
* equity & infatuation

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Should equity protect the emotionally dependent?

An emotional dependency which one person may have for another can create a vulnerability which has the potential to be abused. The emotional dependency can cloud the judgment of an individual when entering into transactions with the other party. Equitable principles concerning transactional fairness can provide protection to emotionally dependent parties but it is often difficult to assess the character and strength of the dependency and how greatly it may have influenced a particular transaction. Relationships differ in nature and force and a determination that one party is in an emotionally dependent position can lead to an unbalanced assessment of the relationship. Given the uncertainty involved in establishing such dependencies, it is difficult to justify intervention purely on emotional grounds without a judgmental and arbitrary decision resulting. It is the intention of this article to examine some of the recent developments concerning the ability to provide equitable protection to such relationships.

Equity will not simply protect unequal bargaining power within a transaction; additional features such as lack of consent or taking unconscientious advantage of a disability need to be established. Emotional dependency *per se* will not warrant equitable relief; it must be shown that the other party has unconscientiously exploited the dependency or alternatively the dependency has exercised such a degree of influence over the person's mind that they were unaware of their actions and as a result, consent was lacking.

The types of influence and disabilities which may warrant protection include such considerations as age, literacy, capacity to comprehend the language, business expertise and poverty. Emotional influences are rarely considered because of their highly subjective character and because of the need for equity to be selective in its interference in private, consensual transactions. The recent High Court decision of *Louth v Diprose* (1991) 110 ALR 1 illustrates the preparedness of the court to accept that emotional dependency can create an influence or disability which should be protected. The difficulty is to establish where the boundary will be drawn and how the dependency can be proven. It is suggested that the unreported case of *Efstathia Tzefrios v Irene Polites* (Full Court of the Supreme Court of Victoria, 11 March 1993) represents a better approach to this area. This case approaches the issue of emotional influences in a more cautious fashion; it recognises that emotional burdens can be apparent but that, in isolation, they may be insufficient as a basis for equitable intervention.

Forms of equitable protection

There are three possible methods of protecting emotional dependency in equity: first, equity may impose a fiduciary relationship between the parties involved whereby the 'controlling' party becomes a fiduciary for the interests of the emotionally dependent party and is thereby subject to the onerous equitable obligations which require the fiduciary to act in the best interests of the party being represented. It is difficult to establish a fiduciary obligation unless it can be shown that the dominant party clearly undertook to represent the interests of the weaker party, the weaker party relied on this and was also in a vulnerable position which had the potential to be abused.

Second, equity may conclude that any advantage obtained from the

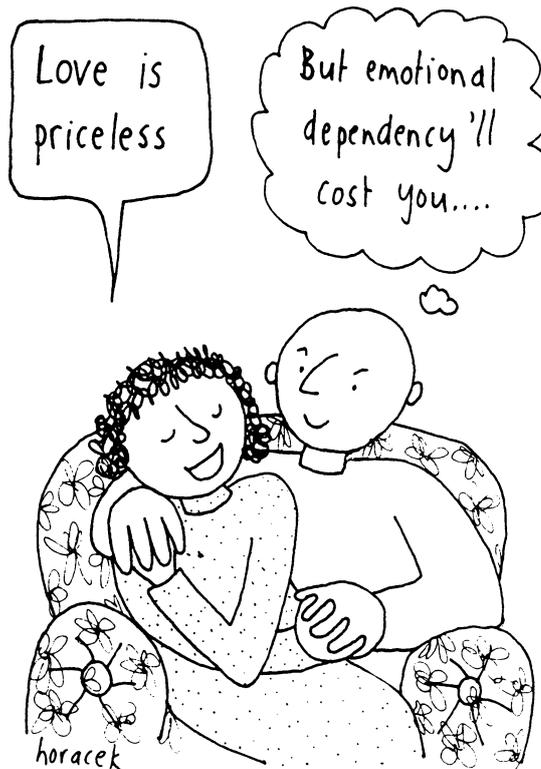
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dependency was a result of the exercise of undue influence by one party. This will occur where the relationship creates a 'presumption' of influence or the influence is constructed within the particular circumstances and such influence is used to obtain an advantage. The focus of undue influence is on the nature of the consent given. The whole purpose of the action is to establish that the party would not have consented to the transaction if the influence had not been exerted.

Finally, it may be possible to conclude that the dependency created a 'special disability' which was unconsciously abused and it would be against the equitable principles of fairness and justice to allow a benefit to be retained from such an abuse. The unconscientious conduct is the primary rationale underlying equitable intervention in these situations. To protect emotional dependency on this ground it must be shown that the dependency was a special disability and that the superior party exploited this dependency and unconsciously obtained an advantage from the transaction. It was on this ground that the majority in *Louth v Diprose* concluded that the transaction should be set aside.

These possibilities indicate that equitable intervention is graded. To conclude that a party within a relationship who is the subject of an emotional dependency is a fiduciary for the other party is very severe. This results in onerous equitable duties being automatically imposed on that party. To establish a fiduciary obligation, a very clear emotional dependency would need to be established and this is difficult. If emotional dependency is to be given any protection, it is suggested that the better alternative is to consider each transaction individually and to assess the character of the consent and the conduct of the parties in each situation. When considering each transaction, the level of protection given will depend on the extent to which the court is prepared to acknowledge emotional ties as a valid susceptibility.

The difficulty is that emotional dependency requires a greater personal analysis than other relationships which consider dominance purely in terms of knowledge or position; it is a more introspective concept which lacks consistency and coherency. How do we determine whether an individual is emotionally dependent or 'infatuated' with another? Contextual issues such as social interaction between the parties, background, culture, and financial circumstances become directly relevant. The court is required to make a determination as to which party is emotionally superior and which party has control. This assumes an artificial equilibrium in relationships which often does not exist and can furthermore promote value judgments about character and motive. The court may disguise its approach to these issues by discussing sweeping and unstructured notions of unconscionability. If emotional dependency is to be recognised as a vulnerability which may need to be protected, then it needs to be carefully examined and considered in the context of the entire relationship.



Emotional dependency only warrants protection if it is genuinely exploited, and simply because a relationship is unbalanced does not necessarily mean that a party has been exploited. Caution is imperative in this slippery area otherwise protecting emotional dependence may become an ad hoc and arbitrary process.

Louth v Diprose

The facts of *Louth v Diprose* involved a consideration of the relationship between a practising solicitor, Mr Diprose, and Ms Louth who was a single parent with two children. At issue was the validity of a property transfer from Mr Diprose to Ms Louth.

Mr Diprose and Ms Louth met at a party in Launceston in 1981 and they developed a relationship which lasted for about seven years. In 1982 Ms Louth left Launceston for Adelaide so that she could obtain some support and financial assistance from her sister. In 1983 Mr Diprose moved to

Adelaide also. Ms Louth had already told Mr Diprose that she could not go out with him because she had met someone else. Mr Diprose moved to Adelaide despite this and did so because of Ms Louth. At first Mr Diprose made no contact with Ms Louth although he did send her some poems. Eventually Mr Diprose did make contact and they went to lunch. Ms Louth repeated that she was not interested in any committed relationship; however, they began to see each other occasionally. Ms Louth made it clear that she was not interested in a relationship but she was happy to remain friends.

Mr Diprose gave Ms Louth many gifts and would often pay bills. In 1985 Mr Diprose agreed to purchase for Ms Louth a property in Tranmere for \$58,000, as a result of discussions between the two. Subsequently the relationship deteriorated and Mr Diprose brought an action against Ms Louth claiming that she had unconsciously taken advantage of his emotional dependency by procuring him to provide money so that she would be able to purchase a property. It was alleged that Ms Louth had manipulated the infatuation of Mr Diprose, so that he would give money, by manufacturing an atmosphere of crisis concerning the need for the property and making certain suicide threats. Ms Louth denied these allegations but her evidence was not accepted by the trial judge, King CJ.

King CJ concluded that Mr Diprose made the gift because he was emotionally dependent on Ms Louth and this gave her a position of great influence on his actions and decisions. King CJ ordered Ms Louth to transfer the house to Mr Diprose. These orders were upheld by a majority in the Full Court of the Supreme Court of South Australia.

On appeal to the High Court, the majority also upheld the order and concluded that Ms Louth had acted unconscientiously by taking advantage of the emotional dependency of the respondent in order to obtain a benefit.

Mason CJ concluded that by dishonestly manufacturing an atmosphere of crisis with respect to the house, Ms Louth had

played on Mr Diprose's susceptibility and that her conduct in so doing was unconscionable because it was calculated to induce. In this respect Mason CJ agreed with the original findings of the lower court.

Brennan J found that the relationship could raise a presumption of undue influence because it was of such a 'personal' character that it could be distinguished from 'the ordinary relationship of a man courting a woman' (p.7). He found there was such a level of emotional dependence that a presumptive relationship of influence may have been raised on the facts. He also found that the conduct could amount to unconscientious conduct because Ms Louth exploited the infatuation and to manufacture an atmosphere of crisis in such a situation 'was dishonest and smacked of fraud' (p.9). Brennan J concluded:

to my mind the defendant's unconscientious use of her power over the plaintiff resulting from his infatuation, renders it unconscionable for her to retain the benefit of such a large gift out of the plaintiff's limited resources'. [p.9]

Deane J agreed and concluded that Ms Louth was guilty of unconscionable conduct. He concluded that the:

adverse circumstances which may constitute a special disability for the purposes of the principle relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible of being comprehensively catalogued'. [p.13]

Deane J felt that abuse of emotional dependency was one form of relief which warranted equitable protection and that there was such a relationship of dependency on these findings.

Dawson, Gaudron and McHugh JJ in a joint judgment agreed with Deane J and concluded that there was an emotional dependency and its abuse was unconscionable in the circumstances.

Toohy J was the only judge to dissent and his judgment reflects a closer consideration of the quality of the dependency and a more balanced assessment of the alleged abuse. In the first place Toohey J was prepared to consider whether enough consideration was given to Ms Louth's evidence as opposed to that of Mr Diprose. Toohey J questioned King CJ on this point but he ultimately felt that it was not necessary to make contrary findings of fact in order to reach a contrary conclusion.

Toohy J examined the loaded expressions used by the trial judge, King CJ, such as 'unrequited love', 'pathetic devotion', 'utter infatuation' and 'feeding the flames of the respondent's passion' and concluded that while they may be 'colourful' they display an 'unbalanced' picture of the relationship between Ms Louth and Mr Diprose. Toohey J felt that the relationship while 'unusual' was not necessarily so obsessive that it created an atmosphere of complete emotional dependence. Further, Toohey J disagreed with the finding of fact and felt that the evidence did not support a conclusion that Ms Louth had 'manufactured an atmosphere of crisis' with respect to the property.

In considering the role of equity, Toohey J felt that equity should not be armed with the power 'to set aside bargains simply because, in the eyes of the judges they appear to be unfair, harsh or unconscionable' (p.27). In conclusion, Toohey J felt that there was no special situation of disadvantage which could have been established from the relationship. He felt that it was more a situation of Mr Diprose acting improvidently *himself* without any assistance from Ms Louth. The relationship offered Mr Diprose very little but it was one in which he, through his *own* determination:

was content to persist and which the appellant in no way misrepresented or disguised. The respondent was well aware of all the circumstances and of his actions and their consequences. [pp.27-28]

The decision of the majority reveals the potential for equity to provide protection against the abuse or influence which emotional dependency may engender both as a presumptive relationship of influence founding an action in undue influence and as a special disability, the abuse of which will found an action in unconscientious dealing. Despite the development of equity there are difficulties in accepting the majority determination.

The emphasis of the majority appears to be on an assumed abuse on the part of Ms Louth *rather* than on any detailed assessment of whether a dependency existed in the first place. It is inferred by the majority that the respondent was dependent because of his infatuation which was shown through his following her to Adelaide and keeping in contact with her. This does not necessarily create a dependency particularly in circumstances where Ms Louth constantly informed Mr Diprose that she was not interested in a committed relationship. Further, Ms Louth did not necessarily exploit Mr Diprose by discussing her financial circumstances with him and it is very difficult to construct a fraudulent scheme out of a friendship which had existed for over seven years.

Toohy J, on the other hand, does consider the circumstances and characteristics of the alleged dependency. For Toohey J, equity should not protect against a self-induced dependency where the party understands and accepts the terms of the relationship. The relationship was one which Mr Diprose accepted and he must have felt that it offered something to him and therefore he assumed responsibility. On this basis, Toohey J felt that equity should not provide unnecessary protection.

The majority was not prepared to conclude that a full acceptance and preparedness on the part of Mr Diprose to enter into the relationship in any way mitigated against the need for equitable protection. Further, the majority were not prepared to consider that the behaviour of Ms Louth reflected the character of the relationship; they seemed to ignore the fact that Mr Diprose assumed certain responsibilities within that relationship of his own accord. The fact that Ms Louth may have told Mr Diprose of her financial difficulties does not mean she exploited him and acted unconscientiously in obtaining the property.

While it is important to recognise that emotional dependency can create susceptibility, it is submitted that the majority has taken this measure of protection too far; there was no issue of any inter-marital pressure, or any dependencies induced by cultural or economic constraints on the respondent. The dependency, if any, was completely created by the self-induced infatuation of the respondent.

A major issue concerns the role equity plays in protecting individuals against the consequences of their own decisions. If the will of an individual has been overwhelmed or the individual has a disability which has been abused, then equitable protection may be given. However, can we truly say that a relationship of influence or a special disability exists if it is created or accepted freely and sustained by both parties involved? Surely equity should only protect individuals against vulnerabilities which are unavoidable or are forcibly created. To allow equity to protect against idiosyncratic vulnerabilities which are openly accepted takes equity too far. To allow equity to set aside the transaction in *Louth v Diprose* comes dangerously close to per-



mitting Mr Diprose to change his mind *ex post facto* when the relationship did not work out as he had hoped.

The majority judgment also displays an underlying discrimination in a number of ways. In the first place it seems unfair of King CJ to have given such an emphasis to the evidence of Mr Diprose when clearly a detailed examination of the situation of both parties is necessary. We cannot assume an emotional dependency because one party claims it. Consideration must be given to both parties within the relationship to assess the nature and quality of the alleged dependency.

Second, the court emphasised the alleged exploitation of the emotional dependency without considering the financial influence which Mr Diprose had actually exercised over Ms Louth. This type of influence can be quite persuasive and Mr Diprose was in a position where he could use his finances to try and obtain the relationship he desired, particularly as he knew that Ms Louth was in financial difficulty.

Finally, the judgment displays an underlying discrepancy in the way it deals with gender issues. It is assumed that because Mr Diprose was a male solicitor he would not have acted in the manner in which he did if he had *not* been emotionally dependent. This is almost an underlying presumption. Unfortunately, it is not at all clear that this presumption would work the other way. On the contrary, Ms Louth is almost assumed to be of fraudulent intent because she discussed her situation with Mr Diprose. Underlying the judgment is the feeling that Ms Louth has seduced Mr Diprose into making the purchase and this feeling is given greater emphasis by the failure to give adequate consideration to the evidence of Ms Louth.

The difficulty with the case is that emotional dependency can, it seems, be presumed if you are a male solicitor and should know better. However, for a single female with children, the presumption actually works the other way; not only is she presumed to be emotionally balanced and unaffected, she is actually considered to have abused the other party *because* of this presumption.

Emotional dependency post *Louth v Diprose*

Following the majority decision in *Louth v Diprose* it seems clear that emotional dependency is a vulnerability which equity is prepared to protect. At this stage it does not warrant the imposition of a fiduciary obligation but this may simply depend on the quality and character of the dependency. Brennan J was prepared to accept that such dependency could amount to a presumptive relationship of influence and it was also found that such a dependency could form the basis for a 'special disability' as discussed in *Commonwealth Bank v Amadio* (1983) 151 CLR 447 and form the basis for an action in unconscientious dealing.

Despite the willingness of equity to protect such a vulnerability, the difficulties in its construction have not been resolved. It is unclear to what extent equity will act paternally to protect a self-induced dependency in isolation of other social, cultural or financial constraints inducing such a dependency. It is unclear whether equity will always regard a benefit obtained from such an emotionally induced party as an unconscientious dealing. *Louth v Diprose* is valuable because it expands the potential scope of equitable protection and considers a wider range of vulnerabilities; beyond this it tells us little about the sort of emotionally dependent situations which equity should be protecting.

A cautious approach

On the other hand, cases such as *Efstathia Tzefrios v Irene Polites* display a more realistic approach to the consideration of emotional dependency and the issue of unconscientious conduct. The facts of the case involved two sisters who entered into a loan transaction. One sister, Ms Tzefrios, had entered into the transaction because she had been requested to do so by her sister, Ms Polites, and also because she believed that Ms Polites' business was thriving and that she would have no need to finance the loan. In trying to have the loan agreement set aside, Ms Tzefrios alleged that unconscientious advantage was taken of the blood relationship and the strong emotional ties which that relationship produced.

Nathan J found that Ms Polites was 'almost shameless in calling on the sibling relationship to induce her sister to pledge her property for her own advantage' (p.25). To this extent he recognised that emotional dependency can be a significant consideration within such a transaction and can produce inequalities.

Nevertheless, it was concluded by Nathan J that the emotional ties between the sisters were only a part of the overall disability under which the appellant was found to be. The serious mistakes concerning her sister's financial position were also held to constitute the disability and ultimately the court unanimously concluded that the transaction, as far as Ms Tzefrios was concerned, should be set aside. The emotional ties that the sibling relationship produced were insufficient *by themselves* to establish a disability warranting the protection of equity. The court was careful to consider the context of the relationship; while the 'call upon a blood relationship can impose an irresistible moral burden' (p.25) the court also found that the appellant was not commercially innocent and realistically she would not have entered into the transaction just because her sister had requested her to do so. Emotional dependency was recognised but not assumed and the other disabling factors combined to produce a special disability which was exploited by Ms Polites and the other parties to the transaction.

The *Polites* case shows a more cautious development of emotional dependency and a greater awareness of the context in which such a dependency should be assessed. The case displays a more accurate awareness of the potential to prejudice or *assume* emotional dependencies within particular relationships, and to this extent is similar to the approach of Toohey J in *Louth v Diprose*.

Conclusion

It is clear that a balance needs to be drawn when protecting emotional dependencies. It is important for equitable principles to recognise and expand the types of influences and disabilities which individual parties may be subject to. In isolation from other influences, caution is necessary when making a determination that emotional dependency has been exploited and warrants the transaction being set aside. *Louth v Diprose* makes too many assumptions about dependency and exploitation and lacks a balanced and structured approach which is essential when personal relationships are being critically exposed. The caution which the *Polites* case endorses is more appropriate. Without such caution, equitable intervention may degenerate into unbalanced paternalism and unnecessarily intrude into private transactions.