THE EQUITABLE DOCTRINE OF UNDUE INFLUENCE CONSIDERED IN THE CONTEXT OF SPIRITUAL INFLUENCE AND RELIGIOUS FAITH: *ALLCARD v SKINNER* REVISITED IN AUSTRALIA

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I INTRODUCTION

The equitable doctrine of undue influence allows for the rescission of a gift or contract arising out of a relationship of influence between the transacting parties.[1] The doctrine applies in two ways. The first application is through 'actual undue influence' where it must be proved that one party unconscionably used their position of significant influence in the relationship to secure the transaction.[2] Actual undue influence is analogous to duress at common law although it allows more flexibility as to the type of conduct that will justify relief.

The alternative application of the doctrine of undue influence is through 'presumed undue influence'.[3] Here, the court presumes that the transaction resulted from the unconscionable exertion of influence if two factors are satisfied. The first is whether there is a sufficiently strong relationship of

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1 The probate doctrine of undue influence has different requirements and is not discussed in this article. See generally Matthew Tyson, 'An Analysis of the Differences between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions' (1997) 5 *Australian Property Law Journal* 38.

2 '[T]here has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor': *Allcard v Skinner* (1887) 36 ChD 145, 181. Actual undue influence does not depend upon a pre-existing relationship: *Johnson v Buttress* (1936) 56 CLR 113, 134.

3 The House of Lords in *Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773 ('*Etridge*') sought to assimilate the two limbs of undue influence into one doctrine more closely resembling actual undue influence. Their Lordships did this by emphasising that the presumption of undue influence was merely a 'forensic tool' by which a finding of actual undue influence could be made despite the lack of direct evidence: 797. Further, some members of the House of Lords cast doubt on the utility of the second category of presumed undue influence by which a relationship of influence to which the presumption applies is proved on the facts: 822, 842–3. A critical evaluation of the judgments in *Etridge* is outside the scope of this article, however, it is hoped that this aspect of the case is not followed in Australia. See Roderick Meagher, Dyson Heydon and Mark Leeming, *Equity: Doctrines and Remedies* (4th ed, 2002) [15-105].

influence between the transacting parties on the facts or, alternatively, whether the parties' relationship belongs to a class to which the presumption applies automatically for reasons of public policy. The second is that, given the relationship in question, the transaction would not normally be expected because of its value or other factors. The relationship coupled with the transaction activates the presumption of undue influence.[4]

For the transaction to stand, the presumption that undue influence was exercised must be rebutted by the stronger party. This can be achieved by demonstrating that the stronger party 'took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee'.[5] Producing evidence that the person subject to the influence received independent advice before entering into the transaction is the most common way to rebut the presumption, although not essential in all cases.

Judges are reluctant to describe too precisely the type of relationship that will attract the presumption,[6] however, it has been characterised as a type of fiduciary relationship because one party reposes trust and confidence in the other such that the other 'may exercise ascendancy or dominion over the will or mind of the donor'.[7] A duty arises on the part of the stronger party not to abuse that trust and confidence.[8] Only those relationships in which it is not normal to expect contracts or sizeable gifts are affected by the automatic presumption of undue influence.[9]

The doctrine of undue influence is not as straightforward as this brief description implies and indeed the description is given with some trepidation.[10] There is debate concerning both its operation and underlying rationale. This article will consider questions raised by the doctrine's application to relationships of spiritual influence and to gifts motivated by religious beliefs.[11] This article will seek to clarify the doctrine's operation in this specific context, and address broader questions about the doctrine's operation and rationale. The discussion

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4 In Australia, see, eg, *Watkins v Combes* (1922) 30 CLR 180, 193–4; *Yerkey v Jones* (1939) 63 CLR 649, 675. In England, see, eg, *Allcard v Skinner* (1887) 36 ChD 145, 185 recently affirmed in *Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773, 798–800. See also Meagher, Heydon and Leeming, above n 3, [15-030]; Rick Bigwood, 'Undue Influence in the House of Lords: Principles and Proof' (2002) 65(3) *Modern Law Review* 435, 445. For the view that it is the relationship alone that activates the presumption, see Paul Desmond Finn, *Fiduciary Obligations* (1977) [179] and *Barclays Bank Plc v O'Brien* (1994) 1 AC 180, 189–90.

5 *Johnson v Buttress* (1936) 56 CLR 113, 135; *Union Fidelity Trustee Co of Aust Ltd v Gibson* [1971] VR 573, 575.

6 See *National Westminster Bank Plc v Morgan* [1985] AC 686, 709.

7 *Union Fidelity Trustee Co of Aust Ltd v Gibson* [1971] VR 573, 575. See also *Johnson v Buttress* (1936) 56 CLR 113, 135.

8 *Johnson v Buttress* (1936) 56 CLR 113, 135; *Union Fidelity Trustee Co of Aust Ltd v Gibson* [1971] VR 573, 575. Some commentators query the fiduciary analysis and I will discuss this further below.

9 *Yerkey v Jones* (1939) 63 CLR 649, 675.

10 'Few areas of law have struggled so unsuccessfully for satisfactory doctrinal exposition and analysis as the equitable jurisdiction to relieve against undue influence in the procurement of an *inter vivos* transaction': Bigwood, 'Undue Influence in the House of Lords: Principles and Proof', above n 4, 435.

11 Although in principle the doctrine applies to contracts as well as gifts, the case law primarily concerns gifts. Cf *Tufton v Sperni* (1952) 2 TLR 516. The issue of 'manifest disadvantage' arising in relation to contracts will not be addressed.

will concentrate on the presumed undue influence cases and focus on questions raised by the 19th century case of *Allcard v Skinner* and by recent Australian cases.

II UNDUE INFLUENCE IN THE CONTEXT OF RELIGIOUS FAITH

The doctrine of undue influence has often been applied to transactions arising in the context of religious faith. The courts' approach is illustrated by Lindley LJ in *Allcard v Skinner*:

> But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible.[12]

The presumption of undue influence has applied automatically to relationships of spiritual influence, for example, 'confessor/penitent' and spiritual adviser/follower, although the automatic presumption is not usually relied upon in the modern cases.[13] Instead, the court examines the nature of the particular relationship in question.[14] In addition to relationships whose primary characteristic is shared religious beliefs, a relationship with a religious or spiritual aspect may be characterised as a relationship of trust and confidence to which the presumption of undue influence should apply.[15]

Historically, spiritual influence was seen as one of the most powerful influences upon a person's conduct:

12 *Allcard v Skinner* (1887) LR 36 ChD 145, 183.

13 There is a good argument that the automatic categories should be abolished. See Bigwood, 'Undue Influence in the House of Lords', above n 4, 439 at n 24. *Contra Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773.

14 See also *Clark v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* (1998) 1 Qd R 26. This was an unsuccessful claim for equitable compensation for breach of an alleged fiduciary duty to protect the plaintiff from a foreseeable risk of harm by providing false theological advice. It was held that the relationships of Church and communicant, or Bishop and communicant, did not in themselves give rise to fiduciary duties of the type alleged.

15 See, eg, *Nel v Kean* [2003] EWHC 190 (Unreported, Simon J, 14 February 2003). In this case the stronger party gave emotional and practical support to a group of women, including the weaker party. Spiritual guidance was also given to some members of the group.

> What is the authority of a guardian, or even parental authority, what are the means of influence by severity or indulgence in such a relation, compared with the power of religious impressions under the ascendancy of a spiritual adviser; with such an engine to work upon the passions; to excite superstitious fears or pious hopes; to inspire, as the object may be best promoted, despair or confidence; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness: that good or evil, which is never to end? What are all other means to these? Are inferior considerations to have so much effect; and is no regard to be given to the most powerful motive, that can actuate the human mind?[16]

Modern authorities also acknowledge the power of spiritual influence upon a person of religious faith. After quoting with approval the statement above, McClelland J in the 20th century case of *Quek v Beggs*[17] commented:

> To such considerations as these might be added the ease and subtlety by which suggestions may be conveyed to, encouraged in, and absorbed by, those vulnerable to them as to what is the will of God in relation to their actions in particular matters.[18]

Allcard v Skinner is a leading case on the doctrine of undue influence. It also illustrates the doctrine's application to a relationship of spiritual influence.[19] Miss Allcard greatly admired the preaching and work of the Reverend Mr Nihill. Although a Church of England clergyman, he was considered unorthodox by that institution. He became Miss Allcard's spiritual director and confessor and she joined the 'The Sisters of the Poor', a Sisterhood set up by Mr Nihill and Miss Skinner to do charitable work in London. Miss Allcard transferred all her assets to Miss Skinner, the Lady Superior of the Sisterhood, in pursuance of the rule of poverty adhered to by members of the Sisterhood. Most of these assets were spent in charitable works; neither Miss Skinner nor Mr Nihill received any personal benefit. Miss Allcard participated in this expenditure. Subsequently, Miss Allcard renounced her vows and left the Sisterhood to become a Roman Catholic.

Some time later Miss Allcard brought an action for rescission of her gifts. She was unsuccessful, but only because of her delay in bringing the action. A majority of the Court of Appeal (Lindley and Bowen LJJ) held that she would have been allowed to recover at least some of her property, had it not been for her delay in instituting proceedings. In dissent, Cotton LJ, would have allowed her claim in part.

There was no finding of *actual* undue influence in *Allcard v Skinner*. All members of the Court were adamant that Miss Skinner and Mr Nihill had behaved with complete propriety:

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16 *Huguenin v Baseley* (1807) 14 Ves Jr 273, 288; 33 ER 526, 532 (Sir Samuel Romilly, during argument).

17 (1990) 5 BPR [97405] 11,761.

18 Ibid 11,766.

19 See generally Michael Nash, 'Undue Influence in Contract' (1988) 85 *Law Society's Gazette* 29. Nash points out that the case is important for three reasons: it was decided shortly after the fusion of the courts of law and equity by a bench of eminent lawyers; it illustrates the development of the doctrine of undue influence during the 19th century; and 'it brought to a head the controversies over the direction the Church of England was taking, and whether ritualism and the monastic life could have any part in the established church'.

> The result of the evidence convinces me that no pressure, except the inevitable pressure of the vows and rules, was brought to bear on the Plaintiff; that no deception was practised upon her; that no unfair advantage was taken of her; that none of her money was obtained or applied for any purpose other than the legitimate objects of the sisterhood. Not a farthing of it was either obtained or applied for the private advantage of the lady superior or *Mr Nihill* … [20]

Despite this, a presumption of undue influence arose because the relationship between Miss Allcard and Miss Skinner was one of complete spiritual submission and obedience in which Miss Allcard could not 'freely exercise her own will'.[21] The presumption could not be rebutted because when joining the Sisterhood Miss Allcard had promised not to seek the advice of outsiders without Miss Skinner's consent. The lack of independent advice was fatal even though it was highly unlikely that Miss Allcard would have followed any advice that counselled her against the gift. At first instance, Kekewich J acknowledged that 'she would have put from her the advice received as a temptation of the evil one'.[22]

Spiritual beliefs and practices continue to be important in contemporary Australia. The range of religions practiced in Australia has grown and undue influence cases involving relationships of spiritual influence and transactions motivated by religious faith continue to be heard. In Australia there have been five such cases since 1986, the majority at the Supreme Court level. The two most recent cases were decided in 2001 and 2002.[23] Some involved deliberate and extreme exploitation for personal gain of trust and confidence reposed in a spiritual adviser. *Luffram v Australian and New Zealand Banking Group Ltd*[24] ('*Luffram*') is one example.[25]

In *Luffram*, a religious leader, described as 'a person who in the name of religion preys on the sensibilities of those who are gullible and uses the beliefs of those weaker than himself for his own self advancement', persuaded one of his followers to provide security for his debts to a bank.[26] It appears that the basis of the decision was actual undue influence with notice by the defendant bank.

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20 *Allcard v Skinner* (1887) 36 ChD 145, 179.

21 Ibid 172. One of the rules of the Sisterhood was: 'when thou are reproved, remember that the voice of thy Superior [Miss Skinner] is the voice of God. Listen on thy knees in perfect silence and defend not thyself': at 147.

22 Ibid 159.

23 There do not appear to be Australian cases prior to 1986. Conversely, in England, the last successful reported decision was *Tufton v Sperni* [1952] 2 TLR 516. Cf *Nel v Kean* [2003] EWHC 190 (Unreported, Simon J, 14 February 2003). This case was not decided on the basis of a relationship of spiritual influence although the relationship did have spiritual aspects. There have been actions in which spiritual influence was alleged but these were decided on procedural points without consideration of the substantive issues. See, eg, *Roche v Sherrington* [1982] 1 WLR 599; *Catt v Church of Scientology Religious Education College Inc* [2001] CP Rep 41. In Scotland, see *Anderson v The Beacon Fellowship* [1992] SLT 111.

24 (1986) ASC ¶55-483.

25 See also *Illuzzi v Christian Outreach Centre* (1997) Q ConvR ¶54-490. This case concerned whether a church could be vicariously liable for the undue influence of one of its 'salvation counsellors' who persuaded a member of his bible study group to provide a guarantee for his bank loan.

26 (1986) ASC ¶55-483, 56,602.

In *McCulloch v Fern*[27] there was also deliberate manipulation of a relationship of spiritual influence in order to secure a personal benefit in the form of a reduction of a mortgage held by the leader of the sect to which both parties belonged. Unlike *Luffram*, the gift in *McCulloch v Fern* was linked to the parties' shared religious practices in that the mortgaged property was to be used for the purposes of the sect. The donor believed that the donee represented God. Through physical and psychological pressure, the donor was convinced by the donee that it was God's will that she make the gift.[28] Justice Palmer relied upon the presumption but found in the alternative that there was actual undue influence.

The remaining two cases do not involve deliberate (or conscious) exploitation. In *Quek v Beggs* substantial gifts of property comprising most of the donor's assets were set aside due to an unrebutted presumption of undue influence arising from the relationship between the donor, Mrs Quek, and the primary donee, her Baptist pastor, Mr Beggs. The parties enjoyed a close friendship in which the donor received substantial emotional, practical and spiritual support during her terminal illness. She had estranged herself from her children and relied almost exclusively on the pastor and his wife for support.

A generous reading of the facts would suggest that the pastor behaved naively in accepting her gifts, that he genuinely shared the donor's belief that God had asked her to make the gifts, and that he was to use them to build a house for his retirement. Unlike the plaintiff in *Allcard v Skinner*, the donor did not change her mind. Her children brought the action after she died.

The most recent Australian case is *Hartigan v International Society for Krishna Consciousness Inc*[29] ('*Hartigan*'). In this case the gift in question was generated by religious enthusiasm, rather than the spiritual influence of another individual. Mrs Hartigan gave her only substantial asset, a farming property in northern New South Wales, to the defendant, the International Society for Krishna Consciousness ('ISKCON'). At the time, she was 36 years old, married, and pregnant with her third child. She was not in a relationship of spiritual influence with anyone in the Hare Krishna community that would attract the presumption of undue influence.

In language reminiscent of Lindley LJ in *Allcard v Skinner*, Bryson J found that:

> [T]here was nothing in the nature of a deliberate attempt by the defendant or by anyone in the Krishna Consciousness Movement to get the better of the plaintiff, to overbear her or deceive her, or to deprive her of the opportunity of making up her own mind. Nobody was insidiously working to make the plaintiff behave contrary to her own interests.[30]

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27 [2001] NSWSC 406 (Unreported, Palmer J, 28 May 2001).

28 See also *Norton v Relly* (1764) 2 Eden 286; 28 ER 908; *Huguenin v Baseley* (1807) 14 Ves Jr 273; 33 ER 526; *Nottidge v Prince* (1860) 2 Giff 246; 66 ER 103; *Lyon v Home* (1868) LR 6 Eq 655; *Morley v Loughnan* [1893] 1 Ch 763; *Chennells v Bruce* (1939) 55 TLR 422.

29 [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002).

30 Ibid [37].

The motivations for the gift were Mrs Hartigan's desire to assist the religious community that she wished to live in, her husband's encouragement to make the gift, and a belief based on her understanding of the Hare Krishna scriptures that divestiture of material possessions would assist her spiritual growth.

In allowing rescission, Bryson J stressed the extreme improvidence of the gift and the lack of independent advice. He accepted the extensive evidence on Hare Krishna scriptures, provided as part of the defendant's arguments, and found that according to those teachings, Mrs Hartigan was not expected to give away her property.[31] Although there had been no relationship of influence prior to the gift, the negotiations between the Hartigans and two representatives of the local ISKCON community had led Mrs Hartigan to repose trust and confidence in the two representatives, thereby raising the presumption of undue influence. Justice Bryson held that they should have been alerted to Mrs Hartigan's unorthodox understanding of the Krishna Consciousness teaching and corrected her. He also held that the two ISKCON representatives should have arranged for independent advice.[32]

Thus, in Australia, the case law on spiritual influence falls into both categories of undue influence. It also includes cases that could be argued on either ground. It is also worth noting that the person vulnerable to influence in each Australian case was a woman and that all the actions were successful, although I will not discuss these aspects further.[33] There is, however, no decision in Australia like *Allcard v Skinner*. That case stands alone because of the shared altruistic motives of donor and donee and the total absence of any personal benefit.

III QUESTIONS RAISED BY THE CASE LAW ON UNDUE INFLUENCE IN THE RELIGIOUS FAITH CONTEXT

Despite its status as a leading decision on the doctrine of undue influence, *Allcard v Skinner* raises some questions when it is viewed in the context of transactions motivated by religious faith. Similar questions and others arise from the Australian case law in this area. Some of these questions, while especially significant in this particular context, also relate to the operation of undue influence in general.

The first questions are *conceptual* and concern the rationale for the doctrine of undue influence. What is the conceptual basis for recovery in cases such as *Allcard v Skinner* and *Hartigan,* and can the same conceptual basis be used to explain cases of actual undue influence? These questions reflect an existing and

31 This was because she had young children: *Hartigan* [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002) [36], [94].

32 *Hartigan* [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002) [93].

33 For cases involving male plaintiffs see *Morley v Loughnan* (1893) 1 Ch 763; *Tufton v Sperni* [1952] 2 TLR 516; *Roche v Sherrington* [1982] 1 WLR 599.

vigorous debate about the nature of undue influence.[34] Then there are questions that relate to the *operation* of the undue influence doctrine. For example, what is the function of independent advice given that, as noted above, most of the donors would have been confirmed in their intentions by such advice rather than following it? Further, should a donee's lack of personal benefit be taken into account when assessing the remedy for undue influence? In *Allcard v Skinner* Miss Skinner spent the proceeds of Miss Allcard's gifts on charitable work with the latter's approval. How was this relevant, if at all? The answers have implications for religious groups who spend the proceeds of gifts tainted by a finding of presumed undue influence. Another doctrinal question raised specifically by *Hartigan* is whether there must be a *relationship* of spiritual influence before equitable intervention is warranted. Are there other, more appropriate, equitable doctrines? Also relevant in the specific context of spiritually motivated gifts is the significance of the improvidence of a disputed transaction in assessing the likely success of an action. The courts in *Allcard v Skinner*, *Quek v Beggs* and *Hartigan* all stressed the magnitude of the disputed gifts. One might think that the answers to these questions are present in the answer to the first, conceptual, question. However, as I will demonstrate below, the prominence of the conceptual debate does not greatly assist in resolving the particular questions about the operation of undue influence.

There are two further questions that relate solely to the specific context of religious faith. The first is related to the question above concerning the improvidence of transactions. In *Allcard v Skinner* Lindley LJ stated that 'if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.'[35] This threshold test for undue influence has been regularly applied in subsequent cases, however, the question remains: can it accommodate gifts motivated by religious faith? For example, did the fact that Mr Nihill was not part of the mainstream Church of England have any relevance to the decision in *Allcard v Skinner*? And does the threshold 'ordinary motives' test contain a bias against large gifts to minority religious groups? Finally, are any policies relevant to the religious faith context apparent in the case law?

The remainder of the article will discuss these questions. I will rely primarily upon *Allcard v Skinner* and the Australian cases noted above, particularly *Quek v Beggs* and *Hartigan*, with some reference to other decisions in the United Kingdom and North America. The questions are addressed in order from the most general to the most specific, with the exception that the doctrinal and contextual relevance of improvidence are discussed together in subparts E and F.

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34 This debate has been largely generated by unjust enrichment theorists. See, eg, Peter Birks and Chin Nyuk Yin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (1998) 57.

35 (1887) 36 ChD 145, 185. The House of Lords has recently confirmed this test: *Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773.

A What is the Conceptual Basis for the Courts' Intervention in Cases of Actual or Presumed Undue Influence?

This question taps into a fundamental debate regarding the doctrine of undue influence. It concerns both the conceptual basis of the doctrine as well as the relationship between actual undue influence and presumed undue influence. The first aspect of the question is whether the conceptual basis of presumed undue influence focuses upon the defendant's unconscionable conduct or the plaintiff's impaired will.[36] My own view is that it is the former.

Actual undue influence is clearly based upon the prevention of equitable fraud (unconscionability):

> The first class of [actual undue influence] cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act.[37]

Cases that rely on a presumption of undue influence rather than proof of actual undue influence are explicable on a prophylactic basis. The transaction is rescinded because it is presumed that the party holding influence abused that influence; that is, the basis of the doctrine is still prevention of equitable fraud. The presumption is justified because the nature of the relationship coupled with the nature of the transaction means that there is a risk that influence has been improperly used. So that high standards of propriety are maintained by donee religious bodies or individuals in fiduciary relationships of trust and confidence, equity assumes that abuse has occurred, unless the stronger party can demonstrate the contrary.[38] Even when there is no personal benefit – as in *Allcard v Skinner* where the proceeds of the gift were devoted to charity – it can be argued that the prophylactic justification holds good. The risk of wrongful use of influence is still present whatever use the gift is put to.

This answers my first question about the conceptual basis of cases such as *Allcard v Skinner*. The conceptual basis of the doctrine of undue influence is the defendant's unconscionable behaviour, not the plaintiff's impaired will. Miss Allcard knew what she was doing when she made the gifts:

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36 See, eg, Birks and Chin, above n 34, 57.

37 *Allcard v Skinner* (1887) 36 ChD 145, 171.

38 'The consequential imposition of a fiduciary responsibility would seem to be informed by considerations of public policy aimed at preserving the integrity and utility of such relationships given the expectation that the community is expected to have of behaviour in them, and given the purposes they serve in society': Paul Desmond Finn, 'The Fiduciary Principle' in Timothy G Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 42. See also, Finn, *Fiduciary Obligations*, above n 4, [173]; Rick Bigwood, 'Undue Influence: "Impaired Consent or Wicked Exploitation"?' (1996) 16 *Oxford Journal of Legal Studies* 503; Bigwood, 'Undue Influence in the House of Lords', above n 4, 435. *Contra* Birks and Chin, above n 34, 91. I have adopted an anonymous reviewer's comment here. The reviewer asserted that to be consistent with wider fiduciary law, the presumption itself must be that there has been an actual abuse of the relationship of influence, rather than the risk of abuse. Nevertheless, the rationale for imposing a presumption of abuse is based on the risk of abuse in such circumstances, and the need to maintain high standards of behaviour in fiduciary relationships.

> The real truth is that the Plaintiff gave away her property as a matter of course, and without seriously thinking of the consequences to herself. She had devoted herself and her fortune to the sisterhood, and it never occurred to her that she should ever wish to leave the sisterhood or desire to have her money back.[39]

Nonetheless, she was entitled to rescind the transaction because of the risk, in such situations, that a person's trust and confidence can be abused. Rejection of the 'impaired will' conceptual basis of undue influence is also implicit in Justice Bryson's reasoning in *Hartigan*: 'It may be unconscionable to accept and rely on a gift which was fully intended and understood by the donor and originated in the donor's own mind, where the intention to make the gift was produced by religious belief.'[40]

It is true that undue influence decisions place varying emphases upon both the prevention of unconscionable behaviour by the defendant and the impaired will of the plaintiff. This is because the two themes are complementary. Depending upon the facts of the situation, either may predominate as the reason for recovery. However, this does not change the *rationale* for recovery, which is maintenance of fiduciary standards. This view is taken by Rick Bigwood:

> The real complaint in any given instance of relational undue influence is twofold: first, that the fiduciary-like expectation held by or ascribed to the dependent party has been breached; and second, that on account of such a breach, the transaction entered into lacked the quality of 'independence' on the part of the beneficiary – that independence being considered the hallmark of genuine personal consent – which has been eroded by the fiduciary's influence.[41]

The other aspect of the fundamental question is whether actual undue influence should be separated from presumed undue influence. Actual undue influence has clear parallels to common law duress and could easily be assimilated with that doctrine.[42] However, there are actual undue influence decisions that involve a fiduciary relationship. In these instances, relief is given because an unconscionable advantage has been taken in that relationship. It seems preferable to accept that the categories blur at the edges and that actual undue influence straddles the divide between common law duress and presumed undue influence.[43] I do not intend to discuss the various views concerning the proper conceptual basis and ordering of undue influence any further, except as they relate to the specific doctrinal questions posed by the religious faith cases.

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39 *Allcard v Skinner* (1887) 36 ChD 145, 179.

40 [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002) [28].

41 Bigwood, 'Undue Influence: "Impaired Consent or Wicked Exploitation"?', above n 38, 512. See also *Johnson v Buttress* (1936) 56 CLR 113, 134 (Dixon J); Finn, 'The Fiduciary Principle', above n 38, 44–5.

42 See Finn, 'The Fiduciary Principle', above n 38, 43.

43 *Contra* Finn, *Fiduciary Obligations*, above n 4, [173]; Finn, 'The Fiduciary Principle', above n 38, 43. It should also be acknowledged that the House of Lords in *Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773 has clearly answered my question in the negative. In their Lordships' view, presumed undue influence and actual undue influence are alternative means to the same conclusion and should not be separated.

B What is the Function of Independent Advice?

According to Dixon J in *Johnson v Buttress*,[44] the presumption of undue influence is rebutted by showing 'that [the donee] took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee'.[45] Proving that the donor received independent advice concerning the gift is one way of achieving this.[46] The advice given must be pragmatic rather than necessarily legal.[47]

It remains unclear, however, whether the advice must have been followed. Must it simply have been given, whether or not it is followed by the donor, or must it have been heeded, in which case, in all probability, the gift would not have been made. This question is particularly relevant in the context of gifts motivated by religious faith because independent advice concerning the unworldliness and improvidence of the gift may simply confirm the donor's intention. Should independent, pragmatic and comprehensive advice suffice to rebut the presumption of undue influence, regardless of the fact that the donor's determination precludes them from following such advice? If this was the case, such gifts could only be overturned if actual undue influence was proved.

Alternatively, are there some gifts that cannot be made, regardless of the presence of independent advice, because that advice can never remove the donee's advantage? In other words, are there cases where the donor, by their nature, can never exercise an independent judgment in relation to the donee?

There appear to be two views in the cases and commentaries regarding the function of independent advice. The first view was taken by Kekewich J at first instance in *Allcard v Skinner*. Counsel for Miss Skinner submitted that the requirement of independent advice was meaningless because Miss Allcard would have treated it as the temptation of the Devil and because it would have strengthened her convictions. Justice Kekewich accepted that this was the likely outcome, however, he noted that:

> The necessity of competent independent advice wherever that necessity occurs, is not affected by the consideration that the advice, however plainly and strongly given, would in all probability be disregarded, or, in other words, that the donee of a gift obtained by the exercise of undue influence might insist on the donor adopting this precaution (which would make the gift indubitably safe) without running any appreciable risk of loss.[48]

Thus, in Justice Kekewich's view, as long as independent advice was given, it did not need to be followed for the presumption to be rebutted.[49]

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44 (1936) 56 CLR 113.

45 Ibid 134.

46 However, independent advice is not an essential requirement. See *Haskew v Equity Trustees, Executors and Agency Co Ltd* (1919) 27 CLR 231, 235.

47 See, eg, *Brusewitz v Brown* [1923] NZLR 1106; *Bester v Perpetual Trustee Co Ltd* (1970) 3 NSWR 30.

48 (1887) 36 ChD 145, 159. *Contra Allcard v Skinner*, (1887) 36 ChD 145, 184–5. According to Lindley LJ, it was impossible to know what Miss Allcard's reaction to independent advice would have been.

49 In fact, Kekewich J found that Miss Allcard had the benefit of sound advice from her family at the time of entry into the sisterhood and this validated the gift. This finding was overturned on appeal.

The second view regarding the function of independent advice suggests that unless the independent advice is heeded it is almost impossible to rebut the presumption. The writers of a leading text on equity take this view: 'reliance is to be placed upon the presence of advice only if it appears to have had effect upon the disponer in forming his independent intention; it will be hard to show this if the advice were not followed'.[50] If this is taken at face value, the independent advice requirement will become redundant. The advice is either heeded, in which case the transaction is not entered into and does not become the subject of litigation, or the advice is not heeded, thereby strengthening the presumption. However, the statement does allow for the possibility that the advice is heard and understood, but the donor decides to complete the transaction nonetheless.

Does the conceptual basis of the doctrine of undue influence provide any guidance in answering these questions? Applying either rationale for the doctrine yields the same result. If we decide that the doctrine is about the prevention of unconscionable behaviour, one may argue that a defendant's influence may be so strong that independent advice cannot remove their advantage. Conversely, if the doctrine is about the donor's impaired autonomy, the provision of independent advice may not suffice to remedy their severely-impaired decision making ability. On either view, it is a matter of degree as to whether the independent advice must have been followed. This suggests that the answer regarding the role of independent advice depends upon the particular facts.

The stronger the likelihood of actual undue influence, the less relevant the presence of independent advice will be. However, in the case of presumed undue influence where there is no personal benefit to the donee and where the parties acted bona fide in pursuance of shared beliefs, the presence of independent advice is significant. This is because it removes any perceived advantage to the donee while also respecting the donor's autonomy. For example, it is arguable that the Court in *Allcard v Skinner* would have needed little persuasion to legitimise Miss Allcard's gifts and so the mere provision of adequate advice would suffice. Conversely, in cases like *Quek v Beggs* and *McCulloch v Fern*, given the personal benefit to the donee, the advice would need to be heeded even if it was not followed. Depending upon the particular facts of the case, the emphasis placed on the defendant's conduct and the plaintiff's decision making ability will vary and the strength of the independent advice factor will reflect this.

C What is the Significance of the Absence of Personal Benefit and How is the Remedy Formulated?

Lack of personal benefit to the party holding spiritual influence over the donor has several effects. First, and most obvious, this factor suggests the absence of any undue influence. In most of the reported cases on spiritual undue influence, the existence of the defendant's personal gain intensifies suspicion of exploitation. Further, personal benefit is a constant feature in the reported examples of actual undue influence. However, as *Allcard v Skinner* shows, the

50 Meagher, Heydon, and Leeming, above n 3, [15-135] citing *Powell v Powell* [1900] 1 Ch 243, 246.

absence of personal benefit will not preclude a presumption of undue influence arising. Logically, this follows because a defendant's behaviour may still be exploitative, even if they receive no personal gain and have good character and standing.[51]

Is there any protection given to donees who may be held liable, even though they received no personal gain from the gift? In *Allcard v Skinner*, Miss Skinner received no personal gain from the gifts. It was intended that the proceeds would be used for the charitable purposes of the Sisterhood. This was the case, and Miss Allcard enthusiastically participated in the expenditure. Only Cotton LJ considered the question of Miss Allcard's remedy.[52] After noting the absence of personal gain and that there was no deliberate deception by Miss Skinner, he stated:

> But if the Plaintiff has an equity to set aside gifts made to the Defendant, in my opinion the Defendant would have a stronger equity against the Plaintiff to prevent her from making the Defendant personally liable for money spent for the charitable purposes to promote which the Plaintiff and Defendant were at the time of the expenditure associated, and which the Plaintiff was at the time willing and anxious to promote.[53]

In his dissenting judgment, Cotton LJ held that Miss Allcard was only entitled to any part of the gift still held by Miss Skinner and to income derived from it since commencing her action. It is not clear how Cotton LJ reached this conclusion, however, it seems to be the most appropriate one. Similarly, in obiter, Lindley LJ said that Miss Allcard would have been entitled 'to obtain restitution from the Defendant of so much of the Plaintiff's property as had not been spent in accordance with the wishes of the Plaintiff, but remained in the hands of the Defendant'.[54] Are these conclusions possible if the traditional remedy of equitable rescission[55] is applied?

The aim of equitable rescission is to restore the parties, as far as possible, to their original positions before the gift was made. However, unlike common law rescission, '[t]he question is not whether the parties can be restored to their original position; it is what does the justice of the case require?'[56] Equitable rescission is a flexible remedy that can accommodate changes in the value of the property received, or performance of the transaction entered into.[57] Thus, equitable rescission can be granted upon terms.

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51 Bigwood, 'Undue Influence: "Impaired Consent or Wicked Exploitation"?', above n 38, 512. An American example involving a will is *Suagee v Cook (Re Estate of Maheras*), 897 P 2d 268, 274 (Okla, 1995). 'The gravamen of undue influence is legal harm from the wrongful exertion of power over the will's maker rather than the receipt of *personal benefit* from the offending act of influence'.

52 Lindley and Bowen LJJ held that the claim was barred due to Miss Allcard's delay in commencing the action.

53 (1887) 36 ChD 145, 170–1.

54 Ibid 186. In fact, Miss Allcard had limited her claim to this sum.

55 But see *Dusik v Newton* (1985) 62 BCLR 1 (damages); *Mahoney v Purcell* (1996) 3 All ER 61 (equitable compensation); *McCulloch v Fern* [2001] NSWSC 406 (Unreported, Palmer J, 28 May 2001) (constructive trust remedy).

56 *O'Sullivan v Management Agency Ltd* [1985] 1 QB 428, 466–7.

57 *Alati v Kruger* (1955) 94 CLR 216, 223–4.

In *Allcard v Skinner* there are four factors relevant to a grant of rescission that explain the limited remedy that Cotton LJ was prepared to grant. These are: the delay on the part of Miss Allcard, the moral character of Miss Skinner, the lack of personal benefit, and the fact that most of the gift had been dissipated. A plaintiff's delay in taking action, even if it does not preclude recovery outright, will be taken into account in awarding a just remedy.[58] Secondly, the fact that a defendant's 'personal conduct is not open to criticism' will be taken into account in formulating a remedy that does not operate harshly.[59] Because Miss Skinner received no personal benefit and most of the money had been spent she would not have been restored to her original position if ordered to repay the gift.

The reasoning of the High Court in *Vadasz v Pioneer Concrete (SA) Pty Ltd* [60] ('*Vadasz*') is also helpful in understanding Lord Justice Cotton's statement in *Allcard v Skinner*. The High Court found unconscionability to be the conceptual basis for the court's approach to rescission:

> Thus unconscionability works in two ways. In its strict sense, it provides the justification for setting aside a transaction. More loosely, it provides the justification for not setting aside the transaction in its entirety or in doing so subject to conditions, so as to prevent one party obtaining an unwarranted benefit at the expense of the other.[61]

This statement has been criticised for not explaining more precisely the grounds upon which rescission will be granted.[62] However, in my view, it encapsulates the reason why Miss Skinner was not required to repay the full value of Miss Allcard's gifts. It was unconscionable in the specific, doctrinal sense of the term for Miss Skinner to have accepted the gifts, because the elements of undue influence were satisfied. However, due to Miss Allcard's delay, the personal character of Miss Skinner (in the words of *Cheese v Thomas* she was an 'innocent fiduciary'[63]), the lack of personal benefit, and the fact that the money had been irretrievably spent for the intended purpose, it would have been unconscionable for Miss Allcard to insist upon full recovery.[64]

Another factor apparent in Lord Justice Cotton's reasons for why only limited rescission was available was the fact that the plaintiff approved and participated in the expenditure of her gifts. This is problematic because at that time she was still 'spellbound' by the influence of Mr Nihill and Miss Skinner. Therefore, the weaker party's conduct at the time of the gift should not be relevant to the terms of rescission because they could still be subject to the other party's influence.

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58 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278–9.

59 *Cheese v Thomas* (1994) 1 WLR 129, 138.

60 (1995) 184 CLR 102 (citing with approval *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218; *Alati v Kruger* (1955) 94 CLR 216; *O'Sullivan v Management Agency Ltd* (1985) 1 QB 428; *Cheese v Thomas* (1994) 1 WLR 129).

61 *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 114.

62 See, eg, John W Carter and Gregory Tolhurst, 'Rescission, Equitable Adjustment and Restitution' (1996) 10 *Journal of Contract Law* 167.

63 *Cheese v Thomas* (1994) 1 WLR 129, 138.

64 See Louis Proksche, 'Rescission' in Patrick Parkinson (ed), *The Principles of Equity* (2003) 923 at n 72: 'Money paid which has been irretrievably spent for the purpose for which it was given may be irrecoverable [citing *Allcard v Skinner* (Cotton LJ) and *Quek v Beggs*] even though the defendant may indirectly have some benefit therefrom'.

The remedy in *Quek v Beggs* is not so easily explained. In that case the donor gave substantial gifts of money and land to her Baptist pastor. Some of the gifts were made for the purpose of building a retirement home for the pastor on land owned by his parents-in-law and were expended in this way. Justice McClelland held that it would be inequitable to order repayment of these amounts because the benefit had passed to the legal owners of the land, Mr Beggs' parents-in-law, and therefore Mr Beggs could not be restored to his former position. He viewed Mr Beggs as a 'mere conduit pipe'[65] in relation to these payments, citing the mistaken payments case of *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation*.[66] He also drew an analogy with Lord Justice Cotton's statement in *Allcard v Skinner* quoted above.[67] By contrast, the fact that Mrs Beggs was a joint recipient of the gifts was considered irrelevant because she was a volunteer and had notice of the relationship of influence.

The outcome in *Quek v Beggs* is puzzling. The 'conduit pipe' defence used in the mistaken payments case traditionally applied to agents, especially banks. The bank in that situation simply paid the mistaken payment into a client's account, acting upon instructions. There was no personal gain and they had no influence upon the eventual destination of the money.

Conversely, Mr Beggs was intimately involved in the receipt and payment out of the gift from Mrs Quek. The purpose of the payment was to benefit him directly, irrespective of the legal ownership of the land. If there had been a dispute between the parents-in-law and Mr Beggs, it is inconceivable that he would not have been able to establish some form of equitable interest in their land, probably on the basis of proprietary estoppel. Hence, why should the plaintiffs be unable to recover the money because of a technicality (in this case, that the parents-in-law were not joined in the action)? Although McClelland J drew strong parallels with *Allcard v Skinner*, the crucial difference was that in that case there was clearly no personal benefit (apart from the satisfaction of goals achieved). In *Quek v Beggs*, Mr Beggs retained the benefit of a retirement home, albeit on the basis of an informal understanding.

Thus, although the absence of personal benefit makes it less likely that undue influence will be found (*Allcard v Skinner* is unique among the English and Australian cases) such a finding is logically possible. The remedy of rescission is able to accommodate the lack of an explicit personal gain to achieve practical justice for both parties. Consequently, the donee is unlikely to be required to repay money that has been spent bona fide in accordance with the shared intention of the parties.[68]

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65 *Quek v Beggs* (1990) 5 BPR [97405] 11,761, 11,779.

66 (1988) 164 CLR 662, 673–4.

67 *Quek v Beggs* (1990) 5 BPR [97405] 11,761, 11,779.

68 The likelihood that equitable rescission may become only one possible remedy for undue influence chosen from a 'basket of remedies' raises the problem of protecting defendants such as Miss Skinner. It is conceivable that in the future, courts faced with the impossibility of rescission will choose to award equitable compensation instead. It is not clear whether this remedy would accommodate factors such as delay, bona fides and irretrievable expenditure etc to achieve a just outcome. It can also be asked whether the Court in *Allcard v Skinner* were able to lay down a strict prophylactic rule, comfortable in the knowledge that the limitations of rescission would mitigate harsh outcomes. See also Pauline Ridge,

D Must There be a Relationship of Spiritual Influence or is it Sufficient that a Transaction is Motivated by Religious Fervour?

The doctrine of undue influence protects those who are vulnerable in relationships of trust and confidence. In these relationships, the vulnerable party has 'let down his or her guard' and is susceptible to the influence of the other party.[69] Traditionally, spiritual influence cases concern relationships between a spiritual leader and a follower who looks to the leader for spiritual guidance and inspiration, and may even attribute divine qualities to that person.[70] However, what of those cases where the relationship is not the prime motivation for the weaker party's transaction, but rather the reason is their own religious convictions? Is there any need for equitable protection, and if so, is undue influence the appropriate doctrine?

In *Allcard v Skinner* Lindley LJ made it clear that the undue influence doctrine is concerned with 'the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence'.[71] The recent case of *Hartigan* raises these questions. This case is unique amongst the Australian cases because Mrs Hartigan's decision to give her property to ISKON was not associated with an existing relationship of spiritual influence. Justice Bryson held that a relationship of trust and confidence arose during the subsequent negotiating process with the leaders of the local ISKON community. *Tufton v Sperni*[72] is an English example. In that case an unscrupulous property dealer took advantage of a recent convert to Islam and sold him property on highly disadvantageous terms. Like Mrs Hartigan, Mr Tufton was enthusiastic about his new found faith and this affected his business judgment: 'In regard to matters affecting his faith and cause of Moslems, he was (in the language of the Judge) "credulous and unbusinesslike"'.[73]

In both cases, a relationship of influence attracting the presumption of undue influence was found to exist, however, it is arguable that the facts would have been better pleaded as attracting the doctrine of unconscionable dealings, as stated in *Commercial Bank of Australia Ltd v Amadio*[74] ('*Amadio*'). It is not unusual for the two doctrines to overlap in this way; indeed, in *Amadio* itself, Mason J criticised the pleadings for relying upon unconscionable dealings instead of undue influence.[75]

The requirement of the doctrine of unconscionable dealings is a special disability in the weaker party that is knowingly taken advantage of by the stronger party to secure the transaction. Constructive knowledge of the special

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'*McCulloch v Fern*' (2002) 18 *Journal of Contract Law* 138.

69 Bigwood, 'Undue Influence: "Impaired Consent or Wicked Exploitation"?', above n 38, 510.

70 See, eg, *Nottidge v Prince* (1860) 2 Giff 246; 66 ER 103; *McCulloch v Fern* [2001] NSWSC 406 (Unreported, Palmer J, 28 May 2001).

71 (1887) 36 ChD 145, 183.

72 (1952) 2 TLR 516.

73 Ibid 517.

74 (1983) 151 CLR 447.

75 Ibid 464. The facts could have been pleaded as a relationship of influence between the son and his parents with notice by the bank.

disability is sufficient. Historically, special disabilities were limited to physical or economic conditions that affected the weaker party in all their dealings, however, the High Court has more recently held that the doctrine can extend to relational disadvantages such as an emotional infatuation with the stronger party.[76] It could be argued that Mrs Hartigan's enthusiasm for her new religion and lifestyle, which in some respects misinterpreted the Hare Krishna teachings, was a special disability akin to an emotional infatuation. This was knowingly taken advantage of by the agents for the defendant. The same analysis can be applied to *Tufton v Sperni*.

Does it make any difference if *Hartigan* and *Tufton v Sperni* are characterised as examples of the unconscionable dealings doctrine rather than of undue influence? There is no difference in outcome; the remedy is still rescission. Both doctrines have a similar conceptual basis although they apply to slightly different scenarios. Undue influence focuses on a relationship between the parties, whereas, unconscionable dealing focuses on the circumstances of the transaction itself. The advantage of recognising that some spiritual influence cases are better suited to the doctrine of unconscionable dealings is that awkward interpretations of facts can be avoided.[77] Rather than straining to find a relationship of influence in *Hartigan*, the root weakness of the transaction (the fact that Mrs Hartigan proposed her gift in the flush of religious conversion and under a misunderstanding as to its spiritual significance) is addressed by recognising this as a special disability.

E What is the Significance of the Improvidence of the Transaction?

The improvidence of the transaction is relevant in two ways to the application of the undue influence doctrine in the context of religious faith. First, there are many statements in the case law asserting that equity will not 'undo' transactions simply because they were unwise or foolish and, by implication, improvident. 'Courts of equity have never set aside gifts on the grounds of imprudence, folly or want of foresight on the part of donors.'[78] Despite this rhetoric, such gifts are generally set aside, and improvidence can be a strong, indeed, overwhelming reason for awarding relief. In *Hartigan*, for example, the improvidence of the gift rendered it extremely suspicious. In Justice Bryson's view:

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76 *Louth v Diprose* (1992) 175 CLR 621.

77 See, eg, *Amadio* (1983) 151 CLR 447, 461, 474. In their separate, yet similar, judgments, Mason and Deane JJ drew a distinction between unconscionable dealings and undue influence. This favours the dichotomy proposed by Birks and Chin, above n 34, 57. Presumed undue influence is said to look to the plaintiff's 'overborne will' (quality of consent), whereas unconscionable dealings look to the defendant's conduct. With respect, this cannot be correct. A strong distinction does not exist between unconscionable dealings and undue influence – they blur into each other. See Bigwood, 'Undue Influence: "Impaired Consent or Wicked Exploitation"?', above n 38, 514.

78 *Union Fidelity Trustee Co v Gibson* [1971] VR 573, 575. 'Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief': *Tufton v Sperni* (1952) 2 TLR 517, 519; '[O]ur laws, very unfortunately for the owners, leave them at liberty to dissipate their fortunes as they please, to the ruin of themselves and their families' *Bridgeman v Green* (1757) Wilm 58; 97 ER 22, 23.

> The gift could not be explained by ordinary human motivations of generosity, charity or religious feeling, and was so extraordinarily improvident as itself to call for consideration of the circumstances and state of mind which led the plaintiff to decide to make it.[79]

The extreme improvidence of the transaction renders it suspicious and calls for scrutiny to ensure that no-one took advantage of the donor in any way. What the cases do not make clear is whether an extremely improvident transaction would ever be allowed to stand.[80] For example, is the logical conclusion from *Hartigan* that the court will never allow a mother with a young family and no other means of support to give away her only asset? Therefore, the assertion that the courts do not undo unwise bargains is not convincing in the religious faith context. The second way in which improvidence is relevant is discussed in the next section.

F Does the Benchmark of 'Ordinary Motives on which Ordinary Men Act' Contain a Bias Against Minority Religions or Transactions Motivated by Religious Faith in General?

The improvidence of the transaction is also relevant to the doctrine's threshold requirement, established by Lindley LJ in *Allcard v Skinner*, of a transaction which is 'so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act'.[81] A transaction must meet this test before the presumption can apply.[82]

The greater the improvidence of the transaction, the greater is the risk that undue influence was exercised, and the justification for applying the presumption is correspondingly increased. Thus, in *Quek v Beggs*, a gift of $5000 in the circumstances of the relationship could 'reasonably be accounted for by reference to ordinary motives of friendship and gratitude'[83] and was therefore unchallengeable. Mrs Quek's subsequent gifts to the value of $242 000 were not explicable in this way and attracted a presumption of undue influence.[84]

At one level, this test makes sense: readily explicable transactions are unlikely to have resulted from undue influence, and thus, the presumption would be unrealistic.[85] However, measuring the improvidence of the transaction according

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79 [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002) [37].

80 Cf *Re Brocklehurst's Estate* (1978) 1 Ch 14. The majority of the Court of Appeal held that a very generous gift of shooting rights over the donor's property could not be set aside for improvidence alone when no other element of undue influence was present. *Contra* Denning LJ in dissent.

81 (1887) 36 ChD 145, 185.

82 *Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773, 798–800 (Lord Nicholls). Lord Nicholls preferred Lord Justice Lindley's 'ordinary motives' formulation to Lord Scarman's test of 'manifest disadvantage' in *National Westminster Bank Plc v Morgan* [1985] AC 686. The application of the manifest disadvantage requirement had proved difficult. However, even the House of Lord's clarification of the test in *Etridge* may be difficult to apply. See, eg, *R v AG* [2003] UKPC 22 (Unreported, Lord Bingham, Lord Steyn, Lord Hoffmann, Lord Millett and Lord Scott, 17 March 2003). The 'manifest disadvantage' requirement is not generally accepted in Australia: see Meagher, Heydon and Leeming, above n 3, [15-120].

83 (1990) 5 BPR [97405] 11,761, 11,774, 11,778.

84 Ibid 11,778.

85 The benchmark ensures that 'everyday and commonplace transactions are not caught by the rule': *Nel v Kean* [2003] EWHC 190 (Unreported, Simon J, 14 February 2003) [82]. See also *Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773, 799.

to society's norms ('the ordinary motives on which ordinary men act')[86] has serious consequences for transactions motivated by religious faith because such transactions are often intended to contradict such norms. Gross improvidence in secular terms may be the primary attraction and motivation for a gift to a religious institution or individual. Many religions espouse poverty as a means to spiritual growth. Some Christians, for example, hone their faith by 'trusting in the Lord' rather than in financial security, hence Miss Allcard's vow of poverty. This suggests that gifts motivated by religious beliefs are more likely to attract scrutiny by the courts.

The likelihood of judicial scrutiny increases when donors hold strong religious beliefs. Anthony Bradney has highlighted the difficulties of 'obdurate believers' in Great Britain in having their beliefs and practices accepted by the law.[87] For obdurate believers 'their religion is central to their lives, determining their behaviour in most or all respects'.[88] They are characterised by the 'unyielding nature of their faith'.[89] There are a greater number of obdurate believers in religions that are new to Great Britain (and therefore, likely to be minority religions) although obdurate believers can also be found in mainstream religious groups. Bradney criticises the use of a test that is based upon '[m]oral standards which are generally accepted in the society in which the Judge lives'[90] in the context of English child custody law:

> A failure to live by such standards frequently becomes, in the law's eyes, a failure to live in an acceptable manner. In a society such as Great Britain, dominated as it is by secular liberal *mores*, obdurate believers will invariably live by standards which are different from those which are general in society or take the standards which are general and apply them in a more rigid and unwavering manner. There is thus, at root, an incompatibility between the law and the believer.[91]

Bradney argues that this benchmark characterises many areas of law other than child custody law. The threshold test of 'ordinary motives on which ordinary men act' in the doctrine of undue influence is not one of his examples, yet it clearly poses similar problems for obdurate believers. Even if the obdurate believer is unlikely to challenge a gift on this ground, their heirs may do so.

Using the norms of society to evaluate the acceptability of a transaction also discriminates between religious groups according to their size and social acceptability. 'Ordinary motives on which ordinary men act' may encompass mainstream religious practices but not necessarily those of minority groups. For example, would it be considered within the 'ordinary motives' test for a woman to give away all her assets to a Roman Catholic order of nuns that she is entering[92] because Australian society has a tradition (albeit a dying one) of women entering convents? Would it be more questionable for a woman to make

86 *Allcard v Skinner* (1887) LR 36 ChD 145, 185.

87 Anthony Bradney, 'Faced by Faith' in Peter Oliver, Sionadh Douglas Scott and Victor Tadros (eds), *Faith in Law: Essays in Legal Theory* (2000) 89.

88 Ibid 90.

89 Ibid.

90 *C v C* (1991) 1 FLR 223, 230.

91 Bradney, above n 87, 101 citing *Thornton v Howe* (1862) Beav 14.

92 The facts of *Allcard v Skinner* can be distinguished because Anglican orders of nuns are rare.

such a donation to 'a small break-away sect of a religious movement called the Church Universal and Triumphant'?[93] The 'ordinary motives' threshold test requires judges to make difficult decisions regarding the social acceptability of religious practices. These decisions involve questions that may require substantial evidence of the religious group's beliefs and practices to be put before the court.[94]

Another problem with the improvidence and 'ordinary motives' factors is their subjectivity. This is illustrated by the finding of extreme improvidence in *Hartigan*. Was Mrs Hartigan's gift as improvident as Bryson J thought? In his Honour's view

> the arrangement [was] one of extremely unworldly improvidence which a person could not, in all practicality, possibly enter into while acting under ordinary human motivations, unless the person had abandoned worldly considerations and self-regard.[95]

However, Mrs Hartigan was relatively young, and could reasonably have expected to live for many more years, during which she could have chosen to earn an income to support her family. It would have been reasonable for her to expect that her husband would similarly be able to support their family. They expected (albeit in a casual fashion) to live with the local ISKCON community on its farm and were not concerned about accommodation costs. When assessed in the context of the lifestyle of a Hare Krishna community, the gift appears less improvident than when assessed against the norms of society.

Does this imply that the threshold test for the undue influence doctrine to apply should refer to the norms of the religious group in question instead of the 'ordinary motives of ordinary men'? It would be a radical change to say that if a gift was consistent with the mores of the particular religious group to which the donor belonged, then the undue influence presumption could not apply. This would be inconsistent with the decision in *Allcard v Skinner* itself and does not allow for the societal interest (public policy) in ensuring that religiously motivated donors are not exploited. A more balanced approach, which considers both the norms of society and those of religious groups, is to maintain the threshold test of 'ordinary motives', but to also acknowledge that if the gift is explicable according to the norms of the religious group then this will be a strong factor against granting rescission.

This was the approach taken in *Hartigan*. Justice Bryson accepted the defendant's submission that Mrs Hartigan's gift was not even prudent according to the Hare Krishna teachings, because she was the parent of young children.[96] In other words, the fact that the gift was not explicable, according to the norms of the Krishna Consciousness Movement, supported rescission.

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93 See *McCulloch v Fern* [2001] NSWSC 406 (Unreported, Palmer J, 28 May 2001).

94 Anthony Bradney suggests that 'obdurate believer' litigants improve their chances of success when more evidence concerning the religious group in question is before the court. Rather than increasing the cost and length of individual hearings he suggests that judges receive greater training in religious studies: Bradney, above n 87, 100.

95 *Hartigan* [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002) [74].

96 Ibid [94].

G Which Policies, Relevant to the Religious Faith Context, are Apparent in the Case Law?

There are a number of policies or themes underlying the decisions on undue influence in the context of religious faith. Some have been mentioned previously, for example, the statement that equity will not undo unwise bargains. Whilst such policies clearly influence the outcomes of cases, they are neither conclusive, nor sufficient in themselves to determine outcomes. Two other policies are worthy of mention. A clear policy, apparent in the undue influence cases concerning religious faith, is that of protecting persons from exploitation in the practice of their religious and spiritual beliefs.[97] In early cases, this was expressed in terms of protection against fraudsters, that is, people masquerading as spiritual leaders who extorted material benefits from their followers. For example, in *Norton v Relly*[98] in 1764, the defendant was described as a person who 'preys upon his deluded hearers, and robs them under the mask of religion'.[99]

Most undue influence decisions in the context of religious faith are concerned with this scenario, however, two 19th century cases acknowledged that protection was required regardless of the bona fides of the religious leader. In *Nottidge v Prince*,[100] in 1860 Sir John Stuart V-C adopted with approval the French approach of prohibiting all gifts by a penitent to his confessor or the confessor's religious community.[101] In *Allcard v Skinner* in 1887 Lindley LJ made it clear that the nature of religious influence, that is, its subtlety and power, meant that as a matter of public policy, a presumption of undue influence should apply.[102] These two cases show an expansion in the law from protection against charlatans to an acknowledgement that even genuine religious leaders can exploit their followers to their advantage. Although the majority of the Australian cases are concerned with deliberate exploitation of another's religious beliefs,[103] there is a recognition that the protection extends more widely. The judgments in *Quek v Beggs* and *Hartigan* acknowledge that the persons holding spiritual influence had not intended to exploit their positions. It is the vulnerability of Mrs Quek and Mrs Hartigan, and the ease with which their religious devotion and enthusiasm could be manipulated that is protected.

Another policy apparent in the case law is that there is a societal obligation to provide for one's dependants that must take precedence over acts of benevolence

97 See, eg, *Allcard v Skinner* (1887) 36 ChD 145, 183.

98 (1764) 28 ER 908, 909.

99 See also, *Nottidge v Prince* (1860) 2 Giff 246; 66 ER 103; *Lyon v Home* (1868) LR 6 Eq 653; *Morley v Loughnan* [1893] 1 Ch 763; *Chenells v Bruce* (1939) 55 TLR 422. See the almost identical description given of the spiritual leader in *Luffram* (1986) ASC ¶55-483, 56,602.

100 *Nottidge v Prince* (1860) 66 ER 103.

101 Ibid 113.

102 (1887) 36 ChD 145, 183.

103 See, eg, *Luffram* (1986) ASC ¶55-483; *Illuzzi v Christian Outreach Centre* (1997) Q ConvR ¶54-490; *McCulloch v Fern* [2001] NSWSC 406 (Unreported, Palmer J, 28 May 2001).

to religious organisations.[104] If the donor has not adequately provided for any dependants, suspicion is cast on the transaction. In *Hartigan*, for example, Bryson J was concerned that Mrs Hartigan was donating her only substantial asset to ISKON, at the expense of her young children. This policy can be explained as another aspect of the 'ordinary motives' test: that is, ordinary men provide for their families first.[105] It may also reflect the policy behind legislation with respect to testators' family maintenance.[106] Such a policy lessens the donor's autonomy in favour of their dependants and heirs.[107]

IV CONCLUSION

In 1764 in one of the earliest spiritual undue influence cases it was said '[m]atters of religion are happily very rarely matters of dispute in courts of law or equity.'[108] The number of undue influence claims associated with relationships of spiritual influence and gifts motivated by religious beliefs is not large. Nevertheless, the handful of Australian cases occurring in the last 17 years have all been successful. This article discussed a number of the Australian cases and the leading English case *Allcard v Skinner* with the aim of illustrating the operation of the doctrine of undue influence generally, and the concerns relevant to the particular context of religious faith.

The Australian cases about actual undue influence in the context of religious faith, (*Luffram* and *McCulloch v Fern* in particular) are readily comprehensible. The gross exploitation of influence for direct personal gain in those cases is clearly within the heartland of equity's concern with unconscionable behaviour. Of more interest are the decisions that rely on a presumption of undue influence rather than a finding of actual undue influence: *Quek v Beggs*, *Hartigan* and, of course, *Allcard v Skinner*. These cases raise a number of interesting questions, both doctrinal, and in the context of religious faith.

The first question went to the conceptual basis of undue influence. I argued that the religious faith cases have a prophylactic rationale based upon the defendant's unconscionable behaviour. Equitable intervention is warranted to

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104 This policy is given explicit recognition in North American case law. See *Re Love* 182 BR 161, 171 (Bankr, 1995). 'The doctrine of undue influence protects the family's interest by strengthening the presumption of undue influence whenever the donor, in an inter vivos gift to a religious adviser, fails to provide for his or her family': Ann Penners Wrosch, 'Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent, Interests-Based Approach' (1992) 25 *Loyola of Los Angeles Law Review* 499, 533–4.

105 See, eg, *Nel v Kean* [2003] EWHC 190 (Unreported, Simon J, 14 February 2003). Justice Simon found the second of two disputed loans did not meet this benchmark because '[a]lthough expressed as a loan, its effect was to alienate her only remaining asset for the foreseeable future and, on one construction, forever. It would mean that her children received nothing from her and that a private venture (albeit one to which she was plainly attached) would receive everything': at [107].

106 See, eg, *Family Provision Act 1982* (NSW).

107 It is interesting that the alternative claim in *Quek v Beggs* was brought pursuant to the *Family Provision Act 1982* (NSW). It did not need to be pursued because Mrs Quek's children succeeded on the basis of undue influence.

108 (1764) 2 Eden 286, 287; 28 ER 908, 908.

ensure that unconscionable advantage is not taken of those who have let down their guard due to trust and confidence in another person. In addition, high standards are set for religious institutions or individuals who wish to benefit from someone over whom they exert influence. Any doubt as to whether an unfair advantage was taken must be resolved in favour of the donor. This explains why both Miss Skinner and ISKCON were presumed to have exercised undue influence, even though the Courts emphasised that there was no evidence of deliberate wrongdoing.

Consistently with the prophylactic rationale, the enquiry can focus upon the defendant's conduct or the plaintiff's lack of independence in decision-making; they are two sides of the same coin. However, this conclusion does not resolve the other, more specific, doctrinal questions concerning the role of independent advice: the fashioning of the remedy and the significance of improvidence of a transaction.

The independent advice requirement (although not mandatory) shows that no advantage has been taken of the donor and also that a free, fully-informed decision was made. I argued that the role of independent advice varied in significance depending upon the particular facts. In cases about the presumption of undue influence, such as *Allcard v Skinner* where there was no personal benefit received from the gift and no suggestion of actual wrongdoing, the mere presence of adequate independent advice would probably rebut the presumption, regardless of whether Miss Allcard followed it. It was suggested that there are scenarios where independent advice that is ignored demonstrates that the donor is completely under the influence of the donee; that is, there are some gifts that can never be accepted due to the complete reliance of the donor on the donee.

The remedy of rescission was found to contain sufficient flexibility to avoid unjust outcomes. Otherwise, there was a danger that a prophylactic doctrine with high standards might operate too harshly on donees who receive no personal gain and who dissipate the proceeds of the gift. This cannot be said of more novel remedies for undue influence, such as equitable compensation and constructive trust. Another doctrinal issue is whether undue influence is always the appropriate doctrine when a gift in the context of religious faith is disputed. I argued that scenarios such as in *Hartigan* are better pleaded as an unconscionable dealing pursuant to *Amadio*.

The degree of improvidence of a disputed gift is relevant both doctrinally and with respect to religious donees. It was found that suspicion of the presence of undue influence increased as the improvidence of a gift increased. Although it is often said that gifts will not be rescinded on the ground of improvidence alone, this was not convincing.

There are two questions of specific relevance to the context of religious faith. First, there is the 'ordinary motives' threshold test for presumed undue influence, which discriminates against gifts by 'obdurate believers' and against religions that are not accepted within mainstream society. This is not necessarily a reason for rejecting the test because there is a public policy in ensuring that even obdurate believers are not taken advantage of. Miss Allcard, for example, was undoubtedly an obdurate believer. However, sensitivity is required in applying

the 'ordinary motives' test, and Justice Bryson's approach in *Hartigan* of testing also against the motives of ordinary Hare Krishna adherents seems appropriate. It is also important that judges be informed in detail of the beliefs and practices of minority religious groups.

Other policies that underpin undue influence decisions in the context of religious faith were discussed. Of interest is the idea that one must provide for one's dependants before giving a gift according to one's religious beliefs. Although not clearly articulated, it was suggested that this policy was present in *Hartigan* and *Quek v Beggs* and may be an unintended reflection of the policy of testators' family maintenance legislation. Whether or not this is an appropriate policy and whether a distinction can be drawn between inter vivos and testamentary gifts deserves further study.