

ECONOMIC DURESS IN CANADIAN LAW: TOWARDS A PRINCIPLED APPROACH

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The emergence of economic duress as a distinct ground for relief from contractual obligations in Canada has been marked by a relatively uncritical adoption of the "overborne will" approach, with occasional reference to the "inequality of bargaining power" approach. Neither of these approaches is satisfactory. The "overborne will" theory presents an implausible picture of what happens to a person subject to duress, while the "inequality of bargaining power" approach obscures important differences between different grounds of contractual relief. This paper outlines a principled approach to economic duress, which focuses on the rights and opportunities of the parties to the transaction. The principled approach, which has been adopted implicitly or explicitly elsewhere, provides a satisfactory explanation of many leading Canadian cases on economic duress and should replace the other approaches.

L'émergence de contraintes économiques comme motif pour le débiteur de se libérer de ses obligations contractuelles a été marquée au Canada par l'adoption plutôt unanime de l'approche de la « volonté prédominante », tout en faisant parfois référence à l'approche de « l'inégalité du pouvoir de négociation ». Toutefois, aucune de ces approches ne donne le résultat escompté. La théorie de la volonté prédominante présente l'image irréaliste d'une personne soumise à des contraintes, alors que l'approche de l'inégalité du pouvoir de négociation ne tient pas compte d'importantes différences entre les divers motifs qui permettent au débiteur de se libérer. Cet article décrit une approche raisonnée aux contraintes économiques et qui met l'accent sur les droits et les possibilités des parties à une transaction. L'approche raisonnée, qui a été adoptée de façon implicite ou explicite dans d'autres pays, explique de façon satisfaisante plusieurs affaires canadiennes importantes portant sur les contraintes économiques et devrait remplacer les autres approches.

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I. Introduction

A contract entered into under economic duress is voidable at the option of the party under duress.² But the meaning of "duress" in this context remains unclear in Canadian law. There are many ways in which one party can exert pressure on another; and there are many ways in which the party subject to pressure can react to it. Canadian courts, following a series of English cases, have adopted the "overborne will" theory, which demands that the volition of the party alleging duress be virtually suspended before a claim of duress will be recognized, and have supplemented the overborne will theory with references to inequality of bargaining power. This paper argues that this approach should not be followed, for at least three reasons. First, the "overborne will" theory focuses on the wrong aspect of the interaction between the stronger and the weaker party. In a typical situation of duress, the weaker party is not rendered an automaton, but acts wilfully; if the overborne will theory is applied literally, duress claims will never succeed in these situations. Second, the overborne will theory is not actually applied; duress claims are allowed to succeed in cases where its requirements are not met. An approach that explains these cases is therefore required. Third, an alternative approach is available. This approach, which I call "principled", focusses not on the victim's will, but on the legitimacy of the stronger party's threat and on the effect of that threat on the weaker party's choices: the principled approach attends to the underlying reasons for having a defence of duress in contracts in the first place. This approach, which appears to have superseded the "overborne will" approach in some English and Commonwealth cases, is able to accommodate in a principled way the existing Canadian cases on economic duress.

² S. Waddams, *The Law of Contracts*, 3d ed. (Toronto: Canada Law Book, 1993), [Waddams] ¶502; G.H.L. Fridman, *The Law of Contract in Canada*, 2d ed. (Toronto: Carswell, 1986) at 294.

11. Three Paradigmatic Cases

It is common for analysts of duress to present a series of highly stylized examples against which to test various theories of duress. Although this procedure may not seem to do justice to the complexity of the case law, it is nonetheless useful to consider how intuitions that seem appropriate to stylized cases carry over to real cases of economic duress. In each of these cases one party, *A*, makes a proposal intended to induce the other party, *B*, to agree to something. In each case, *B* agrees, but subsequently seeks to avoid the agreement on account of duress.³

1. *The Armed Robber*. "An armed robber [*A*] threatens his victim [*B*] on a dark and lonely street: 'Your money or your life.'"⁴

2. *The Foundering Ship*. A tugboat, *A*, happens upon a ship in distress, *B*. *B*'s crew will die unless *B* is rescued immediately. The tug has done nothing to cause the ship's predicament. The tug demands a fee greatly in excess of its normal charge to tow the ship to safety.⁵

3. *Business Compulsion*. *B* has a contract to supply radar sets to *C*, and subcontracts with *A* to provide a certain number of components at a certain price. After the contract is made, the market price of the components rises substantially. *A* threatens to hold back the components it has agreed to provide unless *B* pays the higher price. *B* knows that it could obtain the components elsewhere and then sue *A* for breach of contract, but it cannot obtain the components in time to avoid breaching its contract with *C* and incurring not only a substantial penalty for default but also damage to its reputation for reliability.⁶

Case 1 is the paradigm of duress. The gunman's proposal to *B* is wrongful, both on criminal and on civil grounds, and has the effect of substantially limiting *B*'s opportunities for choice. Case 2 is arguably the

³ The three examples are fairly standard, and I have used them, along with several others, before. See H. Stewart, "A Formal Approach to Contractual Duress" (1997) 47 U.T.L.J. 175 Stewart, ["Formal Approach"]; and H. Stewart, "Where is the Freedom in Freedom of Contract? A Comment on Trebilcock's *The Limits of Freedom of Contract*" (1995) 33 Osgoode Hall L.J. 259. See also R. Bigwood, "Coercion in Contract: The Theoretical Constructions of Duress" (1996) 46 U.T.L.J.

⁴ C. Fried, *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981) at 95; cf. M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) at 84-85 (1993) (highwayman) [Trebilcock]; *Barton v. Armstrong*, [1976] A.C. 104 (P.C.) (Barton executed deed on terms favourable to Armstrong after Armstrong threatened Barton with death); *Byle v. Byle et al.* (1990), 65 D.L.R. (4th) 641 (B.C.C.A.) (parents conveyed land to son following son's threat to kill his brother) [Byle].

⁵ Cf. Trebilcock, *ibid.* at 85-86; Fried, *ibid.* at 109-11 ("bad Samaritan"); *The Port Caledonia and the Anna*, [1903] P. 184 (tug demanding £1000 to tow drifting ship).

⁶ *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971); cf. *Cdn. Energy Services Ltd. v. Gotaverken Energy Systems Ltd.* (1989), 36 C.L.R. 238 (B.C.S.C.).

paradigm of unacceptable exploitation. While *A*'s proposal does not appear to worsen *B*'s options, *A* takes advantage of a situation in which *B* arguably has no choice, to extract a price that seems excessive. Case 3 squarely raises the issue of economic duress. *A*'s proposal to breach its contract does not have the violently coercive quality of the Armed Robber's threat, nor does it seem as blatantly exploitative as the Tug's demand, yet it is wrongful, and it does put *B* in a difficult position. At the same time, the use of economic strength to extract favourable terms is not, as a general rule, impermissible in market societies.⁷ One of the central issues in economic duress is to articulate a standard for determining the boundary between acceptable and unacceptable use of economic power in commercial relationships. If this question can be answered, an equally important issue is to determine what effect an unacceptable proposal must have on *B* before we will say that *B* can avoid the agreement for duress.

III. Three Models of Contractual Duress

A. *The Overborne Will*

In English law, economic duress⁸ was first recognized as a distinct category for relief in *Pao On v. Lau Yiu*.⁹ The plaintiffs (the Paos) agreed to sell shares in a company (Shing On) to another company (Fu Chip) controlled by the defendants (the Laos). No cash was to change hands; the purchase price was to be made up of 4.2 million shares in Fu Chip, valued at \$2.50 per share. In addition, the Paos agreed not to sell these shares before 30 April 1974, one year after the closing date of the transaction. This agreement was referred to as the "main agreement". Recognizing that under

⁷ In a case where a farmer under threat of foreclosure executed a release in favour of a bank, and some years later alleged economic duress, the judge, allowing the bank's motion for summary judgment, put this point starkly: "In terms of the means employed [to obtain the agreement], the rest [of the farmer's case] is really a complaint against the fundamental principles of the free enterprise system — a system that the law, essentially at least, seeks to foster and to protect. The simple truth is that the law permits and indeed assists the mighty corporate lenders in this country to collect the loans that they make, and, subject only to insignificant exemption, to impose economic ruin upon their debtors in the process, without the least concern for any injury to their mental or physical wellbeing. If the law permits all of that, then it surely must permit the threat of all of that, and as well the demand, however, [sic] coarsely expressed, for equivalent security." *Burgers v. Canadian Imperial Bank of Commerce* (1995), 32 C.B.R. (3d) 64 (Ont.Gen.Div.) at 78. The farmer represented himself in this case, and Misener J., who considered the affidavit evidence on the motion carefully and at length, plainly regarded these comments as part of his explanation of the law to a layperson.

⁸ Indeed, relief for any form of duress other than physical threats was for many years somewhat limited in English law: see J. Dalzell, "Duress by Economic Pressure" (1942) 20 North Carolina L.Rev. 237, 341 at 241-46 [Dalzell]; M.P. Sindone, "The Doctrine of Economic Duress Part 2" (1996) 14 Aust. Bar Rev. 34, 114 at 38 [Sindone].

⁹ [1979] 3 All E.R. 65, (P.C.) [*Pao On* cited to All E.R.]. For the state of the English law of duress around the time *Pao On* was decided, see Sindone, *ibid.* at 47-50.

this agreement, the Paos were bearing all the risk of downward movement in the price of Fu Chip stock, the Paos and the Laus executed another agreement (the "subsidiary agreement"), in which the Laus agreed to repurchase the shares from the Paos on or before 30 April 1974 at \$2.50 per share. The Paos quickly realized that they were now prevented from obtaining any benefit if the Fu Chip stock rose in value, and they refused to close the main agreement unless the Laus agreed to substitute for the subsidiary agreement a proper indemnity, which would protect the Paos in case of a decline but would give them the benefit of an increase. The Laus were anxious to close the main agreement; they recognized that they could probably successfully sue the Paos for specific performance of the main agreement, but chose instead to renegotiate the subsidiary agreement. The trial judge found as a fact that no-one really expected the Fu Chip stock to fall in value, and that the Laus "were quite prepared to take a calculated risk."¹⁰ So a guarantee was executed, in which the Laos agreed to indemnify the Paos if the price of the stock fell below \$2.50 on 30 April 1974, and in which the Paos gave an indemnity in case they should sell their shares before that date, and also gave the Laos an option to purchase the shares if they fell below \$2.50. On the same day, the subsidiary agreement was cancelled. But on 30 April 1974, contrary to everyone's expectations, shares in Fu Chip were worth only \$.36. The Paos sued on the guarantee, and in defence the Laus relied on various grounds, including economic duress.

The Laus argued that the Paos' refusal to close the main agreement as scheduled amounted to duress. The Privy Council disagreed. Recognizing that a defence of economic duress might well exist in English law, the Board held that there was no factual basis for its application in this case. Lord Scarman made the following observations about the defence:

Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. ... [C]ommercial pressure is not enough. There must be present some factor 'which could in law be regarded as a coercion of his will so as to vitiate consent'. ... In determining whether there was a coercion of the will such that there was no true consent, it is material to enquire 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. All these matters are ... relevant in determining whether he acted voluntarily or not.¹¹

The Board later reiterated that the listed factors were "evidential" of whether there was true consent, and that the issue was whether there was "a coercion of will, which vitiates consent".¹²

¹⁰ *Pao On*, *ibid.* at 72 (Lord Scarman quoting the trial judge).

¹¹ *Ibid.* at 78.

¹² *Ibid.* at 79.

A few years later, in *Universe Tankships of Monrovia v. International Transport Workers' Federation*,¹³ the House of Lords both affirmed and cast doubt upon the approach of *Pao On*. The plaintiffs (Universe) were shipowners operating out of Liberia. The defendants (I.T.F.) were a federation of trade unions which had a policy of "blacking" ships flying under flags of convenience. When the plaintiff's ship, the *Universe Sentinel*, docked at Milford Haven, the I.T.F. presented its master a list of conditions that it had to comply with to obtain a certificate exempting from the "blacking" policy. Without this certificate, the ship was unable to get a tugboat, and was thus unable to continue its voyage. Universe and the I.T.F. entered several agreements, the essence of which was that Universe agreed to abide by certain conditions of employment and to pay the I.T.F. the total sum of \$80,000 U.S., consisting of \$71,720 as back pay for the ship's crew, \$1,800 as various entrance and membership fees for the crew, and \$6,480 as a contribution to the I.T.F.'s "Welfare Fund".¹⁴ Soon after, the ship was out of port, Universe sued the I.T.F., arguing that the \$80,000 had been paid under duress. By the time the case reached the House of Lords, Universe had abandoned its claims for all but the third component — the \$6,480 "Welfare Fund Contribution".

Although five speeches were delivered, only one deals with duress in any detail. Lord Scarman held that the claim of economic duress has two elements:

- (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted.¹⁵

The first element seems to be based on *Pao On*, but Lord Scarman went on to describe duress in terms quite different from the "overborne will":

Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him.¹⁶

Lord Scarman then reiterated some of the factors mentioned in *Pao On* as evidentiary of duress (e.g., "protest, ... the absence of independent advice"), but he added:

But none of these evidentiary matters goes to the essence of duress. The victim's silence will not assist the bully, if the lack of any practicable choice but to submit is proved.¹⁷

¹³ [1982] 2 All E.R. 67 (H.L.) [*Universe Tankships*].

¹⁴ *Ibid.* at 71-73.

¹⁵ *Ibid.* at 88.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

Thus, while not expressly repudiating the "overborne will" approach, Lord Scarman enunciated a test for duress that focussed attention on the features of the interaction between the parties.¹⁸

Since there was no real dispute that *Universe* had no practical alternative to submit to the I.T.F.'s demand, the case turned on whether that demand was legitimate. The House split 3-2 on this point, Lord Diplock, Lord Cross and Lord Russell holding that the demands for a payment to the I.T.F.'s Welfare Fund fell outside what public policy regarded as legitimate demands in industrial disputes, while Lord Scarman and Lord Brandon holding that there was no real difference between this demand and the other demands made by the I.T.F. which, by this time, had been conceded to be legitimate.

The importance of *Universe Tankships* is that it shifts the focus from the effect of *A*'s demand on *B*'s volition to the legitimacy of *A*'s demand and its effect on *B*'s opportunities. As Lord Scarman says, duress is not a matter of rendering *B*'s actions involuntary, but of using illegitimate means to reduce *B*'s opportunities to the point where he or she has no choice but to comply with *A*'s demands. Subsequent cases show the English courts paying lip service to the notion of the "overborne will" while concerning themselves centrally with these two factors. Three examples will suffice. In *The Alev*¹⁹, the phrase "overborne ... will" was used,²⁰ but the central holding was that the plaintiff's refusal to unload cargo which the defendants had a legal right to receive and over which plaintiffs had no lien was an illegitimate threat amounting to duress because, in the circumstances, the defendants had no real alternative to getting the cargo unloaded.²¹ In *Dimskal Shipping Co. S.A. v. International Transport Workers Federation (The "Evia Luck")*²², which is factually very similar to *Universe Tankships*, Lord Goff said, "it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterized as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract."²³ Far from relying on the theory of the overborne will, this formulation implicitly repudiates it by recognizing that *B*'s will is engaged rather than overborne by *A*'s threat. Thus, *CTN Cash and Carry v. Gallagher*²⁴ dispenses altogether with the "overborne will" and focuses on the legitimacy of a lawful proposal to withdraw credit facilities, made with the bona fide belief that the debtor

¹⁸ The House of Lords was not bound by *Pao On*, but would no doubt have been reluctant not to follow it.

¹⁹ *Vantage National Corporation v. Suhail and Sand Bahwan Building Materials LLC (The "Alev")*, [1989] 1 Lloyd's Rep. 138 (Q.B.).

²⁰ *Ibid.* at 145.

²¹ *Ibid.* at 146; see also *Atlas Express Ltd. v. Kafco (Importers and Distributors) Ltd.*, [1989] Q.B. 833.

²² [1992] 2 A.C. 152 (H.L.).

²³ *Ibid.* at 165.

²⁴ [1994] 4 All E.R. 714 (C.A.).

owed other funds.

The theory of the overborne will can be criticized on two related grounds. First, the theory suggests that the plea of duress cannot succeed unless *B* has been reduced to a state of near automatism, that is, unless *A*'s actions virtually deprive *B* of the power to act voluntarily.²⁵ The focus of the theory is on *B*'s subjective state of mind,²⁶ rather than on the legal nature of the interaction between *A* and *B*. But even the most intense forms of duress will rarely deprive the victim of his or her volition; the Armed Robber's victim hands over her money no less willingly than Universe Tankships, the captain of the Foundering Ship no less eagerly than the owners of the *Alev*.²⁷ The theory of the overborne will seems either to restrict the scope of duress to a very small group of situations, or to be aimed at the wrong target.²⁸

²⁵ E.g., *The Siboen and the Sibotre*, [1976] Lloyd's Rep. 293 at 336 ("the Court must in every case at least be satisfied that the consent of the other party [*B*] was overborne by compulsion so as to deprive him of any animus contrahendi."); *Century 21 Campbell Munro Ltd. v. S & G Estates Ltd.* (1992), 89 D.L.R. (4th) 413 (Ont. Div. Ct.) at 417-418 ("Economic pressure does not amount to duress unless there is a coercion of the will to the point that the payment or contract was not a voluntary act").

²⁶ Cf. *Barton v. Armstrong*, *supra* note 3 at 119. See P.S. Atiyah, "Economic duress and the 'overborne will'" (1982) 98 L.Q.R. 197 at 202 [Atiyah]. The theory of the overborne will "is surely bound to divert attention into quite irrelevant inquiries into the psychological motivations of the party pleading duress. A related point is that if *B* really is deprived of volition, the contract should be void rather than voidable. If the contract were void, then *B* could not affirm it; yet it is generally accepted that a contract entered into under duress can be affirmed by the weaker party. *Ibid.* at 201. M.H. Ogilvie, "Wrongfulness, Rights and Economic Duress" (1984) 16 Ottawa L.Rev. 1 at 2-6 (traces the links between the theory of the overborne will and the will theory of contractual obligations: since the latter has been superseded, she argues, the former should be abandoned; [Ogilvie, "Wrongfulness"]; see also M.H. Ogilvie, "Economic Duress in Contract: Departure, Detour or Dead-End?" (2000) 34 Can. Bus. L.J. 194 [Ogilvie, "Economic Duress"].

²⁷ Atiyah, *supra* note 26 at 200 (original emphasis); ("A victim of duress *does* normally know what he is doing, *does* choose to submit, and *does* intend to do so"). See also Bigwood, *supra* note 2 at 207-208; Sindone, *supra* note 7 at 56-59; Ogilvie, "Wrongfulness", *supra* note 25 at 19; Trebilcock, *supra* note 3 at 84 (noting that the Armed Robber's victim makes a decision that is "perfectly rational, deliberate, and fully informed").

²⁸ A similar issue has arisen with regard to the defence of duress in the criminal law. Should duress be understood as vitiating the accused's will by negating the mental element for the offence, or as altering the accused's reasonable perceptions and opportunities to the point where he or she should not be held liable, even though he or she has committed the actus reus with mens rea? The first answer was given in *Paquette v. The Queen*, [1977] 2 S.C.R. 189; the second in *D.P.P. v. Lynch*, [1975] A.C. 653 at 670-678 per Lord Morris, at 679-80 per Lord Wilberforce, at 694-95 per Lord Simon (dissenting on other grounds), and at 710 per Lord Edmund-Davies, and in *R. v. Hibbert*, [1995] 2 S.C.R. 973. (In *R. v. Howe*, [1987] 1 All E.R. 771, the House of Lords overruled *Lynch*, but not on this point.) The Supreme Court of Canada's latest pronouncement on the defence of duress is on the surface consistent with *Hibbert*, but emphasizes an affinity between the defence of duress and physical involuntariness: see *R. v. Ruzic* (2001), 153 C.C.C. (3d) 1 at paras. 42-47. On the link between

Second, the notion of the overborne will does not seem to do any work in any of the actual or hypothetical cases discussed so far. In *Pao On*, it is sufficient to observe that although the Laus' threat was wrongful, the Paos had a reasonable alternative to submitting to it.²⁹ In *Universe Tankships*, the House recognized that Universe's behaviour was willed, or volitional, but held that the combination of I.T.F.'s illegitimate threat and Universe's lack of a reasonable alternative relieved Universe of responsibility for the bargain it had made. In neither case is it necessary to determine whether the victim was deprived of volition. Similarly, in a hypothetical case such as the Armed Robber, it is surely not necessary for the victim to show that she acted without volition in handing over her money; what is significant is the Robber's influence on her rights, interests, and opportunities.³⁰

B. Economic Duress as an Instance of Unequal Bargaining Power

In *Lloyds Bank v. Bundy*,³¹ Lord Denning considered whether several categories of contractual relief had any common element. He noted the high value assigned to freedom of contract in English law, in particular to reluctance of the courts to set aside contracts even in favour of the poorest parties;³² but he also noted that there were many cases in which contracts had been set aside. In particular, duress of goods,³³ unconscionable

duress in criminal law and economic duress in contract, see also Ross McKeand, "Economic Duress: Wearing the Clothes of Unconscionable Conduct" (2001) 17 J. Contract Law 1 at 5-9 [McKeand].

²⁹ As Atiyah, *supra* note 26 at 201 pointed out, the existence of a reasonable alternative would be irrelevant if the theory of the overborne will were taken seriously: if B's will were overborne, he or she would be incapable of pursuing a reasonable alternative.

³⁰ For a more sympathetic reading of the overborne will theory, see Stephen A. Smith, "Contracting Under Pressure: A Theory of Duress" (1997) 56 Cambridge L.J. 343 at 365 (Smith takes the language of the test as an "overdramatic" reference to situations where true legal consent was lacking, not as describing situations where B was reduced to an automaton) [Smith].

³¹ [1975] Q.B. 326 (C.A.).

³² *Ibid.* at 336 ("Take the case of the poor man who is homeless. He agreed to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows from the bank a high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere").

³³ It was held in *Skeate v. Beale* (1841), 113 E.R. 688 that duress of goods was not a ground for avoidance; but it was held in *Astley v. Reynolds* (1731), 93 E.R. 939 that the plaintiff could recover excess interest paid to recover pledged goods, at least where an action in trover was inadequate. As Waddams, *supra* note 1 at ¶502 points out, these two rules do not fit together very well, and the contradiction has been resolved in favour of allowing duress of goods as a ground for avoidance. *McKenzie v. Bank of Montreal* (1975), 55 D.L.R. (3d) 641 (Ont.H.C.J.), aff'd (1976), 70 D.L.R. (3d) 113 (Ont.C.A.) might be seen in part as a case of duress of goods. The defendant bank wrongfully seized the plaintiff's car and then extracted from her a mortgage to secure the debts of a man to whom she was emotionally attached. The Court held that the mortgage was unconscionable and refused to enforce it.

transactions,³⁴ undue influence,³⁵ undue pressure,³⁶ and salvage agreements³⁷ had all previously been identified as independent grounds for relief. In Lord Denning's view, these disparate categories should be united under the common heading "inequality of bargaining power":

By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs and desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other.³⁸

The elements of this ground of relief would seem to be inequality of bargaining power between *A* and *B*; some form of undue pressure exerted by *A* on *B*; and a grossly unfair contract.³⁹

Economic duress could be seen as an instance of the general doctrine of unconscionability based on inequality of bargaining power. Consider the *Foundering Ship*. The element of inequality would be satisfied by the fact that the *Tug* can just steam away, while the *Ship* has no realistic alternative to making an agreement. The court's willingness to enforce reasonable terms in such cases would indicate that only gross unfairness would justify relief.

³⁴ *Fry v. Lane* (1888), 40 Ch. D. 312; *Harry v. Kreutzer* (1978), 95 D.L.R. (3d) 231 (B.C.C.A.).

³⁵ *Allcard v. Skinner* (1887), 36 Ch.D. 145; *MacKay v. Bank of Nova Scotia* (1994), 20 O.R. (3d) 698 (Gen.Div.).

³⁶ *Williams v. Bayley* (1866), L.R. 1 H.L. 200. As Waddams, *supra* note 1 at ¶516 points out, the category of undue pressure is generally treated as a branch of undue influence but is "akin to duress", in that the parties are not in a special relationship so that the results tend to turn on the acceptability of *A*'s proposal, as in *Williams v. Bayley* itself. Cf. *Hatuk v. Chretien* (1960), 31 W.W.R. 130 (B.C.S.C.), where the court refused to order specific performance when the plaintiff's threat to foreclose on a mechanic's lien led the "illiterate ... stupid ... intensely ignorant" defendants to agree to sell their land at a significant undervalue. The unacceptability of the plaintiff's proposal here presumably came from his knowledge that the defendants would not be sufficiently aware of their alternatives to agreeing to sell the land.

³⁷ *The Port Caledonia and the Anna*, *supra* note 4.

³⁸ *Lloyd's Bank*, *supra* note 31 at 339.

³⁹ Lord Denning spoke for himself on this point. Sir Eric Sachs, Cains L.J. concurring, treated the case as one of undue influence and expressed no opinion about Lord Denning's broader claims: *Lloyd's Bank*, *supra* note 30 at 347. The House of Lords repudiated Lord Denning's approach in *National Westminster Bank v. Morgan*, [1985] A.C. 686 at 707-708 (H.L.) [*National Westminster Bank*], but Canadian courts have been more receptive; see, for instance, *Bertolo v. Bank of Montreal* (1987), 57 O.R. (2d) 577 at 583 (C.A.). For recent contributions that are somewhat in the spirit of Lord Denning's proposal, though they by no means adopt it outright, see D. Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 L.Q.R. 479; M.D.J. Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.Rev. 509; Ogilvie, "Economic Duress", *supra* note 26 at 227-28.

Or consider Business Compulsion. Inequality of bargaining power could be demonstrated by *B*'s need to fulfill its contract with *C*, and undue pressure by *A*'s excessive demand. It may be that *B*'s claim of unconscionability would ultimately fail because the court might be reluctant to relieve a commercial entity on the same basis as "Old Mr. Bundy". But it is arguable that Lord Denning's approach at least provides suitable tools for analyzing claims of economic duress.

But there are two difficulties with Lord Denning's approach. First, what separates the various categories of relief may be as perspicuous as what they have in common, and the attempt to join them together may blur these differences. A crucial difference between duress and unconscionability is the fairness of the transaction: substantive unfairness is the hallmark of unconscionability, whereas an agreement entered into under duress should be unenforceable whether or not it is substantively fair.⁴⁰ Lord Denning's formulation implies that agreements entered into under duress will not be set aside if they are substantively fair; but because a contract made under duress is not truly autonomous, this cannot be the correct result. A crucial difference between undue influence and duress is the effect of *A* on *B*'s will: what is objectionable about undue influence is that *A* is able to influence *B*'s decisions by making it appear that an action taken against *B*'s interests really promotes those interests, whereas when *B* is under duress, he or she is likely to be under no illusion about whose interests are being promoted.⁴¹ Thus, while inequality of bargaining power may well be a common element in all of these situations, the elements that distinguish them may be equally important. Second, the concept of inequality of bargaining power may be too broad. It is a rare transaction indeed in which the two parties face each other on a strictly equal footing; it is almost always the case that one party has more alternatives or better lawyers or more wealth than the other. There must be something other than unequal bargaining power that makes the transactions that Lord Denning is concerned with objectionable; and so it is important to understand, for each of them, just what the additional objectionable feature is. The principled approach to duress, to which I now turn, proposes a set of features for this purpose.

C. *The Principled Approach*

A third approach to economic duress emphasizes its similarity to paradigm cases of physical duress such as the Armed Robber. I will call this

⁴⁰ Sindone, *supra* note 8 at 36. As a practical matter, most agreements entered into under duress are substantively unfair, but it is the duress itself, not the substantive unfairness, that undermines *B*'s power to contract. See *Restatement (Second) of Contracts* (St. Paul: American Law Institute Publishing, 1979), section 176, comment a ("the court will not inquire into the fairness of the resulting exchange" where *A*'s proposal is independently illegal).

⁴¹ Sindone, *supra* note 8 at 35-36; see also *National Westminster Bank*, *supra* note 39 at 704-707.

approach "principled" because it focuses on features of the interaction between *A* and *B* that are relevant to the reasons for and against enforcement of the contract between them. Several scholars have advanced theories of duress on which the principled approach draws: Wertheimer,⁴² Dalzell,⁴³ Bigwood,⁴⁴ Ogilvie,⁴⁵ Smith,⁴⁶ and I.⁴⁷ While these scholars by no means hold identical positions, all of them are attempting to understand the defence of economic duress with reference to the acceptability of *A*'s proposal and its effect on *B*'s opportunities rather than in terms of the overborne will or of bargaining power *per se*.

The principled approach has three characteristics that should be emphasized at the outset. First, duress is treated normatively: the question of whether *B* acted under duress is inseparable from the question of what *A*'s and *B*'s rights were in the circumstances. Second, for the formal approach the important empirical fact about *B* is not whether his or her will was overborne, but whether his or her opportunities were meaningfully impaired by *A*'s actions. Third, the formal approach does not attempt to encompass all potential grounds of contractual relief; it is concerned with a particular class of situations, leaving open the possibility that other situations may be handled with other legal tools (such as unconscionability or undue influence).

The elements of the principled approach are as follows. The first question is to determine whether *A*'s proposal to *B* is a threat or an offer. The philosophical literature contains numerous attempts to distinguish threats from offers. There is general agreement that a threat contracts *B*'s opportunities while an offer expands them, but there is little agreement about the baseline from which the expansion or contraction of opportunities should

⁴² But see Byle, *supra* note 4; Barton v. Armstrong, *supra* note 4.

⁴³ Dalzell, *supra* note 8.

⁴⁴ Bigwood, *supra* note 3.

⁴⁵ Ogilvie, "Wrongfulness", *supra* note 26.

⁴⁶ Smith, *supra* note 30.

⁴⁷ Stewart, "Formal Approach", *supra* note 3.

⁴⁸ R. Nozick, "Coercion" in S. Morgenbesser, P. Suppes, and M. White, eds, *Philosophy, Science and Method: Essays in Honor of Ernest Nagel* (New York: St. Martin's Press, 1969) [Nozick], proposes a complex empirical baseline in which *A*'s proposal is a threat if it worsens *B*'s opportunities as compared to the normal or morally expected course of events. J. Feinberg, *Harm to Self* (New York: Oxford University Press, 1986) at 227-28 proposes an empirical baseline in which *A*'s proposal is a threat if it worsens *B*'s opportunities as compared to a statistically normal set of opportunities. Trebilcock, *supra* note 4 at 93-96 suggests a market-oriented baseline, where *A*'s proposal would be coercive if *A* exploited a situational monopoly to extract a price from *B* that was uncompetitive or at least violated *A*'s own reference terms. Wertheimer, *supra* note 42 at 217-21, suggests that *A*'s proposal is coercive if it violates *B*'s moral rights. For further discussion of these and other baselines, see Stewart, "Formal Approach", *supra* note 3 at 214-40; Bigwood, *supra* note 3 at 226-38; Trebilcock, *supra* note 4 at 78-102; Wertheimer, *supra* note 42 at 202-41; Feinberg, *supra*, at 189-268; Smith, *supra* note 30 at 346

be assessed.⁴⁸ The principled approach adopts a legal baseline: if *A*'s proposal is legally wrongful, it reduces *B*'s opportunities from the relevant normative perspective. If *A*'s proposal is not legally wrongful, it may well be that it reduces *B*'s opportunities with respect to some empirical baseline or some moral sense of what *B* is entitled to, but from a legal perspective, a legally permissible proposal from *A* does not reduce *B*'s opportunities, because it does not take away anything that *B* was legally entitled to.

The normative reason for adopting a legal baseline for a legal theory of duress is relatively straightforward. If rights are the normatively relevant features of a legal system, then they must be adequately protected by that system. Legally wrongful proposals must then be recognized as threats; if they were not, then *B* could be bound by a promise extracted under a threat to violate his or her legal rights, and this result would negate the right. The appropriate remedy where a contract is entered into under such a threat is to permit *B* to avoid the contract.

This narrow construal of "wrongful" may seem harsh. It excludes, for instance, the *Foundering Ship*, where *A*'s proposal not only expands *B*'s opportunities, but does so in a way that seems quite permissible.⁴⁹ But the principled approach cannot recognize legally permissible proposals as threats: If enforcing a contract where *A* violated *B*'s rights denies *B*'s right, then, equally, it would seem that refusing to enforce a contract where *A* did not act wrongfully denies *A*'s right.

But the principled approach can recognize a second category of proposals which, though not wrongful and therefore not threats, are sufficiently objectionable to justify some relief for *B*. The focus on *A*'s and *B*'s rights suggests the proper route for identifying this type of proposal. The court may be justified in refusing to permit *A* the full exercise of his or her right if *A*'s proposal was not best understood as an exercise of rights but as a response to necessity.⁵⁰ Smith provides a persuasive account along these lines. Recognizing that they are not cases where wrongful pressure stems

⁴⁹ I assume that the *Tug* has no duty to rescue the *Ship*.

⁵⁰ Stewart, "Formal Approach", *supra* note 3 at 184-85, 188-94; Bigwood, *supra* note 3 at 216-26. Dalzell, *supra* note 7 at 364, would have included in this category "any threat to do an act which, though quite lawful by legal standards, is yet an abuse of the powers of the party making the treat; that is, any threat the purpose of which was not to achieve the end for which the right, power, or privilege was given." See also Wertheimer, *supra* note 42 at 41-44. Dalzell, *supra* note 8 at 366, would also have included "a threat to violate the standards of decent conduct in the community." This extension is problematic for the principled approach unless the "standards of decent conduct" can be shown to constitute a proper limit on *A*'s exercise of his or her rights. Ogilvie, "Wrongfulness", *supra* note 26 at 8-13, expresses doubts about the appropriateness of using "moral culpability" as a test for the impropriety of *A*'s proposal, and suggests instead, *ibid.* at 28-29, that an otherwise lawful proposal which "drives the victim into dire economic straits" and thus "deprives him of his basic right to earn his living as he might wish" should count as a wrongful threat for the purposes of duress.

from *A*, he proposes that they be understood as cases where *B* had "no choice" but to enter the contract:

The existence of pressure makes a decision to enter a contract unfree if it (1) leaves [*B*] with "no choice and (2) was operative in the decision-making process. [*B*] has no choice, in the relevant sense, when the only alternatives to entering the contract, including doing nothing, are undesirable...⁵¹

This account might at first glance seem to enable *B* to escape his or her contractual obligations rather easily; but Smith controls the scope of this category by making the requirement that pressure be operative quite stringent. *B* is entitled to relief only if the pressure was the but-for cause of the contract.⁵² Furthermore, *B*'s relief is limited to obtaining fair terms.⁵³ *B* is not entitled to avoid the contract altogether because it is presumed, "absent evidence to show that [*B*] had a reason not to contract with [*A*]," that if the contract was a fair one, the pressure was not the but-for cause of *B*'s entering it.⁵⁴ The appropriate remedy here is to impose a reasonable price on the transaction, and, as Smith notes, this is what the courts have actually done in situations resembling the *Foundering Ship*.⁵⁵ The principled approach thus has two categories of improper proposals: threats (legally wrongful proposals) and objectionable proposals (legally permissible proposals whose effects may be properly limited).⁵⁶

Assuming that *A*'s proposal is improper in one of these two senses, the principled approach then asks whether *B* has any reasonable alternative to acceding to *A*'s proposal. If *B* can realistically respond by laughing off, or seeking a legal remedy for, *A*'s threat, then *B* is not acting under duress, and should not be able to avoid the bargain by pleading duress. On the other hand, if *B* has no reasonable option other than submitting to *A*'s demand, then *B* is acting under duress.⁵⁷

⁵¹ Smith, *supra* note 30 at 361.

⁵² *Ibid.* at 364.

⁵³ *Ibid.* at 365.

⁵⁴ *Ibid.* at 366.

⁵⁵ In *The Port Caledonia and the Anna*, *supra* note 4, the court reduced the towing ship's fee from £1000 to £200. See also *Post v. Jones*, 60 U.S. 150 (1856).

⁵⁶ See Ogilvie, "Economic Duress", *supra* note 26 at 222-26, for some pertinent questions about the difficulty of applying a standard of this sort in practice.

⁵⁷ For discussions of what can count as a reasonable alternative in various factual situations, see Dalzell, *supra* note 7 at 367-82; Bigwood, *supra* note 3 at 263-69. Sindone, *supra* note 8 at 130-32, treats the presence or absence of a reasonable alternative as evidentiary of duress. I think this approach is mistaken. While it may be difficult to determine whether *B* had a reasonable alternative in any given case, the absence of such an alternative should be thought of as an element of duress, because if *B* has a reasonable alternative, *A*'s improper proposal does not have the impact on *B*'s opportunities required to deprive *B*'s conduct of its normative significance as an expression of *B*'s autonomy.

The English theory of the overborne will was perhaps trying to capture something like this idea of having no reasonable alternative, but the language of that theory is infelicitous at best. *B*'s problem is not that he or she acts without any real will, like an automaton or a person subject to undue influence; indeed, *B* may be entirely rational and completely competent in choosing to submit to *A*'s demand. *B*'s problem is simply that his or her freedom of action has been wrongfully reduced, and this problem has little if anything to do with the state of his or her will.

The final element of the principled approach concerns *B*'s behaviour once the pressure has been removed. At this point, *A* and *B* have a contract from which *B* is permitted to get some relief. But *B* may, on reflection, conclude that the agreement is not such a bad deal after all, and may choose to abide by its terms. *B* may thus indicate expressly or by his or her conduct that he or she has chosen not to avoid the contract. While the circumstances under which *B* is alleged to have ratified the agreement should always be examined with care, ratification must be a possibility. The contract is not void *ab initio*, because there is no reason to assume that *A*'s proposal did not indicate a genuine exercise of *A*'s capacity as a bearer of rights. Where *A*'s proposal was wrongful, the contract is voidable at *B*'s option, but can also be ratified at *B*'s option; where *A*'s proposal was objectionable in the more limited sense relevant to the Foundering Ship, *B* may again ratify the contract, or (more likely) seek the appropriate relief (imposition of fair terms).

Under the principled approach, the Armed Robber is of course a case of duress, not because the victim's will was overborne, but because the Robber's proposal was egregiously wrongful and because the victim had no reasonable choice but to comply. But the principled approach treats Business Compulsion with the same set of tools: *A*'s proposal to breach its contract with *B*, though neither criminal nor tortious, was nonetheless wrongful, because it was a threat to breach a valid contract.⁵⁸ Whether *B* had a reasonable alternative will always be a difficult question in cases of alleged economic duress, and cannot be answered in general terms. In Business Compulsion, it may seem somewhat unrealistic to think that an action against *A* could be a fully adequate remedy for *B*'s loss of profits and possible future association with *C*; but that will be an issue to be determined on the particular facts of every case resembling Business Compulsion.⁵⁹ In some cases, such

⁵⁸ Stewart, "Formal Approach", *supra* note 3 at 186; Smith, *supra* note 30 at 351.

⁵⁹ In particular, not every proposed contract modification will amount to a threat of breach, because some proposed contract modifications are just starting points for negotiations while others may spring from problems in performance that would, if tested by legal action, amount to defences. Furthermore, not every threatened breach of contract will amount to duress, because in some cases it will be reasonable for *B* to rely on his or her legal remedies if *A* does carry through with the breach. See also Stewart, "Formal Approach", *supra* note 3 at 186; S.M. Waddams, "Restitution As Part of Contract Law", in Andrew Burrows, ed., *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 197 at 198-203; Bigwod,

as *Pao On*, legal action will be a reasonable alternative, while in others, such as *The Alev*, it will not. Finally, the Foundering Ship is a case of duress because *A*, though not making a wrongful threat, takes advantage of a situation where *B* cannot effectively exercise his or her rights, because his or her choices are so limited; but the proper remedy in the Foundering Ship is not to permit *B* to avoid the contract, but to impose a reasonable price on the transaction. To uphold the bargain in its full severity would be to assert that *B* could make an autonomous choice even where he or she had no alternatives; but to relieve *B* entirely would be to imply that *A*'s initial proposal was wrongful. Thus, the principled approach to duress directs attention to a more relevant set of normative questions — the rights of *A* and *B* and the opportunities reasonably available to *B* — than the theory of the overborne will.

IV. *Economic Duress in Canadian Law*

In the Canadian cases, as in the English, allegations of economic pressure are far more common than allegations of physical threats.⁶⁰ As I have argued, the rights-based principled approach framework is just as applicable to economic duress as to physical threats of violence. In this part of the paper, I discuss Canadian cases in which economic duress has been pleaded. The discussion shows that in some cases the theory of the overborne will, often in a particularly inflexible and implausible version, has taken hold; while in other cases, the theory of the overborne will has been paid lip-service but has done no real work. The principled, or rights-based, approach would provide a more satisfactory explanation of the result in each case; and there are indications in the case law that the deficiencies of the "overborne will" approach are being recognized.

A. *The Rigidification of the "Overborne Will" Approach*

Not long after *Pao On* was decided, the "overborne will" approach was adopted, without much discussion, by Canadian courts; but the House of Lords' implicit rejection of the "overborne will" in *Universal Tankships* has had much less impact. Furthermore, the "evidential matters" referred to in *Pao On* and *Universe Tankships*⁶¹ have become, in the eyes of some

supra note 3 at 238-51; Sindone, *supra* note 8 at 125-28; Smith, *supra* note 30 at 351-52. But sometimes a threat to breach a contract can be very significant. Dalzell, *supra* note 8 at 259, after discussing a series of cases in which a threat to breach a contract had not been recognized as giving rise to a claim of duress, observed that these cases "admit that a wrong is threatened, yet deny the victim an efficient protection against that wrong, and thus have the effect of denying him all remedy". Dalzell also noted at p. 263 that a threat to breach contractual obligations can, under some circumstances, amount to "a gun pointed at the heart of ... [a] business ... the remedy of damages is about as satisfactory after the business is dead, as it would be after the pistol had been discharged and the man was dead".

⁶⁰ *Pao On*, *supra* note 9 at 79; *Universe Tankships*, *supra* note 13 at 88.

Canadian judges, a rigid test for the presence of duress. This rigidity is particularly unfortunate, because it may make it more difficult for Canadian judges to move away from the overborne will approach than their English and Commonwealth colleagues.

Pao On has been endorsed in several cases, including *Stott v. Merit Investment Corp.*⁶² and *Gordon v. Roebuck*,⁶³ which will be discussed below. A particularly clear instance of adoption and rigid application of *Pao On* is found in *Roenisch v. Bangs*.⁶⁴ Harold Roenisch, Sr. had lent Sheep Creek, a ranch controlled by his son Harold Roenisch, Jr., certain monies. In early 1987, the father decided that it would be necessary to obtain security for these monies. In July 1987, his lawyer demanded payments of \$702,000 and \$42,000 from the son; the trial judge found that these demands were made "as a tool to persuade Harold Jr. to have Sheep Creek secure Harold Sr.'s loan."⁶⁵ Shortly thereafter, the son needed funds to finalize a divorce settlement, but the trial judge found that he obtained these funds by mortgaging the Sheep Creek property. The son also alleged that his father had pressured him in various ways, but the trial judge found that the son "was able to stand up to his father on various other occasions" at around this time.⁶⁶ The father obtained a debenture from Sheep Creek on 22 December 1987. The trial judge was satisfied that the son obtained independent legal advice before signing the debenture, indeed that his lawyer advised him not to sign it.⁶⁷ The father demanded payment of the debenture in June 1988 and, when no payment was forthcoming, sued to enforce it in August 1988. The son asserted, among other defences, that the debenture had been executed under duress.

The trial judge rejected this allegation, and it must be said that the factual basis for the duress claim was somewhat thin. But what is significant about the case for present purposes is that the trial judge treated the evidentiary factors from *Pao On* as elements of a rigid test. After quoting extensively from *Pao On*, he treated each of the following four factors as an element that

⁶¹ (1982), 135 D.L.R. (3d) 1, [1982] 1 S.C.R. 726 [hereinafter *Lister* 1982 cited to D.L.R.], revg (1979), 105 D.L.R. (3d) 684, 27 O.R. (2d) 168 (C.A.) [hereinafter *Lister* 1979 cited to D.L.R.], which revd (1978), 85 D.L.R. (3d) 321, 19 O.R. (2d) 380 (H.C.) [hereinafter *Lister* 1978 cited to D.L.R.].

⁶² (1988), 48 D.L.R. (4th) 288 (Ont.C.A.), leave to appeal refused (1988), 63 O.R. (2d) x (S.C.C.) [*Stott*].

⁶³ (1989), 64 D.L.R. (4th) 568, (H.C.J.), [*Gordon* 1989], rev'd in part (1992), 9 O.R. (3d) 1 (C.A.) [*Gordon* 1992].

⁶⁴ (1993), 8 Alta.L.R. (3d) 148 (Q.B.).

⁶⁵ *Ibid.* at 157.

⁶⁶ *Ibid.* at 158. These other occasions included persuading his father to replace a damaged truck motor and refusing to agree to allow his eldest daughter to live with Harold Sr.

⁶⁷ *Ibid.* at 158. Harold Jr.'s lawyer testified that she told him, "... You don't have to sign anything — I clearly recall saying that to him — You don't have to sign any of these documents. And he said, No, no, I've given considerable thought; I'm not ready to start world war four — those were his exact words. ..."

must be present in order for the claim of duress to be made out:⁶⁸

- 1) Did the person alleged to have been coerced, protest? ...
- 2) Did the person alleged to have been coerced, have an alternate course of action, such as an adequate legal remedy? ...
- 3) Did the person alleged to have been coerced, have independent advice? ...
- 4) Did the person alleged to have been coerced, after entering into the contract, take steps to avoid it?⁶⁹

Having answered the first question in the negative, the trial judge held that there was no need to consider the other elements; though he found in the alternative that they were not present either.⁷⁰ The son had made some complaints about the debenture, but had not protested to the father; he had the reasonable alternative of not signing the document; he had been independently advised; and far from avoiding the contract, he "he signed corporate revival documents for Sheep Creek on February 18, 1988, so that the Debenture could be registered."⁷¹

It is submitted that this approach is mistaken. Even if the "overborne will" theory of *Pao On* is taken to be the correct approach, the four factors should be considered together as evidence of duress, not as separate elements of duress; and, furthermore, the "overborne will" approach is flawed and is no longer followed in England. It is submitted that a more logical approach to the fact situation in *Roensch* would be to ask whether the father's conduct was wrongful in any way; if so, whether the son had any alternative to submitting to the father's demand; and if so, whether the son affirmed the agreement by his conduct. Although the trial judge's findings in *Roensch* imply that none of these elements was present, it is notable that he never considered the question of whether the father's conduct was wrongful or objectionable in some other relevant way.⁷² Whether the trial judge's references to "what may appear to be overbearing pressure exerted by Harold

⁶⁸ Contrast *Byle*, *supra* note 4 at 653 (the four factors from *Pao On* are "matters material to inquire into in order to determine whether there was a coercion of will"). In *Gordon* 1992, *supra* note 61, at 3-7, McKinlay J.A. implicitly treats the four factors as evidential of duress, but in the event finds that all were present on the facts of the case.

⁶⁹ *Roensch*, *supra* note 64 at 161-62.

⁷⁰ *Ibid.* at 162 (having found that Harold Jr. did not protest, Rawlins J. said, "At this point it is unnecessary to look at the other elements of duress").

⁷¹ *Ibid.*

⁷² The case does nicely illustrate the differences between duress, undue influence, and unconscionability. Rawlins J.'s approach to the question of whether the father exerted undue influence over the son in executing the debenture focuses largely on the independent legal advice, *ibid.* at 165, which must have a relevance here that it does not have in duress; while his approach to the unconscionability of the debenture and of another document in the case deals with both the substantive fairness of the documents and with the son's cognitive ability to negotiate: *ibid.* at 173-75. In keeping with the idea that substantive unfairness is central to unconscionability, Rawlins J. adjusted the amount that the son owed the father under two

Sr.”⁷³ and to Harold Sr.’s “overbearing, harsh, unpleasant, and sometimes very cruel”⁷⁴ character might, under a different approach to duress, have led to a finding that the father’s conduct was wrongful, remains unknown.⁷⁵

Another element, apparently associated with the overborne will theory, has found its way into some Canadian duress cases. This is the suggestion that relief on the ground of duress is not available if *B* signed the contract intending to have it set aside immediately.⁷⁶ This requirement perhaps makes some sense if the defence of duress is available only where *B*’s volitional capacity has been reduced to a minimum. But it is antithetical to the principled approach, which is concerned less with *B*’s state of mind than with his or her objective situation — the nature of *A*’s proposal and the quality of *B*’s alternatives to compliance. According to the principled approach, an intention to have the contract set aside at the first opportunity might at worst amount to a belief (reasonable or not) that the elements of duress were present.

B. *Duress as a Branch of Unconscionability*

If *Roenisch v. Banks* conveniently illustrates how the “overborne will” theory has become excessively rigid, *Ronald Elwyn Lister v. Dunlop Canada Ltd.*⁷⁷ illustrates the conceptual difficulties of trying to encompass duress and unconscionability in one framework. The Listers had incorporated Lister Ltd. to operate as a franchisee of Dunlop Canada Ltd., and had given personal guarantees of Lister Ltd.’s debts to Dunlop. Mr. Lister was also personally a distributor of Chrysler “Autopar” parts and accessories. The franchise did not

related loan documents, one of which was unconscionable and one of which was not: *Ibid.* at 175-77.

⁷³ *Ibid.* at 161.

⁷⁴ *Ibid.* at 163.

⁷⁵ For other instances of Canadian courts treating the *Pao On* factors as elements of a rigid test, see *Lounsbury v. 712125 Ontario Ltd.*, [1998] O.J. No. 2595 (QL) (Gen.Div.) at ¶59; *Pioneer Canada Inc. v. Iroanyah*, [1990] O.J. No. 1374 (QL) (S.C.); *Victorov v. Davidson*, [1988] O.J. No. 190 (QL) (H.C.J.).

⁷⁶ See *Doull v. Doull*, [1995] O.J. No. 198 (QL) (Gen.Div.) at ¶56 (finding that *B* did not intend immediately to have the contract set aside); *Long v. Tucker*, [1985] B.C.J. No. 1337 (QL) at ¶11 (S.C.). In *Long*, this requirement is traced to *Maskell v. Horner*, [1915] 3 K.B. 106, a case which does not seem to support it. The plaintiff recovered monies pursuant to the defendant’s wrongful threat to seize his goods; the court, in determining that the payments were made involuntarily, was impressed by the fact that “the plaintiff ... never intended to forego his right to recover the sums paid, and ... he only paid because he knew that a refusal to pay would be immediately followed by seizure of his goods ...” *Ibid.* at 121 per Lord Reading C.J.

⁷⁷ Ogilvie, “Wrongfulness”, *supra* note 26, argued some years ago that the courts in both England and Canada were moving from the unhelpful “overborne will” theory of duress to a moral theory. Her prediction was correct for English law but only partially correct for Canadian law.

prosper, and when Lister Ltd's indebtedness to Dunlop had reached some \$127,000, Dunlop simultaneously demanded payment under a debenture and sent a receiver to seize Lister Ltd.'s assets. But "among the assets seized by the receiver ... was an inventory of Autopar automobile parts,"⁷⁸ which Lister owned personally, pursuant to his relationship with Chrysler, and Chrysler informed Dunlop that Chrysler considered itself a creditor of Lister in his personal capacity.⁷⁹ For reasons that are independent of this paper, the seizure of the assets, both Lister Ltd.'s and the Autopar inventory, was held to be wrongful by the trial judge and by the Supreme Court.

About two months later, Chrysler, Dunlop, and the Listers reached an agreement intended to resolve this situation. In essence, the agreement specified that the Listers would grant mortgages to Dunlop on certain properties, in exchange for Dunlop's not enforcing the Listers' personal guarantees of Lister Ltd.'s indebtedness. The Autopar inventory was to be returned to Chrysler, while Chrysler agreed to withdraw its petition for a receiving order against Lister personally. Subsequently, the Listers, hoping to avoid having to mortgage their property pursuant to the agreement, sued Dunlop on a number of grounds, including the assertion that the agreement intended to resolve the situation had been entered into under duress.

In assessing this claim at trial, Rutherford J. took as his starting point Lord Denning's suggestion that duress, unconscionability, unfair bargains, and so forth should all be swept unto the category of "inequality of bargaining power".⁸⁰ He then assessed the "climate of coercion"⁸¹ in which the Listers made the agreement as follows. First, there was a wrongful act by Dunlop:

At the time the agreement and mortgages in question were executed by the Listers, the Autopar inventory ... as well as all the assets of the corporate plaintiff, were being wrongfully detained ... on behalf of the defendant. As a consequence of the seizure of the Autopar inventory, Chrysler had commenced bankruptcy proceedings against Mr. Lister personally ...⁸²

Second, the Listers had no reasonable alternative but to enter into the agreement:

Counsel for the defendant argued that the Listers' obvious alternative at this point was to commence action for the recovery of the Autopar inventory (and/or the corporate assets) if they felt such had been wrongfully detained. However, I am satisfied that such a course was not a practical alternative; given the time generally required for such

⁷⁸ *Lister* 1978, *supra* note 61 at 325.

⁷⁹ *Ibid.* at 326.

⁸⁰ *Ibid.* at 345.

⁸¹ *Ibid.* at 349.

⁸² *Ibid.* at 347.

a determination to be made by the Courts, it is unlikely that personal bankruptcy could have been avoided in the interim by Mr. Lister.⁸³

The principled approach to duress suggests that the next question should be whether the Listers affirmed the agreement once the coercive pressure was released. Instead, following Lord Denning's approach, Rutherford J. investigated the question of whether the Listers were independently advised. His reasons show the difficulty of rationalizing the role of independent advice where duress is alleged:

... the situation in which the Listers found themselves left them no practical alternative but to agree to Dunlop's terms and it seems apparent that the presence of independent advice would do nothing to expand the choices open to them. However ... the function of independent advice is not, in my view, to cause the influence presumed to be inherent in the relationship to somehow disappear; its purpose is to assure that the "dependent" party makes an independent and informed judgment notwithstanding the presence or probable presence of such influence. ... And in the circumstances of this case, I would find that notwithstanding the pressure upon the Listers, they were able to make an independent and informed judgment in light of the advice they received.⁸⁴

Rutherford J. therefore refused to relieve the Listers on the ground of duress. He did, however, give judgment for Lister Ltd. and the Listers pursuant to other claims they had asserted against Dunlop.

It is submitted that Rutherford J.'s analysis shows the difficulty of treating duress and unconscionability as two branches of a larger ground of relief. Since unconscionability is crucially concerned with the substantive fairness of a bargain, the presence of independent advice may be relevant to the question of whether the bargain should be voidable. But since duress is crucially concerned with the availability of reasonable responses to a situation brought about by wrongful conduct or external pressure, the presence or absence of independent advice at the time the contract is made is irrelevant. Suppose a competent, responsible, and independent solicitor happens to be on hand when the Armed Robber threatens his victim, or when the Tug makes its agreement with the Foundering Ship. The solicitor will say to the victim, "Sign the contract." What else could he say? While the situation in *Lister* is less extreme, it is difficult to see how the Listers' ability to make an informed judgment is relevant to an agreement which the trial judge found they had no reasonable alternative to entering.

It may be argued that in a typical commercial transaction, the question of whether duress is present is much less clear-cut than in the Armed Robber. The line between legitimate and illegitimate pressure can be difficult to discern; the rights of the parties may not be clearly apparent when the

⁸³ *Ibid.*

⁸⁴ *Ibid.* at 349, original emphasis.

⁸⁵ *Ibid.* at 349.

agreement is made. Might not the advice of a solicitor be important in such situations? It is submitted that independent legal advice may have two functions in such cases, but that neither function makes the absence of independent legal advice an element of duress. First, legal advice may help *B* determine what his or her legal rights and obligations were when *A* exerted the pressure complained of; second, legal advice may help *B* determine whether he or she has any reasonable alternative to making the agreement. But the independent legal advice does not in itself change the legality of *A*'s conduct or the acceptability of *B*'s alternatives. Thus, while independent advice could be relevant to the element of affirmation, it could not be relevant to the first two elements of duress. In *Lister*, for instance, Rutherford J. noted that "prior to the execution of the mortgages, Mrs. Lister received further independent advice from ... another solicitor".⁸⁵ This further advice would be relevant to the question of whether refusing to carry out the coerced agreement would be feasible or reasonable, and thus to the question of whether it had been affirmed. But it has no bearing on the question of whether the agreement was entered into under duress in the first place.

Similarly, where *B* receives independent legal advice that is relevant to the existence of reasonable alternatives to submitting to *A*'s pressure, the advice does not in itself determine the nature of the pressure, or relieve it. If *A* has made a wrongful proposal to *B*, and *B* receives (correct) legal advice to the effect that a legal remedy against *A* would be ineffective, it would be harsh and unreasonable to say that *B* could not assert a duress claim. On the other hand, where there is a reasonable alternative, *ex hypothesi* the conditions for duress are not met. Thus, the presence or absence of independent legal advice is irrelevant to the question of whether *A*'s proposal was wrongful. Rutherford J. may well have reached the correct result in assessing the Listers' duress claim, but the route he took shows clearly that duress and unconscionability are separate grounds of relief and should not be mixed.⁸⁶

C. *Towards the Principled Approach?*

Recent Canadian cases in which economic duress has been pleaded illustrate that judges can and do work with a principled approach to duress.⁸⁷ Canadian judges generally purport to follow English jurisprudence on duress, in which the unhelpful phrase "coercion of the will" figures prominently, and in which duress is not always clearly distinguished from unconscionability. But I shall argue that the notion of "coercion of the will" does very little work in the Canadian case law, and that instead the cases are best understood in terms of the principled approach outlined above. In cases

⁸⁶ *Lister* 1979, *supra* note 61 at 693 (*Lister* was overturned on other grounds by the Ontario Court of Appeal, but the judgment at trial was restored by the Supreme Court of Canada. The appellate judgments did not disturb Rutherford J.'s holdings on duress. The Court of Appeal distinguished between unconscionability and duress, but did not discuss the significance of the distinction for the question of independent advice).

where it is alleged that a contract was made under duress, judges look for a wrongful act by *A* towards *B* and for *B*'s lack of a reasonable alternative. When both these conditions are met, the contract is voidable at *B*'s option.

In *Stott v. Merit Investment Corp.*,⁸⁸ the Ontario Court of Appeal moved slightly away from the English test and towards the principled approach outlined above. Stott was a salesman for Merit in 1979-1980, a time of large fluctuations in the price of gold. One of Stott's customers lost about \$66,000 U.S. on a transaction that would not have occurred but for an authorization by Stott's supervisor. The customer apparently could not pay, and Stott was expected to cover the loss. At a meeting on 29 January 1980, Stott signed an acknowledgment of his indebtedness to Merit. The trial judge described this meeting as follows:

*Stott stated that after reading the document he said to Kasman [Merit's national sales manager] that he did not think he should sign without legal advice. He said that Kasman replied: "You are probably right, but if you don't sign it won't go well with you at this firm and it would probably be very difficult for you to find employment in the industry." According to Stott, Kasman continued by saying that if he did sign, the company would hold him in high esteem and would open a trading account for him and in effect, that he would never, in the result, be called on to pay a cent.*⁸⁹

Merit's proposal combined the features of threat and offer: Merit threatened Stott with unpleasant consequences if he did not comply with their proposal, but promised him a benefit if he did comply.⁹⁰ Two and a half years later, Stott resigned from Merit and sued to recover the amount Merit had withheld from his commissions to go towards the payment of the loss.

The court used the following framework to analyze Stott's plea of duress:

The term "economic duress" as used in recent cases, particularly in England, is no more than a recognition that in our modern life the individual is subject to societal pressures which can be every bit as effective, if improperly used, as those flowing from threats of physical abuse. It is an expansion in kind but not class of practices that the law already recognizes as unacceptable such as those resulting from undue influence or from persons in authority. But not all pressure, economic or otherwise, is recognized as constituting duress. It must be a pressure which the law does not regard as legitimate

⁸⁷ (1988), 19 N.S.W.L.R. 40 (C.A.). For discussions of the Australian case law before and after *Crescendo Management*, see Sindone, *supra* note 8, Bigwood, *supra* note 3, and McKeand, *supra* note 28.

⁸⁸ *Supra* note 62.

⁸⁹ *Ibid.* at 292 (Finlayson J.A. quoting the trial judge).

⁹⁰ Nozick, *supra* note 47 at 449 (an armed robber proposes the following: "If you go to the movies, I'll give you \$10,000. If you don't go, I'll kill you"). Some writers on coercion have called this sort of proposal a "throffer": see M. Taylor, *Community, Anarchy, and Liberty* (Cambridge: Cambridge University Press, 1982) at 12.

and it must be applied to such a degree as to amount to "a coercion of the will", to use an expression found in English authorities, or it must place the party to whom the pressure is directed in a position where he has no "realistic alternative" but to submit to it ...⁹¹

This formulation, despite the reference to English materials and a subsequent quotation from *Pao On*, does not mention the requirements of lack of independent legal advice and protest from *B*, but relies primarily on the factors that are relevant to the principled approach. Indeed, the judgment depends primarily on whether Merit's act was wrongful and on whether Stott had reasonable alternatives; the other factors are used only for their relevance to these central questions.

But the court's holding with respect to Merit's proposal is not easy to reconcile with the principled approach. The trial judge had found as a fact that Stott believed he would only be responsible for losses on customers' accounts if it was his fault that the losses occurred.⁹² Merit's extraction of Stott's commitment would, then, clearly be wrongful, assuming that it would be a unilateral alteration of Stott's contract of employment; though before voiding the contract, the court would have to consider whether an action for wrongful dismissal would have been a reasonable alternative for Stott. The Court of Appeal overturned this finding of fact, holding that "it appears to have been the practice in the industry to hold the registered representative [in this case, Stott] personally responsible for the creditworthiness of the client"⁹³ and that Stott was aware of this practice. If so, then Stott would have been liable to repay Merit in any event. Nevertheless, the court held that Merit behaved wrongfully:

Stott was pressured into signing the agreement in question and ... the pressure applied would not be recognized by law as legitimate. He was called into his supervisor's office unexpectedly, he was confronted with a customer's delinquent account for which he must have felt some responsibility, he was given no opportunity to consider his position at leisure even though there were no external reasons for urgency, he was effectively discouraged from consulting a lawyer, and he (with full justification) feared for his job.⁹⁴

The wrongfulness of Merit's act appears to consist in its implied threat "to blacklist [Stott] 'on the street', which would have deprived him of the opportunity of pursuing the career for which he had qualified."⁹⁵ Yet it is difficult to define exactly what would have been actionable about Merit's quietly letting other investment firms know what had happened; in contrast

⁹¹ *Stott*, *supra* note 62, at 305.

⁹² *Ibid.* at 294.

⁹³ *Ibid.* at 293.

⁹⁴ *Ibid.* at 308.

⁹⁵ *Ibid.* at 314 per Blair J.A. (dissenting, but not on this point).

to a case where the threat was to defame B,⁹⁶ Merit's story would have been truthful given the factual findings of the Court of Appeal. The Court seems implicitly to have taken Merit's proposal to be a type of blackmail. While the ultimate rationale for the prohibition on blackmail remains quite elusive,⁹⁷ as long as blackmail is prohibited, the principled approach has no hesitation in recognizing a threat of blackmail as wrongful.⁹⁸ Merit's threat is perhaps best understood as wrongful because it is an example of A's using something that is independently lawful for an improper purpose (here, to force Stott to sign the document without the opportunity to reflect or consult a lawyer).

Having found an agreement made under duress, the court proceeded to consider the question of affirmation. The court held that the lengthy period of time that passed before Stott protested and the uncertainty of Merit's legal remedy against him suggested that Stott had affirmed the agreement:

[Stott] had plenty of time to reconsider, obtain the benefit of legal counsel, and repudiate his agreement made in haste. ... He knew he would have to work for years to pay off the debt. If he quit or was fired, Merit's only remedy was to sue him. He would then have had his day in court, and even if found fully liable, he would not have been in any worse shape than by agreeing in January of 1980, to pay over time the full amount with interest at 12%.⁹⁹

Thus, Merit's appeal was allowed, and Stott was unable to recover the amounts deducted from his pay.¹⁰⁰

The decision in *Stott* may be criticized on various grounds. One line of criticism, expressed by Blair J.A. in his dissent, is that the majority had gone too far in reviewing the trial judge's findings of fact. Another line of criticism focuses on the validity of the agreement, apart from the question of duress. On the facts as found by the trial judge, Blair J.A. held that no consideration

⁹⁶ E.g., *Kuan v. Chinavision Canada Corp.*, [1991] O.J. No. 1732 (QL) (Gen.Div.).

⁹⁷ See W. Gordon, "Truth and Consequences: The Force of Blackmail's Central Case" (1993) 141 U. Pa. L. Rev. 1741; James Lindgren, "Unravelling the Paradox of Blackmail" (1984) 84 Columbia L. Rev. 670; G. Lamond, "Coercion, Threats, and the Puzzle of Blackmail" in A. Simester & A.T.H. Smith, eds, *Harm and Culpability* (Oxford: Clarendon Press, 1996) 215. Each of these three accounts of the wrong of blackmail has a persuasive quality, yet all three are all quite different from each other, which indicates the difficulty of the problem. For further discussion, see Wertheimer, *supra* note 41 at 90-103; Stewart, "Formal Approach", *supra* note 2 at 194-97; J. Feinberg, *Harmless Wrongdoing* (New York: Oxford University Press, 1988) at 238-74.

⁹⁸ Smith, *supra* note 30 at 353.

⁹⁹ Stott, *supra* note 62 at 308.

¹⁰⁰ Merit did not counterclaim for the remaining amounts owing under the agreement. Blair J.A. dissented, refusing to overturn the trial judge's finding that the terms of Stott's employment did not require him to cover this customer's losses, because of the intervention by his supervisor. The agreement was therefore void for want of consideration and the question of duress did not arise. In the alternative, Blair J.A. also held that the agreement was not affirmed. *Ibid.* at 309-35.

flowed from Merit to Stott. But on the facts as found by the majority in the Court of Appeal, it is arguable that no consideration flowed from Stott to Merit. Since Stott had to pay the money anyway, his agreement arguably added nothing to his obligations. But these criticisms are not directed at the Court of Appeal's test for duress. *Stott* was a major step in moving from the overborne will approach to a more principled test based on an analysis of *A*'s proposal and *B*'s situation.¹⁰¹

Another Ontario case, decided soon after *Stott*, illustrates the continuing trend away from the overborne will approach. In *Gordon v. Roebuck*¹⁰², the parties had been partners in various development enterprises. In late 1980, they reached a settlement to resolve various disputes. The settlement specified that Roebuck would execute certain statutory declarations which Gordon required to complete certain deals, and which Roebuck had been withholding. In return, Gordon paid Roebuck \$50,000 and gave him a series of promissory notes. Shortly thereafter, Gordon sued for the return of the \$50,000 and for a declaration that the promissory notes were unenforceable; Roebuck counterclaimed on the notes. Gordon's main argument was that the agreement had been entered into under duress. In essence, Gordon's claim was that Roebuck had threatened to withhold the statutory declarations, which Roebuck was obliged to provide, unless Gordon entered into the agreement.

The trial judge, following English case law, laid out the test as follows:

To succeed on the ground of economic duress, the plaintiff must prove that his will was coerced and that the pressure exerted to do that was not legitimate. Lord Scarman has set out four factors to consider in determining if a party's will has been coerced. They are:

- (1) Did he protest?
- (2) Was there an alternative course open to him?
- (3) Was he independently advised?
- (4) After entering the contract did he take steps to avoid it?¹⁰³

The trial judge did not treat these factors as elements of a rigid test, but as factors to be considered; but he does appear to have regarded "coercion of the will" as a subjective event in *B*'s mind.¹⁰⁴ With respect to the requirement of illegitimate pressure, the trial judge held that Roebuck's obligation to provide the relevant statutory declarations "depended on an interpretation" of

¹⁰¹ For another discussion of *Stott*, see Ogilvie, "Economic Duress", *supra* note 25 at 202-204.

¹⁰² *Supra* note 63.

¹⁰³ *Gordon 1989, supra* note 62 at 572.

¹⁰⁴ *Ibid.* at 573. "The plaintiff did not testify and there is, therefore, no direct evidence, as there might have been, as to the coercion of his will." *Ibid.* at 573.

an earlier contract.¹⁰⁵ Thus, it was sufficiently unclear whether Roebuck was legally obliged to provide the declarations that the judge could not say that his conduct was wrongful. The judge also held that Gordon's situation did not meet any of the four criteria laid out by Lord Scarman.

In dismissing Gordon's appeal, the Ontario Court of Appeal endorsed once again the test derived from the English case law, but at the same time was alert to the flaws in that test. First, consider McKinlay J.A.'s distinction between "economic duress" and "unjustifiable economic duress":

I am of the view that coercion was exerted on the appellant's agent to execute the agreement ... However, I am also of the view that the pressure exerted was justified on the facts of this case on the basis only that there was some evidence from which the trial judge could conclude that the appellant had not shown that Mr. Roebuck was not entitled to the funds demanded by him on closing of the transaction. Consequently the agreement was not one which could be set aside as one executed under unjustifiable economic duress.¹⁰⁶

On its face, it is hard to know what to make of the idea of "justifiable economic duress". Surely, if an agreement is made under duress, there is no justification for it (apart, perhaps, from *B*'s subsequent ratification of it). A natural interpretation of the distinction is that McKinlay J.A. meant to refer to the difficult problem of whether the pressure exerted by Roebuck was legitimate or illegitimate. Roebuck's demand undoubtedly put Gordon in a difficult situation; but there was nothing to indicate that there was anything improper about the demand. What McKinlay J.A. calls "justifiable economic duress" is more clearly thought of as not being duress at all, and what she calls "unjustifiable economic duress" refers simply to the situation where all the elements of duress have been made out. In any event, her somewhat confusing distinction is not required by the principled approach to duress.

Second, consider the following comment regarding the role of independent legal advice in the analysis:

With respect to the issue of independent legal advice, the trial judge found that the appellant [Gordon] was independently advised, and there is no doubt that this is so. However, independent advice in such circumstances would likely have been that there was no other practical course available but to capitulate to the demands of the party exerting the pressure.¹⁰⁷

Although this comment is apparently a throwaway and not central to the decision, it clearly demonstrates the illogic of relying on independent legal advice as a factor negating duress. As argued above, independent legal advice may well be relevant to *B*'s knowledge about reasonable alternatives

¹⁰⁵ *Ibid.*

¹⁰⁶ Gordon 1992, *supra* note 62 at 7.

¹⁰⁷ *Ibid.* at 5-6.

or to B's affirmation of the contract, but as McKinlay J.A. points out, if B is really under duress, the independent legal advisor can do no more than point out the duress.¹⁰⁸

The Manitoba Court of Appeal has also moved closer to the principled approach. *Permaform Plastics Ltd. v. London & Midland General Insurance Co.*¹⁰⁹ was a dispute about an insurance claim. Permaform, the insured, was owned and operated by Alexander Berkowits, who was both a Holocaust survivor and a particularly litigious individual. Evidence was led that because of his Holocaust experience "he was inherently susceptible to giving way to persons in a position of authority."¹¹⁰ On 6 October 1984, Permaform's premises was damaged by fire, and Berkowits made a claim on L&M, the insurer. L&M's adjuster, Munroe, suspected that Berkowits had set the fire himself. On 18 October, Munroe told Berkowits that if he withdrew his claim, Munroe would cease his investigation; but if Berkowits pursued his claim, the investigation would continue and there would be a long and costly trial. Four days later, Berkowits signed a release. He was nonetheless charged with arson. In 1986, Berkowits delivered a proof of loss to the insurer; early in 1987, the criminal charge against him was dismissed following the preliminary inquiry; and he then sued the insurer. One of the many issues was whether the release was entered into under duress. The trial judge held that it was; in particular, he said that the insurer had "obtained a civil advantage through criminal investigation"¹¹¹ which would put the transaction into a well-recognized class of duress cases. The Court of Appeal disagreed. It noted first that the police investigation was separate from Munroe's investigation.¹¹² Then, after citing *Pao On*, the court said:

Coercion of the will implies a threat of serious consequences should the contract not be executed.¹¹³

And then the Court cited *Universe Tankships*. Evidently wrestling with the meaning of "coercion of the will" in light of these two authorities, the Court held that the pressure exerted by Munroe was legitimate:

The fact that, without the release, Mr. Munroe would have continued his investigation does not constitute a threat because Mr. Berkowits knew and understood the adjuster's investigations to be the normal process after an explosion and fire and a claim under an insurance policy. ... He told Mr. Berkowits the obvious, namely, that the evidence pointed towards him as being the person who intentionally caused the explosion and fire. There was no misrepresentation or threat in that. He told Mr. Berkowits that he

¹⁰⁸ For another discussion of *Gordon*, see Ogilvie, "Economic Duress", *supra* note 26 at 200-201.

¹⁰⁹ [1995] 8 W.W.R. 201 (Man.Q.B.) [*Permaform* 1995], rev'g [1996] 7 W.W.R. 457 (Man.C.A.) [*Permaform* 1996].

¹¹⁰ *Permaform* 1996, *supra* note 109 at 481-82.

¹¹¹ *Permaform* 1995, *supra* note 109 at 224.

¹¹² *Permaform* 1996, *supra* note 109 at 480-81.

could either abandon the claim or persist in it, but if the claim continued the insurer would likely put up a strenuous defence. This must have been self-evident to Mr. Berkowits. If these comments can be said to constitute pressure, there was no "illegitimacy of the pressure exerted."¹¹⁴

The Court also referred several times to the question of whether Berkowits's will had been coerced. His personal experience as a Holocaust survivor was relevant to this question, but the Court noted that "it is highly questionable, given his previous litigation experience, that he was affected as he now represents"¹¹⁵ and that Berkowits's experiences were, in any event, unknown to Munroe:

There is no evidence that Mr. Munroe intended to coerce the will of Mr. Berkowits, or that he had the slightest inkling that Mr. Berkowits's will was in some way overborne.¹¹⁶

Finally the Court reiterated that while Berkowits may have felt himself under pressure, "any such pressure was pressure of a legitimate nature."¹¹⁷

In *Permaform Plastics*, as in *Roenisch*, the Court cites and refers to the theory of the "overborne will", but, as in *Gordon*, the Court relies centrally on the question of the legitimacy of the pressure exerted. Furthermore, the Court does not set out the "test" for duress in the relatively rigid format seen in *Roenisch* or the trial judgment in *Gordon*, but strives for a formulation that somehow captures both *Pao On* and *Universe Tankships*. The easiest way out of the Court's difficulty would have been to drop the language of the overborne will altogether, and focus on whether Munroe's proposal was a legitimate exercise of the insurer's rights, as the Court of Appeal thought, or virtually a form of extortion, as the trial judge seems to have thought. Berkowits's experiences as a Holocaust survivor, and his alleged complaisance with authority, would, on this approach, not be directly relevant to a claim of duress. But they could, on different facts, be relevant to a claim of undue influence: if the insurer had known of the insured's vulnerability, and had deliberately taken advantage of it in persuading him to sign the release, then the release could be set aside on the basis of undue influence, even if the insurer was within its legal rights in proposing to continue the investigation if no release was signed, and even if the terms of the release were fair. The conceptual basis of duress is different from that of undue influence: the former involves illegitimate influence on the victim's opportunities, while the latter involves illegitimate influence on the victim's will. The "overborne will" approach to duress hides this difference.

Finally, it is worth noting a case where economic duress was found. In

¹¹³ *Ibid.* at 481.

¹¹⁴ *Ibid.* at 481, citing *Universal Tankships*, *supra* note 16 at 88 per Lord Scarman.

¹¹⁵ *Ibid.* at 482.

¹¹⁶ *Ibid.* at 483.

Van Kruistum v. Dool,¹¹⁸ a tenant leased 180 acres of land to a subtenant, who grew horseradish. The owner, who intended to sell the topsoil, was concerned that the horseradish crop would make the soil unsalable. He therefore refused to allow the subtenant to harvest the horseradish until the subtenant had entered an agreement to take steps to eliminate "volunteer" horseradish (that is, natural growth of further horseradish following the harvest). An agreement was negotiated with the assistance of counsel, but the subtenant testified that he agreed to sign the agreement only because he would lose the crop otherwise. The owner subsequently sued the subtenant for breach of the agreement when volunteer horseradish appeared notwithstanding the subtenant's efforts to eliminate it. The trial judge found several reasons for dismissing the owner's action. Among them was economic duress. After quoting the *Pao On* factors, he said "[e]ach factor must be considered, but none may be determinative of the issue, depending upon the circumstances ..."¹¹⁹ He then decided the issue in perfect accord with the principled approach. First, there was a wrongful act by the owner: the refusal to allow the subtenant access to the property to harvest the crop.¹²⁰ Second, the subtenant had no reasonable alternative to signing, notwithstanding the presence of legal advice:

The [subtenant] did not wish to enter into this agreement. However, ... he felt he had no viable alternative. He testified he was "desperate" to harvest his crop. Time was of the essence. Indeed, his evidence was that he made no real profit on this crop, because of the delay in harvest caused by [the owner], but he had to harvest to meet his own contractual obligations with customers and with a view to future orders. He further testified that he was indeed advised by his lawyer that he could institute legal action to enforce his right to harvest his standing crop, but that such an alternative was unreasonable in terms of the time required.¹²¹

The third element was the most difficult for the court to find. The subtenant had in fact made efforts to carry out the contract — indeed, he pleaded in the alternative that there was no breach of the agreement. It was therefore quite plausible for the owner to argue that the subtenant had affirmed the contract by his conduct. But the court rejected this argument because in the circumstances of this case it was not for the owner, who was seeking what amounted to a warranty on the work the subtenant had done, to assert affirmation:

It is true [the subtenant] took no steps to avoid the agreement once he entered into it. In fact, it may be said that he did his best to honour the agreement ... Should the

¹¹⁷ *Ibid.* at 483.

¹¹⁸ (1997), 35 O.R. (3d) 430 (Gen.Div.).

¹¹⁹ *Ibid.* at 447.

¹²⁰ *Ibid.* at 448. This fact also supported the finding that the agreement was unsupported by any consideration flowing from the owner to the subtenant (*ibid.* at 444).

¹²¹ *Ibid.* at 447.

defendant thereby be prejudiced, particularly in circumstances where ... he pleads economic duress as a shield, and not as a sword? I think not.¹²²

One may have doubts about this last point, since duress will almost always be pleaded as a shield rather than as a sword. But it is worth noting that the adoption of something resembling the principled approach makes the court's analysis very different than it would have been under any version of the overborne will approach. If a lack of volition were necessary, duress would not have been found. If the *Pao On* factors were treated rigidly, as elements that had to be present for the duress claim to succeed, the subtenant would certainly not have succeeded on this ground: he had independent legal advice and took no steps to avoid the contract. Yet the absence of these factors really has nothing to do with the situation that faced him when the contract was signed: in the face of a wrongful proposal from the owner, he had no reasonable alternative to signing the contract in order to get his crop harvested.

V. Conclusion

In *Crescendo Management Pty Ltd. v. Westpac Banking Corporation*, McHugh J.A. said:

The reference in *Universe Tankships* ... and other cases to compulsion "of the will" of the victim is unfortunate. They appear to have overlooked that in ... *Lynch* ... the House of Lords rejected the notion that duress is concerned with overbearing the will of the accused. ...

In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than to take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists on unlawful threats or amounts to unconscionable conduct.¹²³

Crescendo Management represents the clearest adoption of the principled approach in the Commonwealth. In these two paragraphs, McHugh J.A. succinctly stated the principal objection to the "overborne will" theory and conveniently summarized two of the three components of the principled approach.¹²⁴ There is every reason for Canadian appellate courts to follow

¹²² *Ibid.* at 448.

¹²³ *Crescendo Management*, *ibid.* 45-46. Mahoney J.A. concurred. Samuels J.A. expressed no view on this issue.

¹²⁴ *Ibid.* at 46-47. (The third component may be implied in McHugh J.A.'s application of the approach to the facts. McHugh J.A. held that the respondent bank Westpac made a

his lead. The Canadian approach to economic duress amounts to a misinterpretation of a misleading theory that has been implicitly rejected in its jurisdiction of origin. A more principled approach to economic duress is available in the case law and in the academic literature, and there are indications that Canadian courts, while paying lip service to the "overborne will" theory, are actually dealing with the factors that the principled approach considers most relevant. All that remains is for the "overborne will" approach to be explicitly rejected and a more principled approach expressly adopted.

wrongful proposal, but that the appellant Crescendo entered the contract in question willingly despite this wrongful proposal). *Ibid.* At 48, where he then stated, "[i]t is unnecessary to determine whether the long delay by Crescendo in complaining about the alleged duress itself indicates that the mortgage was freely and voluntarily executed"). In other words, Crescendo having affirmed the contract by its conduct at the time the contract was executed, it was not necessary to consider whether its subsequent delay in complaining amounted to affirmance.