UNCOVERING ISSUES OF SEXUAL VIOLENCE IN EQUITY AND TRUSTS LAW

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INTRODUCTION

What does the issue of sexual violence against women have to do with Equity and Trusts law? Most students and scholars of the subject would say "very little". In this paper I argue, on the contrary that the issue of gendered violence does indeed arise in this subject-area but it is usually rendered invisible by an overly narrow view of what counts as appropriate *legal* scholarship and pedagogy.

The aim of this paper is a modest one: it is to take one narrowly defined "legal" method — case analysis — and turn it on its head so that it forms the basis of a critical, context-sensitive pedagogy which makes space for an exploration of the issue of sexual violence within this subject-area. By employing what I call "*critical* case analysis" in three doctrinal areas of Equity and Trusts law — undue influence, unconscionable dealing and fiduciary relationships — I hope to show that issues of sexual violence do arise in this subject; that these issues are often omitted or inadequately dealt with by courts and traditional scholars; and that critical case analysis can be a useful pedagogical tool in our classrooms for exposing and exploring such issues.[1]

METHOD: CRITICAL CASE ANALYSIS

One challenge facing feminist scholars who teach compulsory law subjects[2] is to address issues relevant to feminist concerns while at the same time satisfying certain externally determined[3] and apparently gender-neutral doctrinal requirements. A modest step towards meeting this challenge is to use traditional legal categories and methods in critical and non-traditional ways. In this paper I specifically focus on the ways that case analysis may form part of this critical pedagogical project.

The analysis of the principles and rules derived from leading (read appellate) cases continues to dominate the teaching and scholarship in common law subjects such as Equity and Trusts.[4] The limitations of this approach, particularly its disregard for social context, have been well documented.[5] It is possible, however, to use cases differently, in a way that brings context to the forefront and highlights its interrelationship with doctrine. Analysis of cases can form an important part of our critical pedagogical practices if we use them in the following ways:[6]

- **Using the facts of cases to contextualise doctrine:** In traditional case analysis, it is usual to simplify the facts of cases so that they are reduced to a minimum, "bare-bones" account that sets the scene for the presentation of legal rules and principles. The messy facts that make up the lives of the parties who come to court are largely left out. A close and critical reading of facts contextualises the particular doctrine being studied and provides insight into peoples' lived experiences: it illustrates the way that the law operates in specific factual contexts. By bringing facts to the centre of analysis rather than treating them as mere padding for the presentation of legal principles and rules, it is possible, for example, to gain some insight into the lives of women who have appeared before the courts and the courts' treatment of them. By focussing attention on the specific, it also checks any tendency to universalise the experience of particular groups of people. For example, students may be asked to consider not only the implications of

the gender identity of the parties involved in the particular case being studied, but also the relevance of their class, race, ethnicity and so forth. If certain groups of people are not represented in the cases, students may be asked why this might be so.

- **Problematising facts and doctrine:** In traditional case analysis, the words of judges are taken to represent objective and authoritative statements as to "the facts of the case" and the applicable "law"[7]. This version of judicial decision- making allows for the possibility that judges sometimes "get it wrong", but it maintains an underlying belief that there are right answers that judges must attempt to find. By analysing the words of judges as narratives (stories) rather than objective statements of law and fact,[8] it is possible to begin to problematise doctrine and the judicial construction of facts, and to question the powerful truth claims made by judges when they decide cases. Subjecting legal narratives to close reading and critique makes it possible, for example, to deconstruct myths about women's sexuality or the reliability of migrant workers' claims to back injury which judges have helped to create.
- **Analysing case outcomes as the exercise of power by the state:** Treating legal judgments as narratives also questions the inevitability of particular case outcomes and thereby raises questions about the politics of legal doctrine. As case outcomes are state sanctioned, a critical analysis of who wins and who loses provides an important insight into the direct exercise of power by the state.
- **Using cases as a basis for discussing progressive legal strategies:** Some cases result in the development of doctrines that have the potential to lead to progressive legal change. By ensuring that such cases are adequately dealt with even if they are of little apparent "authority" in the jurisdiction being studied, it is possible to stimulate discussion on such developments which can be both intellectually satisfying and politically involving, and which could provide an impetus for future activism.[9]

Hence cases can be extremely useful in our teaching and scholarship if we utilise them in critical and imaginative ways; that is, if we use them to problematise doctrine and the judicial construction of facts, and to analyse and critique the social contexts and conditions of power in which cases come to court and are won or lost.

In the next section of this paper I provide a short sample of how critical case analysis can be employed to uncover and explore issues of sexual violence in three equitable doctrines.

UNCOVERING ISSUES OF SEXUAL VIOLENCE IN THE DOCTRINES OF UNDUE INFLUENCE, UNCONSCIONABLE DEALING AND BREACH OF FIDUCIARY DUTY

Undue Influence

Farmers' Co-operative Executors and Trustees v Perks[10] and *Bank of Credit and Commerce International S A v Aboody*[11] are two "undue influence"[12] cases which provide specific examples of violence in women's lives and how this violence is dealt with by courts exercising equitable jurisdiction. These cases scarcely appear in the traditional texts and casebooks. Where they do appear they are used only to make the odd doctrinal point and their contexts of sexual violence are omitted. *Perks* involved the constant physical and mental abuse inflicted on Joy Perks by her husband during their marriage of over 20 years. During the frequent episodes in which he was violent towards her, he would often make reference to "squaring up" and "signing on the dotted line".[13] By this he meant that she should sign over to him her half interest in the family farm on which they lived and worked. Not surprisingly, she eventually did. Three years later he murdered her. The executor and trustee of her estate brought an action in Equity against the husband seeking a declaration that the transfer of the half interest in the farm was void by reason of undue influence.[14] This action was successful before Duggan J in the Supreme Court of South Australia. Unfortunately for Joy Perks, the law's intervention came too late to, save her from the violence of her husband, although it saved her property for her estate.

In the case of *Aboody*, Doris Aboody was pressured by her husband into charging her house as security for the debts of their family company Together with her husband she was nominally a director and shareholder of the company but it was clear that he made all business decisions during the marriage. On the advice of its own solicitors the bank insisted that Doris Aboody see a solicitor for independent advice

before she executed the charge,[15] and it arranged this for her on its premises.

During her meeting with the solicitor the husband burst into the interview room and yelled to the solicitor: "Why the hell don't you get on with what you are paid to do and witness her signature?"[16] A shouting match between the two men ensued. Doris Aboody was clearly distressed by the scene: "she was reduced to tears".[17] She signed the charge. The solicitor's notes of the meeting read in part: "Husband is a bully. Under pressure and she wants peace."[18]

The family company eventually collapsed and the bank sought to enforce the charge on Doris Aboody's home. She claimed that the charge should be set aside by reason of the husband's undue influence. The English Court of Appeal found that the husband had exercised undue influence in procuring her signature. The validity of the charge was nevertheless upheld on the ground that she did not satisfy the additional doctrinal requirement that the transaction be "manifestly disadvantageous" to her.[19]

The Court rejected an argument by counsel for Doris Aboody that the "manifest disadvantage" requirement is satisfied simply by showing that the party wishing to impugn the transaction has been deprived of their power of choice as a result of their will having been overborne.[20] The Court held that the transaction could not on balance be shown to have been to Doris Aboody's manifest disadvantage because despite the fact that she risked her property by charging it as security for the company's debts, she derived a benefit as a family member from the credit provided by the bank to the family company.[21] In other words the Court found that the husband's bullying and her consequent lack of choice in the matter were insufficient to invalidate the transaction because she derived this theoretical "benefit" from it.

The Court also suggested a further ground for upholding the transaction: that Doris Aboody would have gone through with it even in the absence of the husband's undue influence, because she just did what he told her anyway.[22] Once again, the Court reaffirmed its view that her lack of any real agency or choice in the matter is not really the issue.

Two leading Equity text/casebooks, Meagher, Gummow and Lehane's, *Equity: Doctrines and Remedies*[23] and Heydon, Gummow and Austin's, *Cases and Materials on Equity and Trusts*[24] which are widely used in the teaching of this subject, make no mention at all of the *Perks* case and mention *Aboody* only to make a number of doctrinal points.[25] The facts of *Aboody* are completely omitted.

This approach accords with traditional case analysis in that *Perks* is only a first instance decision and is not, therefore, a "leading" case, and it is the legal rules rather than the messy facts of *Aboody* that are considered to be of legal and scholarly value according to this view.

By leaving out such cases altogether or by omitting the factual contexts in which they arise, traditional case analysis helps render invisible the gendered aspects of the doctrine of undue influence and misses the opportunity to introduce students to the lived experience of some of the subjects of Equity. It ensures that students do not have to grapple with the reality of gendered violence (at least in class) and the inadequacy of the law's response to such violence.

Unconscionable Dealing

The "unconscionable dealing"[26] case of *Louth v Diprose*[27] illustrates the importance of scratching the surface of legal judgments in order to uncover issues of gendered violence that traditional case analysis and even the courts themselves may completely ignore.

Louth v Diprose concerned a male solicitor who purportedly "fell in love" with Mary Louth, a "sole" parent in financial difficulties who had a history of rape, depression and attempted suicides.[28] The solicitor made a gift of a house to Louth and succeeded in having the gift set aside on the basis of unconscionable dealing. It was held that he was in a position of special disadvantage in relation to her; that *she* had power over him; and that she manipulated him by faking that she faced a housing crisis and faking suicide attempts.[29]

I have commented elsewhere on the courts' remarkable analysis of the power relationship between the parties and the gendered and classed narratives deployed by the various judges.[30] What I want to emphasise here is the backdrop of sexual harassment and threatening behaviour by the plaintiff solicitor in the case. In the course of their relationship which Louth did not want to continue on a sexual basis, the solicitor sent her a large number of "love poems", some of which were explicitly sexual, he followed her around, he made unwanted sexual advances towards her, and threatened her.[31] This context of gendered violence was an

aspect of the case which was only discoverable through an analysis of the trial transcript. No mention of it was made in the various judgments.[32]

Louth v *Diprose* is an important case to teach *critically* in an Equity and Trusts course because it can be used as a basis from which to problematise the judicial construction of facts and to highlight the gaps and silences in the gendered stories that judges often tell. It is instructive, for example, to bring to students' attention the glaring omission of the issue of gendered violence in all the judgments. It introduces them to the idea that there may be alternatives to judicial truths perpetrated about women.

Breach of Fiduciary Duty

The doctrine of breach of fiduciary duty provides the highest level of protection in Equity. The fiduciary is under a duty to exercise their power in the interests of the person to whom the duty is owed.[33]

The accepted fiduciary relationships include trustee and beneficiary, agent and principal, solicitor and client, and partners. However the categories of fiduciary relationships are not closed.[34]

Traditionally, fiduciary relationships have been used to protect people's narrowly defined "economic" interests. The accepted categories of fiduciary relationships suggest this. For example, trustees owe fiduciary duties to their beneficiaries with respect to their dealings with trust property and business partners owe fiduciary duties to each other in relation to the running of the business.

Recent decisions in jurisdictions outside Australia have, however, invoked the doctrine to provide equitable relief for infringement of broader "personal" or "practical" interests. For example, the Canadian Supreme Court has invoked the doctrine to provide civil redress for survivors of sexual violence where the perpetrator is in a special position of power and/or trust vis a vis the victim.

In *M(K) v M(H)*[35] the Canadian Supreme Court held that the sexual abuse inflicted by a father on his daughter constituted not only the tort of sexual assault but also a breach of fiduciary duty. In *Norberg* v *Wynrib* a strong minority of the Canadian Supreme Court held that a doctor breached his fiduciary duty to his client when he sexually abused her in "exchange" for drugs which she used to support her habit.[36]

It would be perfectly acceptable in the fashion of traditional case analysis to teach and write about fiduciary relationships without referring to these exciting Canadian developments, as they do not, at least yet, form part of the law of this country.[37] *M(K) v M(H)*[38] was decided too late for fiduciary of his [sic] position." Mason J: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7. possible inclusion in the latest editions of Mea her, Gummow and Lehane's, *Equity: Doctrines and Remedies*[39] and Heydon, Gummow and Austin's, *Cases and Materials on Equity and Trusts*,[40] so it is not possible to say whether these traditional text/casebooks would have dealt with the case had it been decided in time for inclusion. *Norberg v Wynrib*[41] was, however, decided in time to be included in the latter casebook and there are in fact a number of references to it, but the factual context of sexual abuse in the case is completely omitted.[42]

To ignore these developments (or to ignore their factual context) involves forgoing the opportunity to stimulate discussion and debate within our classrooms and our professional communities which could prove both intellectually stimulating and politically involving, and which may encourage activism in the area of civil redress for survivors of sexual abuse in Australia.

A further point that needs to be raised specifically in relation to *Norberg v Wynrib*[43] is that the plaintiff client in that case was a First Nations woman, a fact that is not apparent from reading the reported judgments.[44] For those of us who believe that one's race has social consequences in a racist world, to leave out this fact amounts to a glaring omission, particularly where the issues in the case clearly involve the abuse of power.

A critical approach to both these cases would ask the question of whether the application of fiduciary law is preferable to the established tort-based and statutory paths to compensation, and therefore, whether such an approach should be adopted in Australia.[45] The factual contexts of the cases would be brought to the forefront of analysis so that students may evaluate the law's response to the important gender, race, power and other issues they raise.

CONCLUSION

In this paper I have argued that issues of sexual violence against women clearly arise in the unlikely context of Equity and Trusts law and that critical case analysis is one pedagogical tool that can be employed to uncover and explore these issues. This paper has touched on three equitable doctrines to provide a sample of how such issues might be brought into the teaching and scholarship of this subject. It is an unfortunate fact that once attention is paid to the factual context in which legal doctrine operates, one need not look far to find instances of violence against women.

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1 Although the focus of this paper is specifically on critical case analysis, it should be noted that other methods, including the use of interdisciplinary materials, activity-based learning, and so forth, can, and should, also be used in a critical, context-sensitive approach. Effective teaching and scholarship requires the use of a broad range of methods: see M Le Brun & R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Sydney: Law Book Company, 1994) 46, 313–14. Specific examination of other useful methods is, however, beyond the scope of this paper. For an introduction to a variety of useful teaching methods see *id* at ch 6.

2 For example, Equity and Trusts in some Law Schools including my own at the University of Melbourne.

3 In Victoria the responsible "external" body is the Council for Legal Education.

4 Le Brun & Johnstone, *supra* note l, call this approach the "case method". The authors trace this approach back to the work of Christopher Columbus Langdell in the United States in the 1870s. Le Brun and Johnstone note that the case method is often coupled with the "Socratic method", although they distinguish between the two. For a full discussion of these approaches and the relationship between them see id at 19–21, 282–86.

5 See, for example, G Moffat & M Chesterman, *Trusts Law: Text and Materials* (London: Weidenfeld and Nicolson, 1988) xv-xvii. Le Brun & Johnstone, *supra* note 1, at 97 state that "the current paradigm of legal education which focuses on the analysis of legal rules as reported in appellate court opinions is impoverished". See also, *id* at 282–86.

6 The approach outlined below shares some features with the "problem method" described by Le Brun &Johnstone, *supra* note 1, at 93 ,303. In the problem method students are given a hypothetical problem and they have to "discover what they need to solve the problem; identify the issues arising from the facts; investigate for further facts; identify legal, social, and ethical issues; search out and apply the appropriate law; and develop, evaluate, choose and implement options (*id* at 303)" (footnote omitted). It will be seen that the approach outlined below — critical cases analysis — draws on many of the critical pedagogical insights of the problem method, including teaching students to deal with facts, identifying legal and political issues, evaluating legal outcomes, suggesting other options, and so forth. However a major difference between the problem method and critical case analysis is that in the latter students analyse actual decided cases, rather than hypothetical problems. This means that students have on hand the actual way a court dealt with the real life "problem". This allows students to analyse critically the whole "problem", including the way the court actually decided the legal and factual issues.

7 This is a rather simplified account of mainstream theories of judicial decision-making and it conflates a number of theories into one version. However, a discussion of such theories is beyond the scope of this paper. For an accessible summary of some mainstream and other theories of judicial decision-making see R Hunter, R Ingleby, & R Johnstone eds, *Thinking About Law* (Sydney: Allen and Unwin, 1995) especially 174–88.

8 See, for example, L Sarmas, Storytelling and the Law: A Case Study of *Louth v Diprose* (1994) 19 *Melb UL Rev* 701.

9 Le Brun & Johnstone, *supra* note 1 at 251–52, agree that teachers should not choose a case for teaching only on the basis of the "authority" of the case. The authors state that certain cases may be included because, for example, "they contain interesting facts", "present opposite views of the law", or "do not reinforce racist, sexist, ageist, homophobic, or cultural stereotypes".

10 (1989) 52 SASR 399 ("Perks").

11 [1990] QB 923 ("Aboody").

12 The doctrine of undue influence enables a party to have a transaction set aside in certain circumstances. Its basis is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise ... affecting the [party's] … will or freedom of judgment … Johnson v Buttress (1936) 56 CLR 113, 134 (Dixon J).

13 (1989) 52 SASR 399,406.

14 It was leaded in the alternative that the transfer should be set aside for duress. The trial judge found it unnecessary to decide whether the facts amounted to duress (Duggan J at 405). In separate criminal proceedings the husband was convicted of murder: see *The Queen v Perks* (1986) 43 SASR 112.

15 The facts actually involved three disputed charges and three disputed guarantees. The author is herself guilty of fact simplification in this instance.

16 [1960] QB 923,952.

17 *Id.*

18 *Id.*

19 It should be noted that in England *Aboody* has now been overruled on this point: *CICB Mortgages PLC v Pitt* [1994] AC *200.* But compare *National Westminster Bank plc v Morgan* [1985] AC 686, a House of Lords decision which has not been overruled, where it was held that a *presumption* of undue influence will not arise if the transaction is not "disadvantageous". The current position in England therefore appears to be that "manifest disadvantage" is no longer a necessary requirement for having a transaction set aside on the basis of *actual* undue influence, but it remains a requirement in cases of *presumed* undue influence. For an explanation of the difference between actual and presumed undue influence see *Barclays Bank Plc v O'Brien* [1994] AC 180 (Lord Browne-Wilkinson). The position in Australia remains unclear.

20 *Aboody* [1990] QB 923, 965 (where the Court refers to this submission by counsel).

21 [1990] QB 923,965.

22 *Id* at 971.

[23] RP Meagher, WMC Gummow, & JRF Lehane, *Equity: Doctrines and Remedies* 3rd ed (Sydney: Butterworths, 1992).

[24] JD Heydon, WMC Gummow, & RP Austin, *Cases and Materials on Equity and Trusts* 4th ed (Sydney: Butterworths, 1993).

[25] *Id* at 307, 323 and 326; Meagher, Gummow, & Lehane, *supra* note 23, at 390, 391, 393 and 396. Note that the publication of the relevant editions of these text/casebooks preceded the partial overruling of *Aboody* in England by *CICB Mortgages* v *Pitt* [1994] AC 200. However, regardless of the date of publication, it is submitted that inclusion of both of these cases, facts and all, would serve a number of important objectives from the point of view of good teaching and scholarship, regardless of their "authority" in the traditional sense: see *supra*, text accompanying note 9 and *infra.*

[26] The doctrine of unconscionable dealing is closely related to the doctrine of undue influence. In *Commercial* Bank of *Australia Ltd v Amadio* (1983) 151 CLR 447, Deane J explained the doctrine as follows: "The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party … and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he [sic] procure, or accept, the weaker party's assent to the impugned transaction. ...Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable." (at 474)

[27] *Diprose* v *Louth (No 1)* (1990) 54 SASR 438 (King CJ); *Diprose* v *Louth (No 2)* (1990) 54 SASR 450 (Full Court); *Louth* v *Diprose* (1992) 175 CLR 621.

[28] *Diprose* v *Louth (No 2)* (1990) 54 SASR 450,479–82 (Matheson J).

[29] See eg *Diprose v Louth (No 1)* (1990) 54 SASR 438, 447–49 (King CJ) .

[30] Lisa Sarmas, Storytelling and the Law: A Case Study of *Louth* v *Diprose* (1994) 19 *Melb UL Rev* 701.

[31] See *id* at 715–17 and the references to the trial transcript cited therein.

[32] Legoe J in the Full Court did quote an explicitly sexual passage from one of the poems and reference was made to the poems generally in some of the other judgments. However, this was done in the context of showing that the solicitor was hopelessly infatuated with Louth, not that he was sexually harassing her. See *Diprose* v *Louth (No* 2) (1990) 54 SASR 450, 457 (Legoe J); *Diprose* v *Louth (No 1)* (1990) 54 SASR 438, 439 (King CJ); *Louth* v *Diprose* (1992) 175 CLR 621,644 (Toohey J).

[33] A fiduciary relationship exists where a person "undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship ... gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the

[34] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 95 (Mason J).

[35] (1992) 96 DLR (4th) 289.

[36] (1992) 92 DLR (4th) 449 (McLachlin and L'Heureux-Dubé JJ). The majority did not find it necessary to consider this issue because they found for the plaintiff on the basis of tort.

[37] Australian courts have 'not, however, excluded such possibilities. *See Wayland* (unreported, Family Court of Australia at Melbourne, 18 April 1994) where actions in tort and breach of fiduciary duty were pleaded with respect to child sexual abuse. Brown J awarded compensation but found it unnecessary to analyse the various causes of action because liability was admitted (at 6, 16–17).

[38] (1992) 96 DLR (4th) 289.

[39] Meagher, Gummow, & Lehane, *supra* note 23.

[40] Heydon, Gummow, & Austin, *supra* note 24.

[41] (1992) 92 DLR (4th) 449.

[42] Heydon, Gummow, & Austin, *supra* note 24, at 236–7, 266, 1064.

[43] (1992) 92 DLR (4th) 449.

[44] I would like to thank Mary Jane Mossman for making me aware of this fact.

[45] Possible advantages associated with the fiduciary approach include: (1) the strong symbolic effect in naming the wrong committed a breach of fiduciary duty rather than a tort because the former better captures the fact of the abuse of power and *trust* involved in such cases; (2) the duties imposed on fiduciaries are higher than those imposed by common law doctrines and they are not limited or hindered by stricter common law concepts such as causation and contributory negligence; (3) it has been suggested that equitable compensation may be more generous than damages awarded in tort; and (4) it is arguable that the operation of statutory limitation periods is less restrictive where actions for breach of fiduciary duty are concerned.