

SHIFTING PARADIGMS IN DURESS

Paul Mitchell*

Abstract

This article investigates the notoriously unstable language that has been used to define duress, in particular the tension between “compulsion” and “pressure”. It argues that the cases on claims made under colour of office provide extensive, previously unacknowledged, support for the conceptualisation of the doctrine in terms of pressure, and that the language of “compulsion” derives from cases on void marriages. Although the legal context of those marriage cases would justify dispensing with “compulsion” as part of a general definition of duress in unjust enrichment, the article concludes by suggesting that there may be a valuable supplementary role for compulsion in situations of legitimate pressure.

I.

What is the paradigm example of duress? Readers of English legal sources seeking the answer to this ostensibly simple question immediately enter a world where verbal appearances are deceptive, and where even such normally reliable guides as Lord Scarman speak in riddles. In *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)*¹, for example, Lord Scarman explained that there were “two elements in the wrong of duress” –

(1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. There must be pressure, the practical effect of which is compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no other practical choice open to him.²

* Professor of Laws, UCL. I gratefully acknowledge the support and hospitality of the University of Queensland, where much of the research for this article was conducted, during the tenure of a Distinguished Visiting Fellowship. I am also grateful for the comments and suggestions made by participants at the Global Futures of Unjust Enrichment conference held at UCL in April 2017.

¹ [1983] AC 366.

² *The Universe Sentinel*, *supra* n 1, 400, echoing (and amplifying) his observations in *Pao On v Lau Yiu Long* [1980] AC 614, 635-636 (PC). In *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, 428 Kerr LJ queried whether Lord Scarman had meant to say “lack of will to resist”, or “lack of will in submitting”, rather than “lack of will to submit” in the passage quoted.

What seems problematic here is the element of paradox: “the authorities” understand “compulsion” in terms of “vitiation of consent”, but Lord Scarman tells us that “the classic case” of duress involves the victim deliberately choosing to accept the situation he has been presented with. The traditional view seems to suggest loss of control, the “classic case” exactly the opposite.

Patrick Atiyah was quick to perceive the difficulty, and insistent that it should be resolved before the doctrine of economic duress became mired in confusion. In a brilliant short note prompted by *The Universe Sentinel* he drew attention to the House of Lords’ observations on duress in the criminal case of *Lynch v Director of Public Prosecutions*³ to argue that “A victim of duress *does* normally know what he is doing, *does* choose to submit, and does intend to do so”.⁴ For Atiyah, the retention of the language of overborne will was at best a distraction, and at worst risked inviting literal-minded decision makers to undertake an irrelevant investigation into the victim’s psychological state.

For all its verve and brio, however, Atiyah’s intervention had only a limited influence. Lord Goff in *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck)* observed that

It is sometimes suggested that the plaintiff’s will must have been coerced so as to vitiate his consent. This approach has been the subject of criticism... I ... doubt whether it is helpful in this context to speak of the plaintiff’s will having been coerced. It is not however necessary to explore the matter in the present case.⁵

One judge in the Court of Appeal of New South Wales was prepared to go further: in *Crescendo Management Pty Ltd v Westpac Banking Corporation* McHugh JA accepted Atiyah’s arguments and concluded that “the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing...”.⁶ His colleagues, however, offered no view on the point.

Judges have, therefore, continued to repeat the orthodoxy: duress means coercion, and coercion means opting for the lesser of two evils. Commentators’ impatience at this state of affairs is palpable; Andrew Burrows’ textbook on restitution provides an eloquent example. “As the overbearing of the will is, on its face, plainly a nonsense in the context of duress”, he writes, “what do the courts mean when they use such language?”.⁷ This is not explicitly presented as a rhetorical question; but the author finds so little merit in the language that it might as well have been.

This article offers a different perspective on English law’s apparent failure to embrace a new paradigm of duress. It first examines duress’ place in the traditional organisational structure of the law of unjust enrichment before moving on to focus more closely on the duress cases

³ [1975] AC 653.

⁴ P S Atiyah, “Economic Duress and the ‘Overborne Will’” (1982) 98 LQR 197, 200.

⁵ [1992] 2 AC 152, 166.

⁶ (1988) 19 NSWLR 40, 45-46.

⁷ A Burrows, *The Law of Restitution* third edition (Oxford, OUP, 2011) 269.

involving an overbearing of the will. It concludes by highlighting the valuable role that the idiom of voluntariness and the overborne will might continue to play in current law.

II.

Duress is only one of several grounds of recovery in unjust enrichment that centres on the application of pressure to the claimant. As Lord Diplock put it, in *The Universe Sentinel*, the “rationale” of economic duress was that:

[the victim’s] apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind. It is a rationale similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence or in consequence of threats of physical duress.⁸

Lord Diplock was not the first jurist to perceive the similarities between duress, undue influence and the colour of office cases (these latter being cases where, typically, a defendant holding public office demanded payment for a service he was obliged to provide freely, or at a lower price than he was insisting on). The undue influence cases involved more subtle, insidious persuasion than the typical duress cases (where an overt threat was the norm); defendants in the colour of office cases had less need of persuasion, or threats – they could simply be intransigent, and thereby compel the claimant into making payment – but their similarity with duress was sufficient to make Justice Holmes speak of them as examples of “implied duress”.⁹ As it happened, there was a rich line of case law in respect of colour of office claims throughout the nineteenth century, and only comparatively few claims in respect of duress; how the courts analysed and classified these cases offers an invaluable insight into where claims arising from pressure were seen as belonging in the broader scheme of legal categories.

The key underlying concept in the cases of duress and colour of office was whether the payment had been made “voluntarily”; if it had, there was no recovery. But if there was an absence of voluntariness the action lay. Voluntariness was always a significant requirement. For instance, in one of the earliest duress cases, *Astley v Reynolds*¹⁰, the claimant had pawned plate to the defendant for three years for £20; at the end of the period the claimant came to redeem the plate, but the defendant refused to return it unless the claimant paid an additional £10 interest. The claimant paid, received his goods, then promptly sued for the £10. His claim succeeded, and in its judgment the court made it clear that voluntariness was the central issue. The claimant, said the court, “knew what he did”. But that did not prevent a finding of compulsion:

⁸ *The Universe Sentinel*, *supra* n 1, 384.

⁹ *Atchison, Topeka & Santa Fe Railway Company v O’Connor* 223 US 280, 286 (1912).

¹⁰ (1725) 2 Str 915; 93 ER 939.

the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not.¹¹

By the beginning of the nineteenth century voluntariness had established itself as a central organising concept. In *Bilbie v Lumley*, for instance, which was concerned with a payment made under a mistake of law, Lord Ellenborough CJ rejected the claim, observing that no action lay where “a party paid money to another voluntarily with full knowledge of all the facts of the case”.¹² Similarly, in *Brisbane v Dacres* the question whether a payment made pursuant to a supposed naval custom was recoverable revolved around whether it should be seen as “a mere voluntary payment”.¹³ At the same time, the common law courts were elaborating their conception of compulsion. For instance, in *Knibbs v Hall* a payment made by a tenant to his landlord to avert the threat of distress of the tenant’s goods was held not to have been made by compulsion, since the tenant could have availed himself of a *replevin* to defend against the distress.¹⁴ By contrast, coercion was identified where a steward of a manor had insisted on payment for producing deeds and court rolls at a trial.¹⁵ The complementarity of voluntariness and compulsion as analytical concepts is nicely illustrated by *Shaw v Woodcock*, a duress of goods case from 1827, in which Bayley J relied on compulsion and Holroyd J on voluntariness to reach the same conclusion via similar analytical routes.¹⁶

One especially valuable judicial elaboration of the concepts of voluntariness and compulsion in the early nineteenth century was provided by *Morgan v Palmer*, in which the claimant was a publican who had paid a fee to the defendant, a local justice of the peace, for the annual renewal of the claimant’s publican’s licence.¹⁷ The defendant had no authority to demand such a fee. Counsel for the defendant argued that the payment was a voluntary one, being made “with a full knowledge of all the circumstances”.¹⁸ Counsel for the claimant countered that “that principle does not apply here, for the parties were not upon equal terms, the publican was under a species of duress”,¹⁹ and this argument prevailed. As Abbott CJ put it, a voluntary payment was irrecoverable where the parties were “on equal terms”,

But if one party has the power of saying to the other, “That which you require shall not be done except upon the conditions which I choose to impose”, no person can contend that they stand upon any thing like an equal footing.²⁰

The other judges agreed with this gloss on voluntariness, with Littledale J adding the following comment:²¹

¹¹ *Astley*, *supra* n 10, 916.

¹² (1802) 2 East 469, 470; 102 ER 448, 449.

¹³ (1813) 5 Taunt 143; 128 ER 641 at 146 (Best, Serjt), 149 (Lens, Serjt), 152 (Gibbs J), 161 (Heath J).

¹⁴ (1794) 1 Esp 84; 170 ER 287.

¹⁵ *_ v Pigott* cited in *Cartwright v Rowley* (1799) 2 Esp 723; 170 ER 509.

¹⁶ (1827) 7 B & C 73; 108 ER 652.

¹⁷ (1824) 2 B & C 729; 107 ER 554.

¹⁸ *ibid* 733.

¹⁹ *ibid* 732.

²⁰ *ibid* 735.

In *Bilbie v Lumley*, *Brisbane v Dacres*, and *Knibbs v Hall*, both parties might, to a certain extent, be considered as actors. Here, the plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence.

Two points, about both the historical development in general and *Morgan v Palmer* in particular, stand out. First, there is no discussion of wills being overborne or of consent being vitiated – this language, so prominent (and problematic) in current English law, must be sought elsewhere. Second, the courts were elaborating legal tests for what counted as a voluntary payment, or an instance of coercion: “voluntary” was a technical, legal term, which functioned in a specific way. For instance, in *Astley v Reynolds* the court recognised that the payer “knew what he did” – the payment was, in one sense of the word, “voluntary”, since it was a deliberate act; but it was not a “voluntary payment” as a matter of law, because “voluntary” as a legal term was not a mere synonym for “deliberate”, or “willed”.

III.

Undoubtedly this legal sense of “voluntariness” (and its corresponding sense of “compulsion”) created the potential for confusion, but nineteenth century legal development on this issue seems to have proceeded remarkably smoothly, seamlessly applying the existing concepts to new situations. Perhaps the most striking of these situations was where a claimant sought to have his goods transported by the defendant carrier, and the carrier insisted on charging (and receiving) payment above the maximum level fixed by law. In the earliest of these cases, *Parker v Great Western Railway Company*, the court held that the payment was not voluntary.²² In *Great Western Railway Company v Sutton*, twenty-five years later, Willes J offered an analysis in terms of coercion:²³

I have always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received.

Shortly afterwards, in *Lancashire and Yorkshire Railway Company v Gidlow*, the language of “*duress*” (sic) for such situations was expressly approved.²⁴

What is immediately noticeable in these cases is how far the concept of coercion and duress has moved beyond the simple, crude situation of a threatening demand for money. There was no *threat* in any meaningful sense of the word; nor was there any inquiry into the claimant’s state of mind at the time of making the payment. Perhaps most tellingly there was no attempt to assess the nature of any pressure: how urgent was the need to send the goods?; what were

²¹ *ibid* 738-739.

²² (1844) 7 M & G 253; 135 ER 107.

²³ (1869) LR 4 HL 226, 249. See also the speech of Lord Chelmsford at 263, characterising the payment of money under such circumstances as “wrongfully compelled”.

²⁴ (1875) LR 7 HL 517, 527.

the possible alternatives?; how much would those alternatives cost? These questions would be absolutely central to a contemporary assessment of economic duress, but in the carrier cases they are notable by their absence.

A further, revealing, illustration of the developing ideas of compulsion could be seen in *Steele v Williams*.²⁵ Here a parish clerk had charged the claimant, an attorney, for undertaking his own searches of the parish register and taking his own copies. Statute did not authorise these charges, and the court held that they could be recovered. The analysis of the majority²⁶ focussed on the payment “not [being] voluntary, because, in effect, the defendant had told the plaintiff’s clerk, that if he did not pay... he should not be permitted to search.”²⁷ This, it was said, amounted to “pressure”.²⁸ Later courts would ponder whether the decision in *Steele v Williams* turned on the element of compulsion, or could be made to stand for a broader proposition about demands by public officials for payment not due²⁹, and this has, perhaps, tended to distract attention from the nature of the compulsion which the case involved. For what is striking about the majority’s reasoning is that the judges did not trouble themselves with identifying a threat, or ascertaining whether the parish clerk was determined to withhold the opportunity to look at the parish registers.

What mattered to the majority in *Steele v Williams* was what had mattered in the carriage cases, namely, the exploitation of a situation of inequality. The obvious way for such inequality to arise was where the defendant controlled a unique asset, or was a monopoly provider of a service which the claimant was made to pay to access. Often a defendant’s public office would place him in this kind of position – the justice of the peace in *Morgan v Palmer* and the parish clerk in *Steele v Williams* are good examples – but, as the carriage cases show, public office was not essential to engage the principle. Other instances of the principle being applied to defendants not holding public office include an arbitrator (improperly withholding an award)³⁰ and a vendor of land.³¹

Throughout these developments the courts were consistently conscious that they were using words like “voluntary”, “compulsion” and “coercion” in technical senses. Sometimes they did no more than highlight that a special sense was being employed, as, for instance, when Lowe J said, in *Deacon v Transport Regulation Board*, that the issue in the case was whether payments were made “involuntarily in the sense in which that word is used in this class of case”.³² The hint of special usage might also be more subtle: “such payment could not be

²⁵ (1853) 8 Exch 625; 155 ER 1502.

²⁶ Parke B and Platt B; Martin B’s reasoning brought the facts within the category of “money paid without consideration” (*ibid* 632).

²⁷ *ibid* 630 per Parke B.

²⁸ *ibid* 631 per Platt B.

²⁹ E.g. *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 84 (Glidewell LJ), 155 (Lord Keith).

³⁰ *Fernley v Branson* (1851) 20 LJQB 178. In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] 1 QB 705, 716, Mocatta J acknowledged that this case could not be explained on the basis of a public office. Cf. R Goff and G Jones, *The Law of Restitution* (London, Sweet & Maxwell, 1966) 155, describing the arbitrator as occupying a “quasi-public position”.

³¹ *Knutson v Bourkes Syndicate* [1941] 3 DLR 593.

³² [1958] VR 458, 459.

considered as voluntary” was how Lord Coleridge CJ summarised the decision in *Morgan v Palmer*.³³ But there was also a more substantive engagement with the language of “duress”. In *Fraser v Pendlebury*³⁴, for instance, the assignees in bankruptcy of a mortgagor had come to an arrangement with the defendant mortgagee to pay off the mortgage. A dispute then arose over certain costs incurred by the mortgagee, who refused to execute the arrangement to discharge the mortgage until those costs were reimbursed. The claimants paid the costs under protest, then brought a successful claim to recover them. In reply to counsel’s submission that there was no duress “in the legal sense of the term”³⁵, Erle CJ said that an action lay “where a party seeks to recover money not justly due, which he has paid voluntarily and under undue pressure.”³⁶ Williams J acknowledged that the cases on payment of tolls under compulsion (among others) established that “where a demand is made by a mortgagee who refuses to transfer unless his demand is satisfied, this, though not duress in the strict legal sense of the term, yet constitutes a state of circumstances under which money so paid may be recovered back.”³⁷ For Byles J the money was being recovered back not on the ground of duress, but on the ground that the payment was not voluntary.³⁸

there is no difference whether the duress be of goods and chattels, or of real property, or of the person. In all cases, especially if the money be paid under protest, it is an involuntary payment; it is made under undue pressure, and can be recovered back.

That the language of voluntariness could be particularly useful where “duress” was perceived as having inherent, unhelpful limitations was perhaps most vividly illustrated in *Atlee v Backhouse*.³⁹ There a payment had been made pursuant to an agreement under which the claimant regained possession of his own goods; the obvious issue was duress. But Parke B refused to analyse the case in such terms:⁴⁰

There is no doubt of the proposition... that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear... that, in order to avoid a contract by reason of duress, it must be duress of a man’s person, not of his goods, ... but the ground is, that it is not a voluntary payment.

³³ *Hooper v Mayor and Corporation of Exeter* (1887) 56 LJQB 457, 458.

³⁴ (1861) LJ 31 (CP) 1.

³⁵ *ibid* 2.

³⁶ *ibid* 2.

³⁷ *ibid* 3.

³⁸ *ibid* 3.

³⁹ (1838) 3 M & W 633; 150 ER 1298.

⁴⁰ *ibid* 650. See also *Oates v Hudson* (1851) 6 Exch 346; 155 ER 576. The rule that duress of goods was insufficient to avoid a contract was authoritatively established in *Skeate v Beale* (1841) 11 Ad & E 983; 113 ER 688. Despite compelling criticisms – see, e.g. Goff and Jones, *supra* n 30, 150-151 and J Beatson, “Duress as a Vitiating Factor in Contract” [1974] CLJ 97, 107 – the requirement was not abolished until 1991 with the House of Lords’ decision in *The Evia Luck*, *supra* n 5, 165.

As a piece of legal analysis this approach was not without its drawbacks: rather than addressing the question of the scope of duress directly, it avoided the issue in a not entirely satisfactory way by simply rephrasing it. Nevertheless, it remains a striking passage, for it illustrates that, as early as 1838, English courts were in the process of creating a new paradigm for duress, in which questions about voluntariness of payment, compulsion and inappropriate pressure were central.

IV.

What is rather disconcerting about the nineteenth century paradigm is how closely it resembles the current law's focus on illegitimate pressure. Indeed, the nineteenth century position seems, oddly, to be an improvement on the current law, for it confidently acknowledges that the concepts of voluntariness and compulsion are being deployed in an extended sense, while the current law seems more equivocally attached to "coercion of the will". What has gone wrong? Why did the House of Lords in 1982 have to grope its way, tentatively, towards a position expounded with greater force and sophistication over a hundred years earlier?

Part of the explanation may be a matter of visibility: there were very few cases in the twentieth century about charges imposed above the statutory maximum,⁴¹ and this may have led to the principles on which those cases were based falling into obscurity. It also seems to have been assumed that the imposition of charges cases turned on the crude model of duress as a demand backed by a threat. In *Twyford v Manchester Corporation*⁴², for instance, a claim to recover unauthorised charges imposed by a local authority for access to a municipal cemetery was rejected because there was no proof of a threat by the authority. It was difficult to see how this decision was consistent with leading nineteenth century cases such as *Morgan v Palmer* and *Steele v Williams* (which were not cited), or with the principles of voluntariness and compulsion that those cases encapsulated and illustrated. Even as late as the decision in *Woolwich Equitable Building Society v Inland Revenue Commissioners*⁴³, where almost the entire category of colour of office cases was effectively subsumed under a new principle of liability, debates continued about whether threats had been found in the cases on unlawfully imposed charges.

The immediate explanation for the prominence of threats and coercion of the will in the House of Lords' decisions on duress was a small, but dramatic, line of cases on duress in relation to marriage. The first, *Scott v Sebright*⁴⁴, involved a petition by a woman who had gone through a ceremony of marriage after her husband-to-be had threatened to shoot her, and to publicise the (false) claim that he had seduced her, if she did not marry him. This was in addition to threats by the bridegroom's creditors to bankrupt her. Butt J granted a petition

⁴¹ A notable exception was *South of Scotland Electricity Board v British Oxygen Co Ltd* [1959] 1 WLR 587 (HL).

⁴² [1946] Ch 236.

⁴³ *Woolwich*, *supra* n29.

⁴⁴ (1886) 12 PD 21.

of nullity. The petitioner, he said, “had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats which in her normal condition she would have treated with the contempt she must have felt for the man who made use of them.”⁴⁵ He made it very clear that the decisive factor in such cases was the claimant’s state of mind, and that there was to be no objective element in assessing whether that state of mind was present:⁴⁶

It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear – whether reasonably entertained or not – either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger.

The same principles were applied, and elaborated in *Cooper v Crane*⁴⁷, where the twenty-four year old petitioner had been induced to participate in the ceremony by the respondent’s threat to commit suicide on the spot unless she married him immediately. The petitioner argued that her will had been “overborne by the superior will of the respondent”⁴⁸, or, as Collins J paraphrased it, “her will was overmastered by the influence of the respondent”.⁴⁹ The judge regarded this claim as requiring proof in one of two ways: either the petitioner had not known what she was doing, “or that though she understood what she was doing her powers of volition were so paralysed that, by her words and acts, she merely gave expression to the will of the respondent, and not her own.”⁵⁰ On the facts Collins J was not persuaded that either basis for the claim was made out.

Later cases affirmed these principles⁵¹, and recognised that a petitioner’s fear need not arise from threats made by the respondent or his agents.⁵² In *Buckland v Buckland*⁵³, decided in 1965, Scarman J granted a decree in favour of a man, who had married the respondent as a result of fear that otherwise he would be wrongly convicted by a Maltese court of having committed a sexual offence of which he was completely innocent. The case was notable for being the first such claim by a man.⁵⁴ It also, perhaps, signalled that Scarman J’s thoughts on duress in general were already moving towards the position he would later expound in *The Universe Sentinel*. As we have seen, the earlier decisions on duress in marriage had focussed on whether the petitioner’s will had been “overborne” or “overmastered”, and whether she

⁴⁵ *ibid* 31.

⁴⁶ *ibid* 24.

⁴⁷ [1891] P 369.

⁴⁸ *ibid* 374.

⁴⁹ *ibid* 376.

⁵⁰ *ibid* 376-377.

⁵¹ E.g. *Hussein v Hussein* [1938] P 159.

⁵² *H v H* [1954] P 258.

⁵³ [1968] P 296.

⁵⁴ A Manchester, “Marriage or Prison: The Case of the Reluctant Bridegroom” (1966) 29 MLR 622, 622.

had been “in a state of mental incompetence”. Scarman J held that, on the facts of the case before him, the test for duress was satisfied, but he described the petitioner’s state of mind as follows:⁵⁵

when the petitioner presented himself in the church for the marriage ceremony, he believed himself to be in an inescapable dilemma – marriage or prison: and, fearing prison, he chose marriage.

The element of “choosing” in this slightly comical – almost Wildean - final phrase, strikes a very different note from the earlier cases. It suggests a residual level of autonomy and control: the petitioner had not lost the ability to make a decision, rather his options had been illegitimately curtailed. It is difficult to resist the suspicion that assumptions about gender were in play here: the language of “overmastering” the will was explicitly gendered, and the criteria of weakness, passivity and prostration emphasised in the earlier cases were perfectly consistent with contemporary stereotypical legal attitudes towards women⁵⁶. When presented with a sympathetic male petitioner, it is perhaps not surprising that the court implicitly assumed a different kind of model of behaviour under pressure.

V.

For Lord Scarman, in *The Universe Sentinel*, the “classic case” of duress was the case of a person confronted with a choice between two evils, and the general test of coercion of the will had to be stretched to accommodate this.⁵⁷ His view echoed, but perhaps did not quite go as far as that of Justice Holmes, who had famously observed that:⁵⁸

It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.

If the element of choice is, indeed, “the characteristic of duress properly so called”, does it follow that the conceptualisation of duress in terms of the overmastering of the will is a mistake, with nothing of value to add to the current law? There is certainly an argument to be made that the conceptualisation of duress in the marriage cases was driven by the ultimate outcome of establishing duress – namely, that the marriage would be declared null and void.⁵⁹ There is, in this context, an obvious coherence in insisting that the effect of the duress must have been to deprive the petitioner of her autonomy. But the context of claims in contract and unjust enrichment is different: here it is established that duress makes the contract voidable,

⁵⁵ *Buckland, supra* n 53, 301.

⁵⁶ P Mitchell, *A History of Tort Law 1900-1950* (Cambridge, CUP, 2015) ch 4. Note, also, the evidence in *Cooper, supra* n 47, 372 on the question whether the petitioner was hysterical.

⁵⁷ *The Universe Sentinel, supra* n 1, 400.

⁵⁸ *Union Pacific Railroad Co v Public Service Commission of Missouri* 39 Sup Ct 24, 25 (1918); Holmes had also expressed this view, in passing, in *The Eliza Lines* 199 US 119, 130-131 (1905).

⁵⁹ See further D Tolstoy, “Void and Voidable Marriages” (1964) 27 MLR 385.

and the consent “revocable” to use Lord Diplock’s expression.⁶⁰ Hence it is more appropriate to focus on the quality of the victim’s consent, not on whether there was any consent at all. The “choice between evils” model of duress also has the advantage that it describes the state of mind of a victim of economic duress with literal accuracy.⁶¹ The victim of such duress is placed in the unwelcome position of having to compare the loss he will suffer if he submits to the defendant’s threat with the loss he will suffer if he decides to be defiant.⁶² Whether he makes this calculation calmly, or in a panic-stricken rush, seems irrelevant to the merits of his claim for unjust enrichment.

As a description of the requirements for duress the “choice between evils” model is, therefore, a more attractive one than the “coercion of the will” formula. But the discussion should not conclude there, because the coercion of the will cases have something distinctive to offer when it comes to the question of how the compulsion arises. As we have seen, the current highest authorities on duress require that the pressure be “illegitimate”. A threat to commit a legal wrong will often satisfy this requirement and, particularly in relation to economic duress, it remains to be seen how far a threat to do a lawful act could amount to illegitimate pressure.⁶³ The cases on coercion of the will take a very different approach, which can be summed up by a remark of Collins MR in *Kaufman v Gerson*:⁶⁴ “what does it matter what particular form of coercion is used, so long as the will is coerced?”

The facts and judicial analysis of that case offer a thought-provoking challenge to the current bipartite structure of duress. The defendant’s husband had embezzled money from the claimant in France; to avert her husband’s prosecution and to avoid dishonour to her family, the defendant had contracted with the claimant, again, in France, to repay the amount appropriated if the claimant dropped the criminal prosecution. Such a contract was valid under French law.⁶⁵ The English Court of Appeal, however, refused to enforce the contract, emphasising in its reasoning the strength of the pressure to which the defendant had been subjected: Mathew J said it “amounted to torture”.⁶⁶

A similar factual situation, although lacking the international dimension, arose in *Williams v Bayley*.⁶⁷ There the claimants were bankers who had induced a father, the defendant, to agree to pay debts incurred to the claimants by the defendant’s son. The funds had been advanced to the son under promissory notes on which the father’s endorsement had been forged by the son, and the claimants made it plain to the father that, unless he agreed to repay the loan, they

⁶⁰ *The Universe Sentinel*, *supra* n 1, 384. *The Atlantic Baron*, *supra* n 30, 719. Cf. D Lanham, “Duress and Void Contracts” (1966) 29 MLR 615, who argued that the marriage cases were instances of a rule applicable to contracts in general.

⁶¹ Atiyah, *supra* n 4, 201 particularly emphasised the suitability of the choice of evils model for economic duress.

⁶² See, for instance, the description of the claimants thought processes in *B & S Contracts*, *supra* n 2, 426 (per Griffiths LJ).

⁶³ *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714. For a powerful early example see *Cummings v Ince* (1848) 17 LJ (QB) 105.

⁶⁴ [1904] 1 KB 591, 597.

⁶⁵ *ibid* 592.

⁶⁶ *ibid* 600. See similarly *Société des Hôtels Réunis (Société Anonyme) v Hawker* (1913) 29 TLR 578.

⁶⁷ (1864) 4 Giff 639 (Ch); (1866) LR 1 HL 200.

would report the son's forgery to the authorities. Counsel for the father were careful to distinguish between two separate grounds on which his agreement to pay should be set aside: first, that to enforce the agreement would be illegal (as compounding a felony); second, that the agreement was executed "under pressure as great as could be exercised by one man over another".⁶⁸ When the case reached the House of Lords, it was unanimously held that the agreement should be set aside, and the judges were careful to distinguish between the two grounds that had been advanced. Only Lord Westbury supported both grounds; Lord Chelmsford dealt only with the pressure point; and Lord Cranworth LC held that only the illegality point succeeded. Lord Westbury's observations on the question of whether the father acted voluntarily were particularly eloquent:⁶⁹

The question... is, whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent?... the power of considering whether he ought to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation.

Lord Chelmsford echoed this approach, observing that "the fears of the father were stimulated and operated on to an extent to deprive him of free agency, and to extort an agreement from him for the benefit of the bankers."⁷⁰ What is particularly striking about these analyses, for our purposes, is that the question of the lawfulness of the pressure was irrelevant. What mattered was its effect on the father's will.

Some writers have preferred to rationalise *Williams v Bayley* as a case of undue influence⁷¹ (although the judges make no mention of a relationship of trust and confidence between the father and the bankers). It would also be possible to reinterpret both *Williams v Bayley* and *Kaufman v Gerson* as cases of illegitimate pressure. In *Williams* both Lord Cranworth LC and Lord Westbury regarded the agreement as, in itself, illegal, so it would logically follow that the demand that the father enter into such an agreement was illegitimate. Similarly, in *Kaufman*, although the wife's contract was valid under French law, it would not have been enforceable if made in England⁷², and the members of the Court of Appeal evidently viewed it with disapproval. Such reinterpretations, however, overlook the importance of the decisions on their own terms, as emphatic demonstrations of the independent importance of an overborne will approach to duress. In other words, both *Kaufman v Gerson* and *Williams v Bayley* show that there is a distinctive and significant role for the overborne will analysis as a *supplement*, not an alternative, to the conceptualisation of duress as a choice between evils.⁷³

⁶⁸ (1864) 4 Giff 639, 656.

⁶⁹ (1866) LR 1 HL 200, 218-219.

⁷⁰ *ibid* 216.

⁷¹ E.g. Stephen A Smith, "Contracting Under Pressure: A Theory of Duress" [1997] CLJ 343, 352 n19.

⁷² *Fisher & Company v Apollinaris Company* LR 10 Ch App 297.

⁷³ Cf. Stephen A Smith, "Contracting Under Pressure: A Theory of Duress" [1997] CLJ 343, whose theoretical model also recognises a distinct role for lack of consent in analyses of duress (e.g. at 362). Smith advocates a

VI.

This article set out to explore and investigate the conceptualisation of duress in current English law, in particular the tension between ideas of duress as an overbearing of the victim's will and duress as an unwelcome imposed choice between evils. The leading cases seemed to have left the law uncomfortably placed between the two: a paradigm shift seemed to be under way, but not quite yet achieved. Commentators such as Patrick Atiyah were anxious that the transition should be fully carried through, and the misleading language of "overborne will" discarded as soon as possible.

In fact, this article has shown that nineteenth century courts had already developed concepts of voluntariness, compulsion and coercion which could be used to analyse situations where pressure had prompted the conferral of a benefit on a defendant: a body of cases on duress of goods and claims under colour of office developed, which was sympathetic to claimants on whom a choice between evils had been foisted. Lord Scarman was, therefore, mistaken when, in *The Universe Sentinel*, he suggested that duress as a choice between evils lacked authoritative support. In the late nineteenth and early twentieth centuries, a line of cases on marriage expounded a dramatically different conception of duress – as an overmastering of the claimant's will. It is difficult to resist the suspicion that assumptions about gender played a role here, and it is striking that, until 1965, only very young women met the criteria of the test. This test gained authority, and was applied (and subtly modified) by Scarman J in *Buckland v Buckland*. When, in 1982, the House of Lords made its pronouncements on the current state of English law, it combined both the older and the newer tests, explaining, rather awkwardly, that a choice between evils was really an example of coercion of the will.

The historical background tends to support the arguments for recognising a broad concept of duress in terms of illegitimate pressure. However, as the final section of the article explained, it does not follow that "coercion of the will" analysis is redundant. Its value can be seen where overwhelming pressure is applied through ostensibly legitimate means; these situations present the law with a dilemma, to which coercion of the will case-law offers a solution.

It is, therefore, fortunate that the House of Lords did not dispense entirely with the language of coercion of the will, although they did give it a prominence that it did not deserve. Even Patrick Atiyah, in his celebrated piece on duress, was less sweeping than he might have been: there was, he acknowledged, still scope for cases of duress "where the victim is reduced to such a stage of submission that he acts as though in a trance".⁷⁴ These usages of "coercion of the will" should not be seen as examples of an imperfectly executed paradigm shift; they are clues to the fact that ideas of duress as coercion of the will still have a valuable contribution to make to the current law.

wide interpretation of "coercion" (see 365), which would, applying his model, make the absence of consent more than a supplement.

⁷⁴ Atiyah, *supra* n 4, 201.

