¹ 1919 EDL 189.

detrimental. This is not likely to result in a flush of litigation; in other jurisdictions that have adopted a more modern test for duress, the number of claims for damages have remained rare⁹² — a situation that would in all likelihood be duplicated in South Africa.

Before this topic is closed, a brief word needs to be said about the award of compensation in labour law. Where it is found that an employee has been unfairly dismissed, whether for substantive or procedural reasons, the aggrieved employee can be awarded compensation. The definition of unfair dismissal includes constructive dismissal, which is commonly caused by duress of some kind. Section 193(1)(c) of the Labour Relations Act⁹³ states: “If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or arbitrator may order the employer to pay compensation to the employee.”

Prima facie, this power to award compensation for an unfair dismissal could be construed as the equivalent of an award of damages for patrimonial loss. This was in fact the finding of Basson J in the Labour Court in *Chothia v Hall Longmore & Co (Pty) Ltd*.⁹⁴ But in *NUMSA v Precious Metal Chains (Pty) Ltd*,⁹⁵ a subsequent Labour Court case, Maserumule AJ rejected this opinion.⁹⁶ The true nature of the award of compensation under the Act was finally settled by the Labour Appeal Court in *Johnson & Johnson (Pty) Ltd v CWIU*,⁹⁷ where Froneman DJP held that the claim for compensation under the Act refers to compensation for the violation of the employee’s rights at the dismissal stage, and is not an award that is designed to represent the actual patrimonial loss suffered by the employee because of the dismissal.⁹⁸ Compensation in these circumstances is formulaic rather than something to be measured and quantified — the amount of compensation that may be granted by a Court or arbitrator is set out in s194(1) and (2) of the Act, and does not depend on findings of fact based on evidence. This view of the nature of a compensation award is reinforced by the fact that a Court or arbitrator has a discretion as to whether to award compensation or not — s193(1)(c) is clearly permissive in construction, and is not peremptory.⁹⁹

⁹² See on this point Dawson “Duress through Civil Litigation I” (1947) 45 *Michigan LR* 571 at 573.

⁹³ Act 66 of 1995.

⁹⁴ [1997] 6 BLLR 739 (LC) at 745A-C.

⁹⁵ [1997] 8 BLLR 1068 (LC).

⁹⁶ At 1076F-G Maserumule AJ said: “Such compensation is not in the nature of damages and the employee does not have to prove his or her losses. The Court is obliged to apply the formula as prescribed in the subsection, subject to the proviso contained therein.”

⁹⁷ [1998] 12 BLLR 1209 (LAC).

⁹⁸ At 1219F.

⁹⁹ At 1219H-1220A.

10.2.5 Duress as a defence

The above-mentioned remedies are available not only to the party initiating legal proceedings in the courts. Where a defendant is sued for performance under a contract,¹⁰⁰ or is the respondent in provisional sentence¹⁰¹ or summary judgment proceedings,¹⁰² that party will be entitled to raise duress as a defence.¹⁰³ In Roman times, this defence was known as the *exceptio metus*.¹⁰⁴ It was also possible to raise duress as a defence in Roman-Dutch law.¹⁰⁵ It is unclear whether this defence has a particular name in our law. The defence has been described as the *exceptio quod metus causa* by Wessels,¹⁰⁶ and (in two instances) by the courts,¹⁰⁷ even though this phrase was not used by the old authorities. Most authorities refer simply to a defence of duress, without giving it a specific name. Nothing really turns on this semantic point. Provided the defence is raised, the court may adjudicate upon the issue, and if the essential elements can be proved, the principal action or application may be dismissed, and the defendant or respondent will be entitled to relief — usually rescission and (where necessary) restitution.

¹⁰⁰ For cases where the defence of duress was raised to an action for performance, see *Carruthers v Van der Venter* (1862) 4 Searle 96; *Ferreira v Ferreira* 1915 EDL 9; *Padayachey v Lebeso* 1942 TPD 10; *Malilang and others v MV Houdda Pearl* 1986 (2) SA 714 (A); *Hamilton Paneelkloppers v Nkomo* 1991 (2) SA 534 (O); *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 (1) SA 780 (T); *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C).

¹⁰¹ See *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T); *Ilanga Wholesalers v Ebrahim and others* 1974 (2) SA 292 (D); *Hendricks v Barnett* 1975 (1) SA 765 (N).

¹⁰² See *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C).

¹⁰³ Wessels *Contract* §1201; *LAWSA* Vol 5(1) §153.

¹⁰⁴ See Justinian *Institutes* 4.13.1; *D* 44.4.4.33; Gaius *Institutes* 4.117 and 4.12.1; *C* 8.36.9.

¹⁰⁵ See Voet 44.4.4; Huber *HR* 4.38.13; Van Leeuwen *CF* 1.4.41.5.

¹⁰⁶ *Contract* §1201.

¹⁰⁷ *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 (T) at 32B-D; *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 825C-D.

10.3 Remedies where a non-contractual performance was induced by duress

Where a non-contractual performance or transfer has occurred as a result of duress, the plaintiff's main claim is for the return of the money or property transferred *sine causa*,¹⁰⁸ or its equivalent in value.¹⁰⁹ Where what was transferred was a thing, any fruits and accessories must be returned together with it.¹¹⁰ There are certain limitations to the extent of the defendant's liability, though. The defendant's liability is limited to the amount of his or her actual enrichment at the time the action is instituted by the plaintiff. Non-enrichment thus constitutes a defence.¹¹¹ As a result, if the defendant has either lost the enrichment, or the enrichment of the defendant has been reduced at the time the action is instituted, the amount of the defendant's liability will be similarly affected. The onus to prove non-enrichment or reduced enrichment is on the defendant. There are some provisos to this defence, though.¹¹² If the defendant should have realised that it was possible that his or her enrichment was unjustified, his or her liability to make restitution will only be reduced or extinguished if he or she can show that the diminution of enrichment did not occur as a result of his or her fault.¹¹³ This has significance for duress cases, seeing as the aggressor in duress cases does often act deliberately. Similarly, the moment the defendant becomes aware that he or she has been enriched, his or her defence of non-enrichment is similarly limited to situations where the loss or reduction in enrichment was not due to his or her fault.¹¹⁴

By way of contrast, the traditional rule in cases where restitution pursuant to a rescinded contract is concerned is that the defence of innocent loss of enrichment does not apply.¹¹⁵ Visser has argued that this difference could be overcome if it were to be recognised that restitution after rescission of a contract

¹⁰⁸ See *D* 12.6.7; Voet 12.6.12. Eiselen and Pienaar 3. For a discussion of the applicable rules generally, see LAWSA Vol 9 §76 and 80.

¹⁰⁹ *La Riche v Hamman* 1948 AD 648.

¹¹⁰ See *D* 12.6.65.5; 12.6.15; LAWSA Vol 9 §80.

¹¹¹ Voet 12.6.12; *La Riche v Hamman* 1948 AD 648; *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A).

¹¹² See LAWSA Vol 9 §76.

¹¹³ See De Vos *Verrykingsaanspreeklikheid* 336-7.

¹¹⁴ See *D* 12.6.26.12; Voet 12.6.12.

¹¹⁵ See De Vos *Verrykingsaanspreeklikheid* 158-9; *Davidson v Bonafede* 1981 (2) SA 501 (C) at 510-11.

is an enrichment remedy.¹¹⁶ By way of comparison he points out that in both German law¹¹⁷ and English law¹¹⁸ a defence of non-enrichment exists whether the claim for restitution is contractual or non-contractual. Furthermore, the requirement that there must generally be reciprocal restitution (unless a court is satisfied that the plaintiff cannot restore what he or she received for good reason) is in fact a reflection of the principles of the non-enrichment defence discussed above, since this requirement takes into account the equities of the situation when attempting to restore the balance between the parties. If it is accepted that an order of *restitutio in integrum* is an enrichment remedy, as has been argued above, the current differences in approach could be resolved, and allow for a more uniform approach to be taken to cases where restitution is relevant, whether the context was originally contractual or non-contractual.

One controversial issue is whether interest on a payment of money can be claimed from the date of payment. Under the common law, no such interest could be claimed,¹¹⁹ a view supported in *Baliol Investment Co (Pty) Ltd v Jacobs*¹²⁰ and in *CIR v First National Industrial Bank Ltd*.¹²¹ However, this view has legitimately been criticised by both De Vos¹²² and Eiselen & Pienaar,¹²³ who argue cogently that this rule is unfair to the plaintiff. This is so because the plaintiff bears the risk of the defence of loss or reduction of enrichment up until the time the action is brought. If the plaintiff has to bear this risk, why should the plaintiff not be entitled, reciprocally, to the benefit of any interest accruing on the principal amount. This is the position that applies with regard to claims for restitution after rescission of a contract, where interest can be claimed from the time of payment.

¹¹⁶ Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 203 at 211ff.

¹¹⁷ See §818(III) of the BGB. On this provision see Markesinis *The German Law of Obligations Vol 1* 762ff; Visser “Rethinking Unjustified Enrichment” 1992 *Acta Juridica* 203 at 215-217; Zimmermann and Du Plessis “Grondtrekke en Kernprobleme van die Duitse Verrykingsreg” 1992 *Acta Juridica* 57 at 99ff.

¹¹⁸ See *Lipkin Gorman (a firm) v Knapdale Ltd* [1991] 2 AC 548. In English law this is known as the defence of change of position. See Goff and Jones 818ff; Burrows *Restitution* 421; Virgo *Restitution* 709.

¹¹⁹ For a comprehensive discussion of this rule in both Roman and Roman-Dutch law, see De Vos *Verrykingsaanspreeklikheid* 13, 22, 26, 33, 70, 199-200.

¹²⁰ 1946 TPD 269 at 272-4.

¹²¹ 1990 (3) SA 641 (A) at 659 (per Nicholas AJA).

¹²² De Vos *Verrykingsaanspreeklikheid* 199-200.

¹²³ Eiselen and Pienaar 61-2.

10.4 Conclusion

In this chapter the remedies that are available to a party who had been induced to contract or perform in some way under duress have been reviewed. The first section of the chapter discussed the remedies that are available where it has been proved that a contract has been induced by duress: rescission, restitution and a claim for damages. The need for the recognition of the fact that a claim for *restitutio in integrum* is an enrichment remedy, and not a contractual remedy, was emphasised. The second part of the chapter discussed the nature of the restitutionary remedy that exists where it has been proved that a non-contractual performance was induced by duress.

Appendix

Law Commission proposals, and their potential effect on procedural unfairness in contract

1. Project 47: Unreasonable Stipulations in Contracts and the Rectification of Contracts

In 1983, following a suggestion by Kerr,¹ the South African Law Commission initiated a project to review the legal position concerning unreasonable stipulations in contracts and the rectification of contracts.² The fundamental aim of the project was to consider whether legislation ought to be passed allowing courts to intervene in contractual relationships where it could be found that the contract was unfair. Of course, no general equity jurisdiction to this effect exists in the common law.³ As can be seen from the title of the project, the focus was clearly to be on how to deal with substantively unfair contract terms.⁴ But during the course of its work, the Law Commission came up with proposals that

¹ Kerr “Does a claim for rectification depend upon a mistake having been made and/or upon the requirements of the *exceptio doli generalis* being met?” (1982) 45 *THRHR* 85 at 86.

² South African Law Commission Project 47: Unreasonable Stipulations in Contracts and the Rectification of Contracts.

³ See the discussion of the decision in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) above, and *Burger v Central South Africa Railways* 1903 TS 571 at 576. More recent comments to this effect may be found in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at 16C (the majority judgment) and 35C-E (Cameron JA’s judgment), and in *Afrox Healthcare Ltd v Strydom* [2002] 4 All SA 125 (SCA) at 136e.

⁴ This matter falls beyond the scope of this thesis. For an analysis of this tricky and much debated issue, see the Law Commission’s Working Paper 54, Discussion Paper 65 and Final Report on Project 47, and: Christie *Contract* 17-18; Van der Walt “Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraktsbedinge” (1986) 103 *SALJ* 646 and “Die Suid-Afrikaanse Regskommissie se ondersoek na die beheer oor onbillike kontraktsbedinge” 1989 *Obiter* 147 and “Kontrakte en beheer oor kontrakteervryheid in ’n nuwe Suid-Afrika” (1991) 54 *THRHR* 367 and “Aangepaste voorstelle vir ’n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg” (1993) 56 *THRHR* 65 and “Beheer oor onbillike kontraktsbedinge — *quo vadis* vanaf 15 Mei 1999?” 2000 *TSAR* 33; Van Loggerenberg “Onbillike uitsluitingsbedinge in kontrakte: ’n pleidooi vir regshervorming” 1988 *TSAR* 407; Du Plessis *Onbillike kontraktsbedinge uit ekonomiese perspektief — Die ekonomiese benadering tot die reg en moontlike hervorming van die Suid-Afrikaanse reg rakende onbillike*

could potentially affect the law of contract in a far broader fashion, including the current approach to procedural unfairness. In the Commission’s final report, which was submitted to the Minister of Justice in April 1998, the Commission recommended that the only way the question of fairness in contracts could properly be regulated was by way of legislation. The proposed draft Bill is a lengthy one, but most significant is s1(1) thereof, which states:⁵

“Court may determine whether contractual terms are unreasonable, unconscionable and oppressive, and issue appropriate orders

- 1(1) If a court is of the opinion that
- (a) the way in which a contract between the parties or a term thereof came into being; or
 - (b) the form or the content of a contract; or
 - (a) the execution of a contract; or
 - (b) the enforcement of a contract
- is unreasonable, unconscionable or oppressive, the court may declare that the alleged contract—
- (aa) did not come into existence; or
 - (bb) came into existence, existed for a period, and then, before action was brought, came to an end; or
 - (cc) is in existence at the time the action is brought, and it may then—
 - (i) limit the sphere of operation and/or the period of operation of the contract; and/or
 - (ii) suspend the operation of the contract for a specified period or until specified circumstances are present; or
 - (iii) make any such order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonable, unconscionable or oppressive to any of the parties.”

The first notable thing about this subsection is that it would grant courts a discretion to interfere with contracts in a number of ways if it could be demonstrated that the contract is somehow “unreasonable, unconscionable or oppressive”. The second important thing about the way this proposed legislation is drafted is that the courts would have the power to interfere when it could be shown that “the way in

kontraksbedinge (unpublished LLM thesis, University of Stellenbosch, 1990); Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 227-9. See too Lubbe “Law of Purchase and Sale” 1999 *Annual Survey of South African Law* 186-8 on the possible impact of the newly named Consumer Affairs (Unfair Business Practices) Act 71 of 1988 [formerly the Harmful Business Practices Act], as amended by the Harmful Business Practices Amendment Act 23 of 1999, on the Law Commission’s work in this regard. Van der Walt “Beheer oor onbillike kontraksbedinge — *quo vadis* vanaf 15 Mei 1999?” 2000 *TSAR* 33 also discusses the relationship between the common law, the proposed legislation and existing legislation.

⁵ *Law Commission Final Report* 213 (my emphasis).

which the contract came into being” was unreasonable, unconscionable or oppressive. This suggests that the proposed legislation would also cover instances of procedural unfairness in contract. This view is bolstered by a number of the specifically articulated guidelines contained in section 2 of the proposed draft Bill, which are designed (without being a *numerus clausus*) to provide courts with some direction as to what sort of conduct would be considered unreasonable, unconscionable or oppressive. The guidelines relevant to the question of procedural unfairness are:⁶

“In determining whether a contract or a term thereof is unreasonable, unconscionable or oppressive, as contemplated in section 1 of this Act, the court may, where applicable, take into account the following factors, namely—

- (a) the bargaining strength of the parties to the contract relative to each other;...
- (d) in relation to commercial contracts, reasonable standards of fair dealing or in relation to consumer contracts, commonly accepted standards of fair dealing;
- (e) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;
- (f) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of the contract or to reject any of the provisions thereof;...
- (y) the context of the contract as a whole, in which case the court may take into account the identity of the parties and their relative bargaining position, the circumstances in which the contract was made, the existence and course of any negotiations between the parties, any usual provisions in contracts of the kind or any other factor which in the opinion of the court should be taken into account.”

This is where the proposed legislation could potentially impact upon the topic of this thesis, since duress is a common law doctrine that constitutes a form of procedural unfairness. How would this legislation dovetail with the common law doctrines? The effect of the Law Commission’s wide ranging proposal on the common law rules and principles of procedural unfairness in contract is not entirely clear, since the Law Commission does not discuss the matter in its Final Report.⁷ The content of the Report is almost entirely focused on the mechanisms necessary to regulate substantive unfairness. But the proposed Bill is undoubtedly drafted in such a way that it could have implications for the common law with regard to procedural unfairness. As such, it is important to examine what the proposed Bill might mean for this area of law, and the changes it proposes.

⁶ *Law Commission Final Report* 215-8.

⁷ In the *Law Commission Final Report* 58n80, the compilers tantalisingly say: “Procedural and substantive fairness in contracts are addressed below.” But they give no cross-reference, and repeated readings of the Report have revealed no such discussion on the matter of procedural unfairness.

The most significant thing about the proposed Bill is that although the Law Commission has used the terms “unreasonable, unconscionable and oppressive” in section 1(1), it has also said that the theoretical basis underpinning the legislation will be the concept of “unconscionability”.⁸ In the light of this fact, commentators have criticised the extension of the formulation of s1(1) to include the terms unreasonableness and oppression. The express use of the term “unreasonable” in particular has come in for a great deal of condemnation.⁹ Adopting this approach would run directly counter to the long-held notion that contracts cannot be avoided on mere grounds of unreasonableness, without more. In many situations contracts can be considered “unreasonable” in some way, but to allow this as a ground for rescission would in all likelihood have a negative impact upon commercial certainty, and could seriously compromise the hitherto legitimate contractual interests of parties.¹⁰ Perhaps the subjective width of the term unreasonableness is to be tempered, *eiusdem generis*, by the other two terms: but then why include it on the list, if the other two terms (especially “unconscionability”) are a more precise guide to the true powers of the court? Furthermore, the term “oppressive” does not really add to the definition of unconscionability at all. If Parliament wants to base its legislation in the concept of unconscionability, then that is the term that should be used, and the terms “unreasonable” and “oppressive” should be deleted. However, it is submitted that doing this would, in any event, be unnecessary and undesirable, for the reasons given below.

2. Unconscionability or good faith — a rose by another name?

The first question that can be posed with regard to the principle of unconscionability is how it relates to the principle of good faith under the common law. To a layman, the terms “unconscionability” and “good faith” would probably seem like two sides of the same coin. The Law Commission appear to have come to this conclusion too. The Commission stated in its Discussion Paper that as far as it was

⁸ See the s1(1) of the proposed Bill quoted above and Discussion Paper 65 §1.50.

⁹ See the noted responses to Discussion Paper 65 by: two groups of Judges of the Supreme Court of Appeal; the South African Chamber of Business; Professors Hutchison and Van Heerden of the University of Cape Town; Mrs Moolman of the SA National Consumer Union; Professors Van der Merwe and Van Huyssteen of the Universities of Stellenbosch and the Western Cape; the Unfair Contract Terms Committee; the Council of South African Banks; and the General Council of the Bar, in the *Law Commission Final Report* 138-145.

¹⁰ Christie *Contract* 16 states: “To accept the Law Commission’s proposal [on unreasonableness] would lead, not to a mere continuation of of this process of whittling away the general principle [ie that contracts will not be overturned for being unreasonable], but to its complete abandonment. This would be a disastrous mistake, because every contract no matter how carefully negotiated, would be open to subsequent challenge on the ground that some of its terms were unreasonable. It would be difficult to estimate the extent of the damage that would be done to the conduct of business, personal trust and the ordinary person’s respect for the law.” For further criticism see the article by the (now recently retired) Acting Chief Justice and Acting President of the Supreme Court of Appeal, Mr Justice Hefer “Billikheid in die kontraktereg volgens die Suid-Afrikaanse regs kommissie” 2000 *TSAR* 142 at 147ff.

concerned, when it came to identifying a theoretical basis for the proposed legislation, it did not matter whether a good faith or an unconscionability approach was followed, since “the two approaches lead to the same result”.¹¹ Although this conclusion would appear at the very least to be debatable, for the purposes of argument its truth will be assumed in order to make a few important points.

It seems strange that the South African Law Commission should have chosen a principle of unconscionability as a basis for the proposed legislation, rather than a more familiar principle of good faith. When one considers that the principle of good faith has a lengthy history in our law, this does not appear to make too much sense. But then follows the most extraordinary statement that: “In view of the historical background to our law, the unconscionability approach would be advisable”.¹² With respect, this cannot be correct.¹³ The principle of good faith was a cornerstone of Roman and Roman-Dutch law, and as a result, it is one of the oldest and most venerable principles that exists in our contract law, from an historical perspective. The doctrine of unconscionability is a feature of Anglo-American law that has never formed part of the South African legal system in any systematic or doctrinal way. When one considers that the principle of good faith has been re-prioritised both in academic writing and in court decisions from the 1990s, the approach of the Law Commission in embracing a principle of unconscionability appears to be questionable.

But if this interpretation of the proposed legislation is correct, and if legislation to this effect were to come into effect, what impact might this have upon the classical doctrines of good faith (or should this read “unconscionability”)? It is submitted that it is unlikely that it would have a significant impact at all. According to the Law Commission’s approach, the use of the term “unconscionability” is really a synonym for the requirement of good faith that has always existed in our law. So in reality the enquiry would remain the same — the change would simply be one of terminology. Secondly, it is unlikely that this sort of legislation would be designed to, nor would it have the effect of, converting our good faith requirement, or contextual approach to good faith, into a good faith regime, or a totally normative approach to good faith/unconscionability. We are simply too steeped in that sort of contextual approach to contractual fairness in our legal system, as the Supreme Court of Appeal in *Brisley v Drotsky*¹⁴ and

¹¹ Discussion Paper 65 §1.50.

¹² Discussion Paper 65 §1.50.

¹³ See too the criticisms of the substitution of the good faith requirement with the unconscionability approach by Van der Merwe and Van Huyssteen of Stellenbosch and the University of the Western Cape, and Mr Khaya Zweni of Lawyers for Human Rights, in their response to Discussion Paper 65 (see *Law Commission Final Report* 141), and Hutchison “Good Faith in the South African Law of Contract” in Brownsword *et al Good Faith in Contract* 229.

¹⁴ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

*Afrox Healthcare v Strydom*¹⁵ have shown. In the premises, it is likely that were legislation to be passed in this form, and a judge or magistrate to be faced with an allegation that a contract was negotiated and created in a broadly “unconscionable” manner, he or she would turn initially to the requirements of the classical doctrines like misrepresentation, duress and undue influence for guidance.¹⁶ This argument may be supported by the law on interpretation of statutes. There is a common law presumption of interpretation that Parliament is presumed not to wish to change the existing law more than is necessary.¹⁷ This does not mean that a judge or magistrate will be confined to these doctrines — the Act would provide a similar discretion to the judicial officer to identify and define alternative examples of this broadly defined “unconscionable conduct” *in contrahendo* that the current common law principles of good faith and public policy allow. Taking this sort of approach to the Law Commission’s proposals (should they ever be passed into law) would ensure that, like the common law principle of good faith, a statutory principle of unconscionability could be interpreted by way of reference to well-known doctrines of the common law,¹⁸ and could be applied in a principled and contextual fashion.¹⁹ This approach would contribute to the utility of the proposed legislation, and prevent the legal uncertainty that would come with a wholly free-floating statutory creation. The dangers of creating such a free-floating approach to the principle are well illustrated by the experiences of such a legislative creation in Israeli law, which has been heavily criticised for its vagueness.²⁰ This broad principle of unconscionability could perhaps then be put to use to provide a legal argument or “informing basis” for developing new rules and doctrines to regulate conduct *in contrahendo* only in situations where traditional doctrines do not apply to the facts.

3. But what is unconscionability?

¹⁵ *Afrox Healthcare Ltd v Strydom* [2002] 4 All SA 125 (SCA). For a full discussion, see 5.4.2.5 above.

¹⁶ Hillman “Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress” (1979) 64 *Iowa LR* 849 has argued in the same way in the context of the statutory Uniform Commercial Code in America.

¹⁷ See Botha *Statutory Interpretation* 64 and *Johannesburg Municipality v Cohen’s Trustees* 1909 TS 811 at 823; *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation)* 1981 (1) SA 171 (A); *S v Ebrahim* 1991 (2) SA 68 (A).

¹⁸ See too my comments to this effect in “Good Faith and Procedural Unfairness in Contract” (1998) 61 *THRHR* 328 at 334-5.

¹⁹ Stewart “A Formal Approach to Contractual Duress” (1997) 67 *University of Toronto LJ* 175 at 213 has argued that this sort of approach be adopted in Canadian law.

²⁰ See Cohen “The Effect of the Duty of Good Faith on a Previously Common Law System: The Experience of Israeli Law” in Brownsword *et al Good Faith in Contract* 189 at 212 and “Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate” in Beatson and Friedmann *Good Faith and Fault in Contract Law* 25 at 53-4.

What has been said above is based upon the premise that the Law Commission is correct in equating good faith directly with unconscionability. I have stated in the previous section that I am sceptical of the Law Commission's view that good faith and unconscionability are identical. In order to demonstrate why this is so, it is necessary to examine what unconscionability means, from a legal perspective, in those legal systems that employ the device. The concept of unconscionability is a feature of Anglo-American systems of law. The concept owes its existence to the historical distinction between courts of law and courts of equity in England. While the common law courts, steeped in their classical formalist approach to contract, would not entertain cases concerning the fairness of the bargain, the courts of equity (particularly the Chancery Division) developed the defence of unconscionability to alleviate the harsh effects of the common law approach.²¹ The case of *Fry v Lane*²² is a clear example of the Chancery Division applying the defence. In that case two poor and uneducated men had been induced into concluding an onerous contract without being given the opportunity to seek legal advice. The court refused to enforce the contract, saying:²³

“[A] Court of Equity will inquire whether the parties really did meet on equal terms, and if it be found that the vendor was in distressed circumstances, and advantage was taken of that distress, it will void the contract.”

Due to the rather formal nature of contract jurisprudence in England after the Judicature Act of 1873, and the relatively modest influence of equity on contract, the defence of unconscionability has not played a significant role in English law in the 20th century at all. Enman has summed up the position by saying that the concept of unconscionability in England has been “virtually dead for almost a century”.²⁴ However, this equitable defence has found a happier home in those jurisdictions that received the law/equity divide while under the colonial yoke in the 1700s. It has played an important

²¹ For a discussion of this heritage, see Hillman *The Richness of Contract Law* 129ff. This occurred in England as early as the late 18th century. See *Evans v Llewellyn* (1787) 29 ER 1191 at 1194. It has already been shown in Chapter 5 how, in the unified system of today, the English courts have refused to accept Lord Denning's proposals for a similar concept of unequal bargaining power in the common law.

²² (1888) 40 Ch D 312, citing *Wood v Abery* 3 Madd 417 at 423.

²³ At 321. See too *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484.

²⁴ Enman “Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law” (1987) 16 *Anglo American LR* 197 at 217. Treitel 383 suggests that the defence has no role in English law any more. For a contrary view see Siopis “Unconscionable Bargains and General Principle” (1984) 100 *LQR* 523, who suggests that the doctrine was recognised (albeit obiter) in *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1985] 1 All ER 303 (CA).

role in the law of contract in Australasia and in Canada²⁵ as a facet of the common law, and as a codified feature of the Uniform Commercial Code in the United States,²⁶ where section 2-302 of the Code provides:

“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

The problem with this articulation of the term, let alone the general defence of unconscionability that operates in other jurisdictions, is that it provides courts with great power to combat what can be described as “contractual unfairness”, but without giving any clear definition of the concept, nor guidance as to how it should be interpreted or wielded.²⁷ Leff has criticised the defence of unconscionability acidly for its “amorphous unintelligibility”.²⁸ It has been left to the courts and academic commentators in the relevant jurisdictions to try to impart some useful meaning to the concept. First of all, it must be understood that the defence of unconscionability is “not to be taken as a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other”.²⁹ Mere inequality of bargaining power will not be sufficient to justify a remedy. Moreover, it is not a free-floating device of fairness that operates without constraints in these jurisdictions. Rather, it is a particular doctrine, or legal institution, that can be employed by a court to prevent a particular form of contractual unfairness. Like other legal doctrines, it operates in a specific context. In the leading Australian case of *Commercial Bank of Australia Ltd v Amadio*,³⁰ it was held that

²⁵ On the Canadian legal position see Enman “Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law” (1987) 16 *Anglo American LR* 197; Waddams “Unconscionable Contracts: Competing Perspectives” (1999) 62 *Saskatchewan LR* 1; *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710 at 713.

²⁶ All these legal systems were investigated by the Law Commission, and the Report includes discussion of unconscionability in these legal systems.

²⁷ This point is made by Hillman in “Debunking Some Myths About Unconscionability: A New Framework for UCC Section 2-302” (1982) 67 *Cornell LR* 1 and in *The Richness of Contract Law* 132.

²⁸ Leff “Unconscionability and the Code — the Emperor’s New Clause” (1967) 115 *University of Pennsylvania LR* 485 at 488. The vague nature of the doctrine from an Australasian perspective is openly acknowledged by Harland “Unconscionable and Unfair Contracts: The Australian Perspective” in Brownsword *et al Good Faith in Contract* 243 at 248; Conaglen “Duress, Undue Influence and Unconscionable Bargains” (1999) 18 *New Zealand Universities LR* 509 at 521.

²⁹ Per Lord Radcliffe in *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 626.

³⁰ (1983) 151 CLR 447. For an analysis of the importance of *Amadio* and the doctrine of unconscionability in Australia in general, see Harland “Unconscionable and Unfair Contracts: The Australian Perspective” in

the doctrine of unconscionability may be appealed to “whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created.”³¹ From this definition a number of important characteristics about the doctrine of unconscionability can be identified. These are first, the existence of some circumstance that places the one party at a disadvantage, and secondly an unconscionable exploitation of that advantage by the other party in the contract. The dual nature of the test is implicit in the analytical model of the doctrine of unconscionability that was proposed by Leff, and which remains the leading analysis of the doctrine despite his scepticism about the utility thereof. Leff stipulated that there are two main requirements to a finding of unconscionability: procedural unconscionability and substantive unconscionability.³² Procedural unconscionability refers to a problem during the negotiations leading up to the conclusion of the contract. But here the doctrine differs from other forms of procedural unfairness like misrepresentation or duress in that the jurisdiction under this doctrine is based on whether the aggrieved party was suffering from some “special disadvantage” or “cognitive defect”.³³ This was illustrated in *Blomley v Ryan*,³⁴ where special disadvantage was defined to include “illness, ignorance, inexperience, impaired faculties, financial need or other circumstances [that] affected his ability to conserve his own interests”.³⁵

A similar list of factors is contained in Leff’s article,³⁶ as well as in the *Restatement, Second, Contracts*.³⁷ The key is therefore that the aggrieved party must have been in a position whereby the

Brownsword *et al Good Faith in Contract* 243 at 244ff. See too Cheshire, Fifoot and Furmston 339.

³¹ At 462. Cf the definition given by Lord Brightman in the Privy Council case on appeal from New Zealand of *O’Connor v Hart* [1985] 1 NZLR 159 at 171: “An unconscionable bargain is a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction.”

³² Leff “Unconscionability and the Code — the Emperor’s New Clause” (1967) 115 *University of Pennsylvania LR* 485 at 488ff and 539ff. See also Epstein “Unconscionability: A Critical Reappraisal” 1975 *Journal of Law and Economics* 293; Eisenberg “The Bargain Principle and its Limits” (1982) 95 *Harvard LR* 741 at 748ff; Hillman *The Richness of Contract Law* 132ff.

³³ Conaglen “Duress, Undue Influence and Unconscionable Bargains” (1999) 18 *New Zealand Universities LR* 509 at 521.

³⁴ (1956) 99 CLR 362.

³⁵ At 415.

³⁶ Leff “Unconscionability and the Code — the Emperor’s New Clause” (1967) 115 *University of Pennsylvania LR* 485 at 532 says: “In these cases one runs continually into the old, the young, the ignorant, the necessitous, the illiterate, the improvident, the drunken, the naive, and the sick, all on the one side of the transaction, with the sharp and hard on the other.”

³⁷ §208(d) states that the sort of factors that will be considered here are “knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical and mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors”.

party, due to some special disadvantage of this kind, was effectively unable to negotiate on an equal level, and with full knowledge of what was in his or her best interests. But this is not all. In addition there must be something substantively unconscionable about the transaction that resulted. In other words, the other party must have abused this cognitive disadvantage unconscionably to impose contractual terms upon the other party that are unacceptably unfair.³⁸ So, things like oppressive terms or a grossly inflated or inadequate price could be indicators of substantive unconscionability, depending on the facts of the case. The key factor that distinguishes cases decided on under the doctrine of unconscionability with cases decided on grounds of misrepresentation, duress or undue influence is that in cases of unconscionability, the courts require both procedural and substantive unconscionability to be proved.³⁹ Not only must there be the relevant procedural taint: the resulting contract (or a specific term thereof) must be unfair or unreasonably harsh. In the words of the judge in *Resource Management Co v Weston Ranch and Livestock Co Inc*:⁴⁰ “Where only procedural irregularities are involved, the judicial doctrines of fraud, misrepresentation, duress, and mistake may provide superior tools for analyzing the validity of contracts.”

From what has been discussed above it can be seen that the doctrine of unconscionability is aimed at promoting standards of fair dealing, as well as preventing exploitation.⁴¹ But the doctrine serves a particular purpose in this regard: it is not a general mechanism to justify interference with contractual relationships on grounds of fairness. It is in fact one of the contextualised doctrines that derives its theoretical basis from a general principle of good faith.⁴² Like doctrines of misrepresentation, duress or undue influence, the doctrine of unconscionability as defined above operates to prevent a particular form of violation of the flexible umbrella duty of good faith that is foundational to the law of contract.

This being the case, it is submitted that the suggestions of the Law Commission that “good faith” equals “unconscionability” are not accurate, certainly not in the traditional sense in which the doctrine of unconscionability is understood and employed in those jurisdictions that have a history with it. The nature of the investigation by the Law Commission, as well as the wide scope of the proposed legislation and the comments thereon made by the Law Commission, would suggest that the legislation

³⁸ Leff “Unconscionability and the Code — the Emperor’s New Clause” (1967) 115 *University of Pennsylvania LR* 485 at 539; *Restatement, Second, Contracts* §208(c) and (e); Hillman *The Richness of Contract Law* 141ff.

³⁹ See *Williston on Contracts* §18:10n81 and the numerous authorities cited there.

⁴⁰ 706 P 2d 1028 (1985) cited in *Williston on Contracts* §18:10n84.

⁴¹ See comments to this end in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 441.

⁴² Conaglen “Duress, Undue Influence and Unconscionable Bargains” (1999) 18 *New Zealand Universities LR* 509 at 541-5; Carter and Furmston “Good Faith and Fairness in the Negotiation of Contracts” (1994) 8 *Journal of Contract Law* 1 at 6-7.

would be designed to cover matters far beyond the normal scope of the unconscionability doctrine, and would cover all forms of contractual bad faith, whether procedural or substantive. If this is indeed the case, then either the use of the term unconscionability should be abandoned in favour of the good faith principle, or the term unconscionability should be defined expressly to mean something broader than that traditionally associated with the doctrine in other jurisdictions. In my view the second option would be undesirable, not to mention confusing, and the first option is preferable, if the legislation were to come into force.

4. The doctrine of unconscionability and the South African common law

As has been stated above, South African law has never recognised a doctrine of unconscionability like that which exists in Australasia, Canada and the United States. But could our law, whether it be via the courts or legislation, develop in this direction? The reason for posing this question is that there is a striking similarity between the facts in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*,⁴³ and the facts in *Commercial Bank of Australia Ltd v Amadio*.⁴⁴ *Saayman*'s case concerned the validity of an onerous suretyship agreement signed in favour of First National Bank by Mrs Malherbe, in order to secure the debts of her son. At the time, Mrs Malherbe was 85 years old, partially blind and hard of hearing, and suffered from a number of neurological afflictions. In the *Amadio* case Vincenzo Amadio, whose business was in severe financial trouble, convinced his elderly parents, who were not fluent in English, and who had no idea their son was in trouble, to sign an unlimited mortgage bond to secure his debts. Vincenzo had told his parents the documents concerned a limited mortgage bond for six months, up to a ceiling of \$50 000, which was untrue. Of course the *Saayman* case was ultimately decided on the basis that Mrs Malherbe lacked contractual capacity, but there is certainly a similarity between the substance of Olivier JA's concurring minority judgment and the unconscionability finding in *Amadio*. Might the employment of a doctrine of unconscionability as it exists in the United States or Australasia not have been an alternative solution to the problem in *Saayman*?

Over and above the fact that the doctrine of unconscionability is rather vague in its formulation, which may cause resistance to such a development, the other main difficulty with it is that there is some overlap with the doctrine of undue influence.⁴⁵ This is particularly true in English law, where the doctrine of undue influence has a broader range of application than in other jurisdictions. For example,

⁴³ 1997 (4) SA 302 (SCA).

⁴⁴ (1983) 151 CLR 447.

⁴⁵ This problem is discussed at some length by Conaglen "Duress, Undue Influence and Unconscionable Bargains" (1999) 18 *New Zealand Universities LR* 509 at 529-32.

the English doctrine of undue influence would have been wide enough to cope with a case like *Amadio*, as can be seen from the decision in *Barclays Bank plc v O'Brien*.⁴⁶ The same argument could be made for South African law, since the South African doctrine of undue influence is broadly based on the English approach. As far as South African law is concerned, the law requires that an influence be used “in an unconscionable manner” to induce a detrimental transaction.⁴⁷ This overlap might indicate why the courts in South Africa have shown no inclination to adopt a doctrine of unconscionability like that which exists in the United States or Australasia. This is not to say that there has been no academic argument in this direction; but it has not concerned the Anglo-American doctrine of unconscionability. Rather, it has concerned the comparable German doctrine of “abuse of circumstances”. The German legal system has no separate doctrine of undue influence or unconscionability,⁴⁸ but does have one doctrine of abuse of circumstances, which is contained in §138(2) of the BGB:

“[A] transaction by which a person exploits the position of constraint in which another person finds himself, or the inexperience, lack of discernment or substantial weakness of will of that other person, in order, for his own benefit or that of a third party, to procure the promise of, or obtain, a pecuniary advantage in return for the provision of a service which is markedly disproportionate to such provision, is void.”

In his Dr Jur thesis, Van Huyssteen argued that, at the very least, the specific doctrine of undue influence should be expanded to form a part of a broader defence of “abuse of circumstances” in South Africa.⁴⁹ Van Huyssteen’s thesis is primarily based upon his extensive historical analysis of the mechanisms put in place to combat bad faith conduct *in contrahendo* in our common law, and a comparative survey of the laws in the civilian systems of Europe. But his proposal has not received much support,⁵⁰ and has been subjected to criticism by both academics and the judiciary. De Wet and Van Wyk are particularly scornful:⁵¹

⁴⁶ [1994] 1 AC 180. See on this point Cheshire, Fifoot and Furmston 340, where the two cases and the two doctrines are compared.

⁴⁷ See *Preller v Jordaan* 1956 (1) SA 483 (A) at 492H.

⁴⁸ See Markesinis *The German Law of Obligations Vol 1* 187ff.

⁴⁹ Van Huyssteen *Onbehoorlike Beïnvloeding* 127ff. In a similar vein, Capper has in fact argued for the amalgamation of the doctrine of undue influence and the doctrine of unconscionability into one in Anglo-Australian law. See “Undue Influence and Unconscionability: A Rationalisation” (1998) 114 *LQR* 479.

⁵⁰ The two leading treatises on contract in South African law, by Kerr and Christie, virtually ignore Van Huyssteen’s proposals, and continue to refer to the traditional doctrine of undue influence.

⁵¹ De Wet & Van Wyk *Kontraktereg* 52-3. This is a translation of the original Afrikaans: “*Van Huyssteen* [bepleit] die erkenning van ‘Misbruik van Omstandighede’ waarvan onbehoorlike beïnvloeding dan ’n verskyningsvorm is, as ’n wilsgebrek. Hy slaag egter nie daarin om misbruik van omstandighede duidelik te

“*Van Huyssteen* [advocates] the recognition of ‘abuse of circumstances’, of which undue influence is a form, as a defect of will. However, he does not succeed in defining or describing to concept of abuse of circumstances. It looks too much like a legal creation without structure or guidelines.”

The concern has centred on the vague and open-ended nature of the abuse of circumstances criterion, which probably goes some way to explaining why Van Huyssteen’s idea has not had an impact upon our law. There is also some concern about this doctrine of abuse of circumstances overlapping with the more traditional doctrines like misrepresentation, duress and undue influence, and creating confusion amongst the relatively conservative legal fraternity. In the light of the attitude that has been taken to Van Huyssteen’s proposals, It would appear that it is unlikely that either a doctrine of abuse of circumstances in the Germanic mould, or an Anglo-American doctrine of unconscionability is likely to be adopted by the South African courts in the near future, even if the Supreme Court of Appeal has stated that it will not treat the traditional doctrines as a *numerus clausus*.

omskryf of beskryf nie. Dit lyk vir my al te veel na regspleging sonder rigsoeroe.” Van Huyssteen’s proposals to this end are also criticised by Griessel J in *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 824D.