

CASE NOTE

KAKAVAS v CROWN MELBOURNE LTD*

**STILL CURBING UNCONSCIONABILITY:
KAKAVAS IN THE HIGH COURT OF AUSTRALIA**

RICK BIGWOOD†

This case note explores the merits, or demerits, of the High Court's recent decision in Kakavas v Crown Melbourne Ltd. That decision appears to be further confirmation of a contemporary judicial tendency in Australia, which is to seriously restrict the ameliorative potential of the Amadio-style 'unconscionable dealing' doctrine, at least in relation to so-called 'arm's-length commercial transactions'. The High Court held that no relief is available for unconscionable dealing — or for 'unconscionable conduct' under s 51AA of the Trade Practices Act 1974 (Cth) (now s 20 of the Australian Consumer Law), which is the selfsame thing — unless the party alleged to have acted unconscionably actually knew of the victim's relative 'special disadvantage' and 'preyed upon' him or her. This note questions whether, in relation to a doctrine that has traditionally been understood to implement a legal policy of protecting the transactionally vulnerable from victimisation, the law relating to unconscionable dealing/conduct in Australia ought to be limited to disciplining nakedly exploitative conduct and nothing less.

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* (2013) 298 ALR 35 ('*Kakavas*').

† LLB (Hons) (Auckland), PhD (ANU); Professor, Faculty of Law, Bond University. I am grateful to two anonymous referees for their comments on this note in draft. The usual caveats apply.

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I INTRODUCTION

Harry Kakavas had a chequered past and a serious gambling problem. He claimed to suffer from a pathological impulse to gamble. He was also what is known in the industry as a 'high roller'.¹ Between June 2005 and August 2006, he lost a total of \$20.5 million playing baccarat at a Melbourne casino operated by Crown Melbourne Ltd ('Crown'). He sought to recover that cumulative loss from Crown on the basis that Crown had, through its employees, engaged in 'unconscionable conduct' in contravention of s 51AA of the *Trade Practices Act 1974* (Cth) ('TPA')² (now s 20 of the *Australian Consumer Law* ('ACL'))³

Both at first instance⁴ and in the Court of Appeal of Victoria,⁵ Mr Kakavas argued that Crown had, in contravention of s 51AA, acted unconscionably by actively preying upon his gambling addiction to its own benefit, in particular by luring him to gamble at its casino by incentives such as rebates on losses, free accommodation and use of the company's private jet. However, the

¹ The High Court noted that by August 2006, Mr Kakavas's gambling with Crown had generated a turnover for Crown of \$1.479 billion!: *Kakavas* (2013) 298 ALR 35, 41 [27].

² Section 51AA(1) reads: 'A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.'

³ *Competition and Consumer Act 2010* (Cth) sch 2. Section 20(1) of the *ACL* reads: 'A person must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time.' The *ACL* applies to corporations: *Competition and Consumer Act 2010* (Cth) s 131.

⁴ *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 (8 December 2009).

⁵ *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95 (21 May 2012).

emphasis of his plea shifted when the matter came before the High Court. There, Mr Kakavas advanced a more passive unconscionable dealing claim, which, if successful, would automatically suffice to establish a contravention of s 51AA.⁶ In particular, it was urged that Mr Kakavas's relationship and dealings with Crown satisfied Mason J's statement of principle in *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*'),⁷ namely, that the doctrine of unconscionable dealing 'may be invoked whenever one party by reason of some condition [or] circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created'.⁸ Mr Kakavas alleged that Crown had serially victimised him, over an eight-month operative period,⁹ by knowingly exploiting his serious inability, by reason of an abnormal, pathological interest in gambling, to make responsible decisions in his own best interests while actually gambling at Crown's casino tables.¹⁰

A full bench (in a joint judgment),¹¹ no less, of the High Court unanimously rejected Mr Kakavas's claim that Crown had acted unconscionably toward him in the *Amadio* sense. In a nutshell, the Court stated that '[t]he plaintiff must be able to point to conduct on the part of the defendant, beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position'.¹² However,

⁶ See *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 62–3 [5]–[8] (Gleeson CJ), 71–2 [40], 74 [46] (Gummow and Hayne JJ) ('*Berbatis*').

⁷ (1983) 151 CLR 447.

⁸ *Ibid* 462.

⁹ Over the 14 months when Mr Kakavas lost \$20.5 million to Crown (June 2005–August 2006), there was a six-month period (October 2005–March 2006) when he did not gamble at Crown's casino at all: *Kakavas* (2013) 298 ALR 35, 36 [1], 41 [27], 56 [108].

¹⁰ An argument was also made that Mr Kakavas suffered from yet another special disadvantage relative to Crown because he was subject to an interstate exclusion order (IEO) made in New South Wales by the Commissioner of Police. Under the *Casino Control Act 1991* (Vic) s 78B, the effect of the IEO was that any winnings payable by Crown to Mr Kakavas were forfeited to the State of Victoria. Mr Kakavas hence ought not to have been paid any of the winnings: see *Kakavas* (2013) 298 ALR 35, 37 [8], 43 [37]. It is unnecessary to discuss this aspect of the decision here. The High Court quickly dismissed Mr Kakavas's argument that the IEO could sensibly be described as a personal disadvantage of the kind sufficient to trigger equity's unconscionable dealing jurisdiction: at 63 [136]–[139]. Moreover, even if it could be so described, it could not be said that Crown knew of that fact and victimised Mr Kakavas accordingly. Both parties were ignorant throughout of the consequences of the IEO: at 65–6 [147]–[149].

¹¹ French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

¹² *Kakavas* (2013) 298 ALR 35, 39 [20].

Mr Kakavas's complaint was, in essence, simply one about 'the outcome of risk-laden activity between the parties conducted in the ordinary course of Crown's business', Crown having done nothing more than accommodate its high-rolling client's desire to engage in 'risky business'.¹³ Despite a professional diagnosis of a pathological gambling condition, Mr Kakavas could not demonstrate that he had in fact occupied a position of 'special disadvantage' relative to Crown.¹⁴ The High Court accepted the primary judge's finding that Mr Kakavas's pathological interest in gambling did not actually affect his capacity to make responsible decisions in his own self-interest so far as gambling was concerned, so as to render him vulnerable to exploitation by Crown:¹⁵ 'He was able to make rational decisions to refrain from gambling altogether had he chosen to do so. He was certainly able to choose to refrain from gambling with Crown.'¹⁶

Even if Mr Kakavas's condition had qualified as a relative special disadvantage, however, the High Court also went on to hold that he did not *present* to Crown as a 'target for victimisation', that is, 'as a man whose ability to make worthwhile decisions to conserve his own interests was adversely affected by his unusually strong interest in gambling,' at least 'any more [so] than the other high rollers feted by Crown at its casino while they chose to gamble

¹³ Ibid 40 [21]. The details of the relationship and dealings between Mr Kakavas and Crown during the relevant period are detailed by the Court at 44–56 [39]–[112]. It is unnecessary for present purposes to summarise them fully here.

¹⁴ See generally ibid 59–63 [126]–[135].

¹⁵ Ibid 60 [127], 63 [135]. The Court confirmed various findings made at first instance that Mr Kakavas voluntarily chose to gamble when not in the grip of his abnormal zeal for gambling: at 40 [23]. There was no finding that he 'could not afford to indulge himself as he did': at 42 [31]. Rather, he presented as 'a person of considerable means': at 55 [107]. Nor was there a finding that he had lost the power to exclude himself from gambling activities or self-regulate his behaviour while gambling: at 42 [33]. He was, for example, capable of not visiting Crown's casino for months at a time: at 56 [108]. Moreover, he was able to negotiate special privileges before entering into the impugned programs of gambling with Crown, and this revealed to the High Court that Mr Kakavas 'was capable of making rational decisions in his own interests, and of bargaining in pursuit of those interests': at 49 [73], see also 56 [108].

The primary judge had also found, and the High Court accepted, that Mr Kakavas's 'level of functioning in each of the personal, familial, financial, vocational and legal levels was ... unremarkable', and that his 'finances were, at least to outward appearances and perhaps in fact, in sound, perhaps excellent, shape': at 62 [133], quoting *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 (8 December 2009) 165–6 [444] (Harper J). The Court also quoted the primary judge that 'Harry Kakavas had chosen to gamble. The only remaining choice was where': at 43 [35], quoting *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 (8 December 2009) 159 [427] (Harper J). The High Court concluded that he 'went to considerable lengths to assure Crown that his troubles with gambling were now behind him': at 43 [36].

¹⁶ *Kakavas* (2013) 298 ALR 35, 63 [135].

there'.¹⁷ Accordingly, Crown's employees did not come to appreciate, actually or constructively, that Mr Kakavas was labouring under a special disability when choosing to enter into wagering transactions with Crown, so as to charge Crown's conscience in equity. But more than that, the High Court also considered it unnecessary to determine whether 'constructive notice' sufficed 'to supply the want of findings of awareness on the part of Crown's employees' of Mr Kakavas's personal disability,¹⁸ because, 'in point of principle',¹⁹ constructive notice is simply inadequate to make out a claim of *Amadio*-style unconscionable dealing.²⁰ The Court's ultimate conclusion on the matter was this:

Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose. The [*Amadio*] principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction. Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned.²¹

In the High Court's view, then, nothing less than *actual* knowledge of the other party's special disability — which includes, by way of equitable deeming,²² 'wilful ignorance' or 'shut-eye' knowledge — suffices to engage the *Amadio* principle and hence satisfy the equitable doctrine of unconscionable dealing. It followed that, '[o]n the findings of fact made by the primary judge as to the course of dealings between the parties, [Mr Kakavas] did not show that his gambling losses were the product of the exploitation of a disability, special to [Mr Kakavas], which was evident to Crown'.²³

¹⁷ Ibid 65 [146].

¹⁸ Ibid 68 [162].

¹⁹ Ibid 65 [146].

²⁰ See generally the discussion ibid 66–68 [150]–[162].

²¹ Ibid 68 [161].

²² I used the phrase 'equitable deeming' here simply to distinguish equity's assimilation of actual and shut-eye knowledge from the common law's treatment of the latter as supporting an *inference* of subjective knowledge despite the relevant party affecting not to know, that is, on the basis of evidence that is circumstantial rather than direct. Cf *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700, 707–8 (Lord Esher MR); J H Farrar, 'Floating Charges and Priorities' (1974) 38 *The Conveyancer and Property Lawyer* 315, 319–21.

²³ *Kakavas* (2013) 298 ALR 35, 68 [160].

It is this aspect of the *Kakavas v Crown Melbourne Ltd* ('Kakavas') decision, in particular, that has prompted me to author this note, for I am quite comfortable with the result in the case. Indeed, given the primary judge's findings in relation to Mr Kakavas's lack of special disadvantage relative to Crown, and appellate courts' general disinclination to disturb trial judges' assessments of fact based on witness credibility,²⁴ one might be forgiven for wondering why the matter was a plausible candidate for special leave at all, and one deserving to be heard before a full bench to boot.²⁵ With respect, the case does not seem to be an obvious one for testing the parameters of the unconscionable dealing doctrine, and in particular for the High Court to make a doctrinally significant pronouncement effectively contradicting the prior understanding of numerous courts²⁶ and commentators²⁷ who had relied on what Mason J had apparently said in *Amadio* in relation to constructive knowledge.²⁸ This is the more so when there has been no foreshadowing, on the part of either courts or commentators, that an attenuated knowledge criterion was causing problems in practice. What is more, doctrinal clarification

²⁴ The High Court noted, accordingly, that the primary judge's assessment of how Mr Kakavas 'present[ed]' must be 'accorded significant weight': *ibid* 65 [146]. See also at 64–5 [144], quoting the observations of Dawson, Gaudron and McHugh JJ in *Louth v Diprose* (1992) 175 CLR 621, 639–41.

²⁵ Special leave to appeal appears to have been granted orally by the High Court (Hayne, Heydon and Bell JJ presiding), but the transcript of proceedings does not disclose the Court's precise reasons for doing so: see Transcript of Proceedings, *Kakavas v Crown Melbourne Ltd* [2012] HCATrans 348 (14 December 2012). One argument raised by counsel for Mr Kakavas was that the case raised a matter of general importance, because gambling at casinos and elsewhere is widespread in Australian society, and many who gamble are vulnerable to exploitation. The Court, however, expresses no firm conclusion on that matter, either during the special leave application or in its judgment in the substantive appeal itself.

²⁶ See, eg, *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 114–15 [601], 122 [627] (DeBelle and Wicks JJ); *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 298 [21] (Finn J); *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 (24 May 2007) [30] (Arnold J for Young P, Chambers and Arnold JJ) ('The requisite knowledge [for unconscionable dealing] ... may be actual or constructive'), approved by the Supreme Court of New Zealand in *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735, 741 [6] (Tipping J for Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ).

²⁷ See, eg, R P Meagher, J D Heydon, M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 526; Anthony J Duggan, 'Unconscientious Dealing' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 127, 147 (albeit in the context of questioning attenuated knowledge standards in the light of what Mason J said in *Amadio*); N C Seddon, R A Bigwood and M P Ellinghaus, *Cheshire and Fifoot Law of Contract* (LexisNexis Butterworths, 10th Australian ed, 2012) 802–3; J W Carter, *Contract Law in Australia* (LexisNexis Butterworths, 6th ed, 2013) 529.

²⁸ (1983) 151 CLR 447, 462, 467.

tion in that connection was not necessary in any event to resolve the case at hand.

In this note, therefore, I want to explore the merits (or demerits) of the High Court's insistence upon *actual* knowledge, and *predation*, no less, as preconditions to the granting of equitable relief on the ground of *Amadio*-style unconscionable dealing — at least in relation to 'arm's-length commercial transactions' (whatever that phrase means).²⁹ Should the unconscionable dealing doctrine be limited to disciplining naked exploitation (and not extend to, as I have argued in the past,³⁰ regulating transactional neglect or indifference, say)? Before addressing that question, however, it is first necessary to set out the Court's doctrinal conceptions and reasoning that ultimately culminated in the views expressed in the salient passage quoted above. When considering those conceptions and reasoning, and my subsequent discussion of them, I invite the reader to bear in mind an important premiss captured in the following words of Professor Melvin Eisenberg:

No significant doctrinal proposition can ultimately be justified either on the ground that it is self-evident or on the basis of another doctrinal proposition. Doctrinal propositions can ultimately be justified only by social propositions.³¹

²⁹ Unfortunately, the Court does not explain its use of the quoted phrase, or its significance to the key doctrinal pronouncements in the decision: see *Kakavas* (2013) 298 ALR 35, 68 [161]. Perhaps their Honours had in mind that the doctrine might apply more liberally in relation to non-business transactions, or perhaps in relation to substantial gifts as opposed to contracts, as it has been suggested in the past: see, eg, *Wilton v Farnworth* (1948) 76 CLR 646, 649 (Latham CJ), 655 (Rich J). However, no such distinction was explicitly drawn in the gift case of *Louth v Diprose* (1992) 175 CLR 621; see especially Brennan J's judgment, which requires proof of *exploitation* in relation to gift transactions, ie, just like the *Amadio* principle does in relation to contracts in a business context: at 630–2. Granted, *Louth v Diprose* was a case of obvious predation on the part of the donee anyway.

I have not tried to wrestle with this problem here. Suffice it to say that what the Court states in *Kakavas* may be limited to 'commercial transactions', although the distinction between commercial and non-commercial transactions, or between bargains and gifts, is not a bright-line (or easy) one to maintain and apply. In business, contracts often conceal gifts, whether through the device of a deed or via the voluntary stipulation of a nominal or inadequate consideration. Consider, for example, *Bridgewater v Leahy* (1998) 194 CLR 457, where the sale of grazing land as a going concern for full market value, but which was also accompanied by a deed of forgiveness to the purchaser for a substantial amount of the purchase price, was challenged (successfully, but in my respectful view questionably) on the basis of *Amadio*-style unconscionable dealing. See also below n 164.

³⁰ Rick Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 *Oxford Journal of Legal Studies* 65.

³¹ Melvin A Eisenberg, 'The Theory of Contracts' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge University Press, 2001) 206, 209 (citations omitted).

II THE DOCTRINAL DIMENSIONS OF *KAKAVAS*: THE COURT'S ESSENTIAL OBSERVATIONS, CONCEPTIONS AND REASONING

A *Preliminary General Observations*

The High Court began its reasoning in *Kakavas* with an overview of Mr Kakavas's case.³² In the course of that discussion, their Honours made some preliminary general observations in relation to the equitable jurisdiction to relieve a party from a transaction by reason of the 'unconscionable conduct' of the other party to that transaction.³³ First, their Honours acknowledged that the jurisdiction is rooted in the 'conscience of equity', which they accepted is 'a construct of values and standards' against which the conduct of individuals is to be judged.³⁴ More specifically, the doctrine of unconscionable dealing disciplines 'a species of equitable fraud', which species the Court attributed to Lord Hardwicke LC's third category of such fraud in *Earl of Chesterfield v Janssen*, namely, a

kind of fraud ... which may be presumed from the circumstances and condition of the parties contracting: ... it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other.³⁵

Equity thus intervenes here, we are told, 'not merely to relieve the plaintiff from the consequences of his own foolishness. [Rather, it] is to prevent his victimization.'³⁶ And in deciding whether there had been such victimisation against equity's conscience, the Court reaffirmed³⁷ its earlier-stated view, from *Jenyns v Public Curator (Qld)* ('*Jenyns*'), that the inquiry

³² *Kakavas* (2013) 298 ALR 35, 38–43 [14]–[38].

³³ The specific cases in which the High Court has previously applied the modern doctrine of unconscionable dealing are: *Blomley v Ryan* (1956) 99 CLR 362; *Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 457; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

³⁴ *Kakavas* (2013) 298 ALR 35, 38 [15], 39 [16], citing W M C Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) 44–51.

³⁵ *Kakavas* (2013) 298 ALR 35, 39 [17], quoting *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125, 155–6; 28 ER 82, 100. This statement was approved in *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, 491 (Lord Selborne LC), and in *Blomley v Ryan* (1956) 99 CLR 362, 385 (McTiernan J).

³⁶ *Louth v Diprose* (1992) 175 CLR 621, 638 (Deane J), quoted in *Kakavas* (2013) 298 ALR 35, 39 [18].

³⁷ *Kakavas* (2013) 298 ALR 35, 39 [18], 58–9 [122].

calls for a precise examination of the particular facts, *a scrutiny of the exact relations established between the parties* and a consideration of the mental capacities, processes and idiosyncrasies of the [plaintiff]. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord Stowell's generalisation concerning the administration of equity: 'A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon *the real justice of the case*'.³⁸

In relation to *Amadio*-style unconscionable dealing in particular, this orthodoxy, according to their Honours in *Kakavas*, means that

the task of the courts is to determine whether the whole course of dealing between the parties has been such that, as between the parties, responsibility for the plaintiff's loss should be ascribed to unconscientious conduct on the part of the defendant.³⁹

It would be inconsistent with this approach, said the Court,

to consider [Mr Kakavas's] 'special disadvantage' separately, in isolation from the other circumstances of the impugned transactions which bear upon the principle invoked by [Mr Kakavas]. The issue as to special disadvantage must be considered as part of the broader question, which is whether the impugned transactions were procured by Crown's taking advantage of an inability on [Mr Kakavas's] part to make worthwhile decisions in his own interests, which inability was sufficiently evident to Crown's employees to render their conduct exploitative.⁴⁰

The Court also repeated other well-rehearsed cautions designed to indicate the exceptional nature of intervention with transactions on the basis of

³⁸ (1953) 90 CLR 113, 118–19 (Dixon CJ, McTiernan and Kitto JJ) (emphasis added), quoting *The Juliana* (1822) 2 Dods 504, 521; 165 ER 1560, 1567 (Lord Stowell). See also *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 325 [23] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ) (*Tanwar*). The emphasis is supplied in the passage quoted above simply to highlight those words that are separately quoted by the Court in *Kakavas* (2013) 298 ALR 35, 39 [18]. The whole passage from *Jenyns*, however, is quoted by their Honours at 58–9 [122], where this point is repeated by the Court.

³⁹ *Kakavas* (2013) 298 ALR 35, 39 [18] (citations omitted).

⁴⁰ *Ibid* 59 [124] (citations omitted).

equity's conscience, especially in commercial contexts. Hence, we are reminded that a contract is not unconscionable simply because its terms or the manner of its performance causes loss, hardship or unfairness to the relief-seeking party.⁴¹ We are also reminded that equitable intervention does not exist to save people from their own improvidence, or to displace the tolerable risks inherent in normal and lawful business activity: 'The plaintiff must be able to point to conduct on the part of the defendant, beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position.'⁴² Courts must, therefore, have a sense of occasion when considering applying equity's responsibility-shifting, conscience-based ameliorative doctrines, as many losses inflicted upon transacting parties are all in the nature of the game being played:

there is little scope for the intervention of equity to undo the result of transactions undertaken on the unmistakable footing that no quarter is asked and none is given by either party to the transaction, at least so long as the transaction has been conducted honestly in accordance with the rules of the game.⁴³

A high-rolling millionaire like Mr Kakavas, therefore, inevitably faced a formidable hurdle in convincing a court to shift responsibility for his own conduct onto Crown, when it was not suggested that the latter 'ran a dishonest game'.⁴⁴ Crown did nothing more than accommodate a client's voluntary decisions to engage in 'risky business'.⁴⁵ Gambling, said the Court, was an 'avowedly rivalrous' activity,⁴⁶ and so it made little sense to stigmatise as 'victimisation' lawful conduct that 'took place in a commercial context in which the unmistakable purpose of each party was to inflict loss upon the other party to the transaction'.⁴⁷ The Court, however, was also quick to qualify this, signalling that it might well have been different had the casino operator 'prey[ed] upon a widowed pensioner who is invited to cash her pension cheque at the casino and to gamble with the proceeds', or had other factors

⁴¹ Ibid 39 [19], quoting *Tanwar* (2003) 217 CLR 315, 325 [26] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). Cf *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J): 'It does not appear to be essential in all cases [of unconscionable dealing] that the party at a disadvantage should suffer loss or detriment by the bargain.'

⁴² *Kakavas* (2013) 298 ALR 35, 39 [20].

⁴³ Ibid 41–2 [29].

⁴⁴ Ibid 42 [29].

⁴⁵ Ibid 40 [21].

⁴⁶ Ibid 41 [26].

⁴⁷ Ibid 40 [25].

been at play, such as where the gambler concerned was ‘evidently intoxicated, or adolescent, or senescent, or simply incompetent’.⁴⁸ But this is just to underscore the point, consistent with what the High Court had said in *Jenyns*, that context and circumstances are paramount in the inquiry as to whether ‘victimisation’ can sensibly be held to have occurred between transacting parties.

B *Unconscionable Dealing and ‘Constructive Notice’*

As mentioned in the introduction to this note, even if it had been decided, counterfactually, that Mr Kakavas had occupied a position of special disadvantage relative to Crown when entering into in wagering transactions with the company, Crown nevertheless would not have been held to have *exploited* the strategic opportunities thereby created. This was because it was not, said the High Court, ‘sufficiently evident’ to Crown that Mr Kakavas ‘was so beset by that [disadvantage] that he was unable to make worthwhile decisions in his own interests while gambling at Crown’s casino’.⁴⁹ He ‘did not *present* as a target for victimisation by Crown, any more than the other high-rollers feted by Crown at its casino while they chose to gamble there’.⁵⁰

Before the High Court, Mr Kakavas accepted that Crown, through its employees, did not *actually* know of his alleged special disability; rather, he argued that the primary judge had erred in failing to apply the principles of ‘constructive notice’. That is to say, Crown, it was alleged, ‘was aware of the possibility that [a] situation [of special disadvantage] may exist or [was] aware of facts that would raise that possibility in the mind of any reasonable person’.⁵¹

Anyone familiar with the equitable jurisdiction to relieve against an unconscionable dealing will immediately recognise the source of those words. The Court quoted Mason J in *Amadio*, who said:

if A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A’s) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. And if, instead of having actual knowledge of that situation,

⁴⁸ Ibid 42 [30] (citations omitted).

⁴⁹ Ibid 68 [160].

⁵⁰ Ibid 65 [146] (emphasis added).

⁵¹ Ibid 66 [150].

A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.⁵²

Mr Kakavas relied on this passage as authority for importing notions of so-called constructive notice into the application of the principle of unconscionable dealing as a species of equitable fraud.⁵³ The High Court, however, held that his attempt to do so ‘must fail *in point of principle*’.⁵⁴ Their Honours said that while the concept of constructive notice made sense in connection with the resolution of disputes as to the priority of interests as between the holder of a legal estate and the holder of a prior competing equitable estate in the law of property,⁵⁵ it was neither appropriately extended to ‘commercial transactions’⁵⁶ nor, in particular, suitable for determining whether a transaction is impeachable for equitable fraud or unconscionability.⁵⁷

The Court opined that Mason J did not mean what he appeared to be saying in *Amadio*, namely, that constructive notice sufficed to establish unconscionable dealing.⁵⁸ Rather, his Honour intended merely to paraphrase and adopt what Lord Cranworth LC had said long ago in *Owen v Homan*, namely:

it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain [the advantage], he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge.⁵⁹

Thus, the Court concluded in *Kakavas*, Mason J in *Amadio* was speaking of ‘wilful ignorance’, which, for the purpose of relieving against equitable fraud,

⁵² *Amadio* (1983) 151 CLR 447, 467, quoted in *Kakavas* (2013) 298 ALR 235, 66 [151].

⁵³ *Kakavas* (2013) 298 ALR 35, 66 [152].

⁵⁴ *Ibid* 65 [146] (emphasis added).

⁵⁵ *Ibid* 66 [152].

⁵⁶ *Ibid* 66–7 [152]–[153]. In expressing this view, the Court agreed with Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539, 545, and quoted Jordan CJ’s statement in *Oxley v James* (1938) 38 SR (NSW) 362, 375 (‘in commercial transactions ... means of knowledge are not actual knowledge’).

⁵⁷ In support of this point the Court quoted Gaudron, McHugh, Gummow and Hayne JJ in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 411 [39]: *Kakavas* (2013) 298 ALR 35, 67 [154].

⁵⁸ *Kakavas* (2013) 298 ALR 35, 67 [155].

⁵⁹ *Ibid*, quoting *Owen v Homan* (1853) 4 HL Cas 997, 1035; 10 ER 752, 767.

is tantamount to actual knowledge.⁶⁰ This is consistent, too, with what Deane J (Wilson J agreeing) had said in *Amadio*, namely, that the bank's officer in that case had 'simply closed his eyes to the vulnerability' of the elderly Amadios 'and the disability which adversely affected them'.⁶¹ Deane J described the case as 'one in which "wilful ignorance is not to be distinguished in its equitable consequences from knowledge"'.⁶²

The Court in *Kakavas* then approved of what Deane J had explained in *Louth v Diprose*, namely, that the *extent* of the knowledge of the claimant's special disability that must be possessed by the other party is an aspect of the ultimate question of whether the claimant can be held to have been victimised by the other party or not:

[The claimant's special disability must be] sufficiently evident to the other party to make it *prima facie* unfair or 'unconscionable' that that other party procure, accept or retain the benefit of, the disadvantaged party's assent to the impugned transaction in the circumstances in which he or she procured or accepted it.⁶³

Their Honours then concluded with the doctrinally significant passage quoted in the introduction to this note,⁶⁴ signifying that unconscionable dealing means victimisation in the manner of 'unfair exploitation of ... weakness', which 'requires proof of a predatory state of mind'.⁶⁵ Mere 'inadvertence' or 'indifference' towards the weaker party's interests is not sufficient for making out the 'victimisation or exploitation' with which the *Amadio* principle,⁶⁶ and hence proscription under s 51AA of the *Trade Practices Act* (now s 20 of the *ACL*), is concerned.

⁶⁰ *Kakavas* (2013) 298 ALR 35, 67 [156].

⁶¹ *Amadio* (1983) 151 CLR 447, 478 (Deane J), quoted in *Kakavas* (2013) 298 ALR 35, 67 [157].

⁶² *Amadio* (1983) 151 CLR 447, 479, quoting *Owen v Homan* (1853) 4 HL Cas 997, 1035; 10 ER 752, 767 (Lord Cranworth LC). This passage was quoted by the Court in *Kakavas* (2013) 298 ALR 35, 67 [157].

⁶³ *Kakavas* (2013) 298 ALR 35, 68 [158], quoting *Louth v Diprose* (1992) 175 CLR 621, 637. See also *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 298 [21] (Finn J).

⁶⁴ See above n 21.

⁶⁵ *Kakavas* (2013) 298 ALR 35, 68 [161].

⁶⁶ *Ibid.*

III ANALYSIS

A Introductory Remarks

Readers may well find the *Kakavas* decision to be unremarkable, at least in terms of its result. The high-rolling Mr Kakavas is hardly drawn in the litigation history as an individual especially deserving of our sympathy, and certainly few of us could empathise with his plight. Doctrinally, however, the Court's judgment is notable, as its effect (if not the Court's considered intention) is to further curb the availability of relief from an objectively concluded 'commercial'⁶⁷ transaction via the equitable doctrine of unconscionable dealing, at least by comparison to prior judicial and academic formulations of that doctrine by antipodean courts and commentators.⁶⁸ By construing Mason J's discussion of the knowledge requirement in this field as meaning *actual* knowledge (or its equivalent), and insisting moreover upon proof of 'a predatory state of mind', the High Court has rejected a conception of the jurisdiction that includes mere neglect and attenuated knowledge criteria. This is despite such a 'clarification' of the law being strictly unnecessary to resolve the particular dispute before the Court,⁶⁹ and despite, too, the absence of any evidence that earlier formulations of the doctrine seemingly incorporating attenuated knowledge criteria (such as constructive knowledge or notice) have been causing significant problems in practice or posing an intolerable threat to the general security of transactions.

It follows from what has just been said that the ultimate doctrinal consequence of *Kakavas* is confirmation, for Australia at least, that nothing less than proof of naked exploitation suffices to justify state interference with an objectively concluded bargain transaction, at any rate when the official ground for interference is *Amadio*-style 'unconscionable dealing' or 'unconscionable conduct' under s 20 of the *ACL*. On one level, the Court's judgment in that regard is to be applauded, for it certainly marks a victory for conceptual coherence. There has long been, to my mind at least,⁷⁰ an irreconcilable intellectual disjuncture between the publically announced justificatory foundation of the jurisdiction (that is, 'anti-exploitation'), and judicial

⁶⁷ Again, whatever that phrase means: see above n 29 and below n 164.

⁶⁸ Especially those accepting an attenuated knowledge criterion into the unconscionable dealing inquiry. See, eg, the cases and secondary sources cited above at nn 26–27.

⁶⁹ On any appropriate measure of knowledge it is unlikely that Crown could have been taken to have been 'sufficiently aware' or 'on notice' of Mr Kakavas's alleged special disability.

⁷⁰ See Rick Bigwood, *Exploitative Contracts* (Oxford University Press, 2003) 237, 249–60, 493; Bigwood, 'Contracts by Unfair Advantage', above n 30, 70–2.

formulations of the criteria intended to serve those foundations in the disposition of particular claims (that is, incorporating attenuated knowledge standards). As we shall see below, the state-of-mind elements of exploitation are such that nothing less than *actual* or *subjective* knowledge (or its equivalent) can fit the bill. *Ex hypothesi*, an exploiter's conduct is

called into question ... not because he [or she] *carelessly* failed to know and appreciate facts of which he [or she], or possibly some hypothetical person, ought reasonably to have been aware in the circumstances (eg, by making inquiries or drawing logical inferences from known facts and responding accordingly), but rather because it is *exploitative of* [the other person involved].⁷¹

Exploitation implies *advertent* rather than *inadvertent* conduct on the exploiter's part, and so his or her conduct must be assessed in the light of what he or she actually knew (and did) at the relevant time, as distinct from what a hypothetical reasonable person ought to have known or appreciated.

Under the *Kakavas* formulation of the jurisdiction, however, this conceptual disjuncture disappears. The doctrinal criteria now coordinate perfectly with their higher justificatory purpose of exploitation-avoidance. But this also implies that the norm or burden of responsibility of those who happen to encounter 'specially disadvantaged' persons in the world of transacting is a very modest one: an injunction simply to refrain from deliberately (intentionally, recklessly) exploiting them. That is a standard of dealing that affords significant weight to the advantaged party's (D's) contractual liberty (that is, D's freedom to pursue his or her economic projects through cooperative exchange with others), at the expense of the other party's (P's) interest in being secure from utilisation as a mere instrument at the hands of the Ds of this world.

In my view, it remains legitimate in the wake of *Kakavas* to ask whether the High Court's approach to unconscionable dealing strikes an appropriate balance between the competing 'justice' interests in this area, all things considered. Should equity's unconscionable dealing doctrine be limited to and controlled by the exploitation concept alone? That *normative* question is not addressed in *Kakavas* at all (or in any other High Court decision in the field). It can, in my view, only be resolved by reference to the policies or values intended to be served by the equitable doctrine being applied. It is perhaps surprising, then, that although the Court accepted in its preliminary general observations that the 'conscience' that informs this area of the law is 'a

⁷¹ Bigwood, 'Contracts by Unfair Advantage', above n 30, 71 (emphasis in original).

construct of values and standards',⁷² no attempt was made to expose, explain and justify those values and standards. An awful lot is assumed rather than explained in the Court's reasons. That is true, as well, of the controlling concept of exploitation itself. What does (interpersonal) exploitation mean/involve? Why does the law care about it? The answers to those questions, I believe, reveal both the limitations of the exploitation concept and the ameliorative potential of an unconscionable dealing doctrine that is not judicially constrained by such limitations.

Before turning to consider the questions I have just raised, it is salient to reflect further upon the Court's preliminary general observations in *Kakavas*. Those observations, as far as they go, form much of the backdrop of the reasons that caused their Honours to restrict the unconscionable dealing doctrine to exploitation-avoidance and nothing less.

B *Initial Reflections on the Court's Preliminary General Observations*

Despite the prominence of conscience-based reasoning and doctrine in Australia, the equitable doctrine of unconscionable dealing has remained under-theorised, and hence under-explained, for many years, especially in the judgments of the courts. Much like *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* ('*Berbatis*') before it,⁷³ the *Kakavas* decision is no exception to this observation. Understandably, the High Court was at pains to remind us yet again that relief from transactions on the ground of unconscionable dealing is highly fact-specific and parsimoniously granted, especially in commercial contexts. Further, as just mentioned, the Court was also happy to acknowledge that equity's 'conscience' is 'a construct of values and standards' against which individuals' conduct is to be judged. But nowhere in the judgment, or indeed in any of the previous judgments of the High Court in this area, do we see any detailed and robust account of what values, exactly, are at play in an unconscionable dealing determination, and how those values ought to be weighed and balanced in setting appropriate standards of conduct intended to be signalled and protected by the jurisdiction. Instead, we are told that the doctrine prevents or disciplines 'victimisation', and that 'victimisation' here means nothing less than 'unfair exploitation of weakness', but in truth no credible defence is

⁷² *Kakavas* (2013) 298 ALR 35, 39 [16].

⁷³ (2003) 214 CLR 51. See Rick Bigwood, 'Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd — Curbing Unconscionability: *Berbatis* in the High Court of Australia' (2004) 28 *Melbourne University Law Review* 203.

made of either of those claims, and certainly no elaborate dissection of either concept is provided, as discussed below.

It is impossible to disagree with the Court's endorsement of the *Jenyns* proposition, that conscience-based intervention 'calls for a precise examination of the facts',⁷⁴ which facts are, of course, typically unknowable in advance. However, with respect to the Court, it is surely an exaggeration to say that '[s]uch cases do not depend upon legal categories susceptible of clear definition and giving definite issues of fact',⁷⁵ because the exploitation concept is certainly capable of sustained analysis and elaboration,⁷⁶ as would be any doctrine of unconscionable dealing that purported to express and regulate that particular concern. Granted, the concept of 'victimisation' is at a higher level of abstraction, and hence slightly harder to pin down, for exploiting a person is just one way of victimising him or her, and so exploitation, obviously, does not exhaust the universe of victimisation. Moreover, it cannot suffice, for the purpose of rationalising the *modern* conception of unconscionable dealing, simply to refer back to the *fons et origo* of the doctrine — in this case, Lord Hardwicke LC's third category of equitable fraud in *Earl of Chesterfield v Janssen* — because there is no reason to believe that justice-inspired doctrines do not develop and transform with experience and learning over time, usually toward becoming more nuanced, more sophisticated and (oftentimes) more liberal in their application.⁷⁷ Indeed, in *Hart v O'Connor*, Lord Brightman said:

'Fraud' in its equitable context does not mean, or is not confined to, deceit; 'it means an unconscientious use of the power arising out of the circumstances and conditions' of the contracting parties. It is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.⁷⁸

⁷⁴ *Jenyns* (1953) 90 CLR 113, 118 (Dixon CJ, McTiernan and Kitto JJ), quoted in *Kakavas* (2013) 298 ALR 35, 58 [122].

⁷⁵ *Jenyns* (1953) 90 CLR 113, 119 (Dixon CJ, McTiernan and Kitto JJ), quoted in *Kakavas* (2013) 298 ALR 35, 58 [122].

⁷⁶ See, eg, Alan Wertheimer, *Exploitation* (Princeton University Press, 1996); Bigwood, *Exploitative Contracts*, above n 70.

⁷⁷ Obvious examples of such doctrines that have expanded significantly from restrictions that historically were placed upon them are duress and promissory estoppel. Equity's unconscionable dealing doctrine is, of course, another: see Malcolm Cope, 'The Review of Unconscionable Bargains in Equity' (1983) 57 *Australian Law Journal* 279.

⁷⁸ *Hart v O'Connor* [1985] AC 1000, 1024 (Lord Brightman), quoting *Earl of Aylesford v Morris* (1873) [LR] 8 Ch App 484, 491 (Lord Selbourne LC). The last sentence of this passage —

A senior court could, if it were so minded, do an awful lot in the name of transactional justice with a concept of victimisation that is sourced in the simple idea of ‘unconscientious use of the power arising out of the circumstances and conditions of the contracting parties’, and which definitionally catches beneficial transactions passively received in unconscionable circumstances. I shall return to this proposition below; suffice it for now to observe that the equitable doctrine of unconscionable dealing is neither internally self-limiting nor shackled by its historical antecedents. Again, senior courts are free to develop the doctrine in accordance with what they perceive to be appropriate jurisdictional boundaries given the purposes and policies of the law sought to be served and advanced by that particular doctrine. As formulated in *Kakavas*, however, the purpose or policy of the unconscionable dealing doctrine is narrow indeed: prevent victimisation in the manner of interpersonal exploitation, which concept itself is, presumably, constrained by the law’s (extremely under-articulated) conception of market-transaction exploitation, discussed further below.

In one respect, I believe, the Court in *Kakavas* overplays its reliance on what is extrapolated from *Jenyns* and applied to the unconscionable dealing inquiry; that is, that the court must examine the ‘whole course of dealing between the parties’,⁷⁹ and that the concept of ‘special disadvantage’ cannot be considered in isolation of all the other circumstances of the impugned transaction, but rather is merely ‘part of the broader question’ as to whether transaction-relieving exploitation took place.⁸⁰ For obviously it cannot be suggested that the doctrine of unconscionable dealing invites abandonment to some wilderness of ‘fact and circumstance’. On the contrary, and quite rightly, the High Court has been explicit in the past that conscience-based regulation in equity must be mediated through distinct categories and well-developed doctrinal (and remedial) criteria that focus, channel, and hence discipline the judicial inquiry in particular cases.⁸¹ For *Amadio*-style unconscionable

‘victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances’ — was quoted with apparent approval by Gaudron, Gummow and Kirby JJ in *Bridgewater v Leahy* (1998) 194 CLR 457, 479 [76].

⁷⁹ *Kakavas* (2013) 298 ALR 35, 39 [18].

⁸⁰ *Ibid* 59 [124].

⁸¹ *Tanwar* (2003) 217 CLR 315, 324 [20] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

dealing, then, the doctrinal criteria are essentially twofold. The claimant⁸² must show that:

- 1 she or he was ‘by reason of some condition [or] circumstance ... placed at a special disadvantage vis-à-vis another’; and
- 2 ‘unfair or unconscientious advantage [was] then taken [by the other party] of the opportunity thereby created’.⁸³

In order to satisfy criterion (2), the claimant must, in the light of *Kakavas* at least, show that the advantaged party: (a) was actually aware of the former’s relative special disadvantage; and (b), with that awareness, deliberately failed to administer to (or correct for) that special disadvantage before transacting with the claimant for the purpose of exploiting him or her.

Now, it is understandable that courts that were concerned to guard against excessive liberality in the application of the unconscionable dealing doctrine, for example as posing too great a threat to transactional liberty and security, would issue stern cautions in the nature of those found in the *Kakavas* judgment⁸⁴ (among others),⁸⁵ or stress the lofty thresholds of conduct or

⁸² An unfortunate hangover of history in this area is the appearance, in some formulations of the doctrine, that ‘an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable’, once certain primary facts are shown (ie, special disadvantage and knowledge thereof): see, eg, *Amadio* (1983) 151 CLR 447, 474 (Deane J). Indeed, courts have even spoken recently of an ‘equitable presumption’ of unconscionable dealing arising from proof of special disadvantage and superior-party knowledge thereof: see, eg, *Turner v Windever* [2005] NSWCA 73 (22 March 2005) [2] (Giles JA), [99] (Santow JA); *Lampropoulos v Kolnik* [2010] WASC 193 (30 July 2010) [389] (Simmonds J). However, while it makes sense in the undue influence arena to refer to a presumption of undue influence arising in certain classes of case for public policy reasons, the language of ‘presumption’ should be abandoned in the unconscionable dealing context. There is no need for it and it is misleading. At best, the so-called ‘equitable presumption’ operates merely as a permissible inference rather than a genuine presumption. Moreover, it is clear that the burden of persuasion in unconscionable dealing cases remains throughout on the party alleging unconscionable dealing: see, eg, *Louth v Diprose* (1992) 175 CLR 621, 632 (Brennan J) (‘At the end of the day ... it is for the party impeaching the [transaction] to show that it is the product of the [transferee’s] exploitative conduct’). This is also clear from what the Court said in *Kakavas* (2013) 298 ALR 35, 68 [160], when rejecting Mr Kakavas’s claim: ‘the appellant [Kakavas] did not show that his gambling losses were the product of the exploitation of a disability’.

⁸³ *Amadio* (1983) 151 CLR 447, 462 (Mason J). The other members of the Court who discussed the jurisdiction did not materially depart from this formulation: see at 459 (Gibbs CJ), citing *Blomley v Ryan* (1956) 99 CLR 362, 415 (Kitto J), 405–6 (Fullagar J), 474 (Deane J), 489 (Dawson J).

⁸⁴ See discussion above in text accompanying nn 40–47.

⁸⁵ The most famous warning of this nature is probably that of Kirby P in relation to equitable estoppel in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 585–6. In

‘moral obloquy’ needing to be reached in order to qualify for relief under the equitable doctrine.⁸⁶ It has been said, for example, that ‘unconscionability’ is not simply synonymous with ‘unfair’ or ‘unjust’.⁸⁷ Personally, however, I have long been sceptical about those sorts of curial assertions in this field,⁸⁸ as they simply beg the question of what, in equitable contemplation, ‘unfairness’ or ‘unjustness’ denotes and entails. Neither notion is context- nor norm-independent. Moreover, doctrinal criterion (2) of unconscionable dealing above simply states that ‘unfair or unconscientious advantage’ must be taken, treating the two as apparently synonymous⁸⁹ (although ‘unfair’ obviously means ‘unfair in contemplation of the special dictates of equity’, and not simply ‘unfair’ in some wider, colloquial and untrained sense).

Granted, unconscionable dealing *should* be seen as ‘a doctrine of occasional application’,⁹⁰ so that official judgments that certain conduct in lawful business is ‘unconscionable’ or ‘unconscientious’ ought to be sparingly made. To my mind, though, restraint in decision-making in this area is secured not by judges enlisting more graphic adjectives, labels or warnings in connection with their formal exegeses of the jurisdiction, but rather in how they settle and apply the doctrinal criteria that are intended to facilitate the resolution of actual unconscionable dealing claims. In the present context, that means that the *Amadio* doctrine’s constabulary reach can be controlled (or constricted) by the law’s approach to (1) the ‘special disadvantage’ requirement, or (2) the ‘unfair or unconscientious advantage-taking’ requirement. In relation to the second requirement, courts could either increase the level of knowledge (of the other party’s special disability) required, or stipulate an additional state-of-mind requirement (for example, intentionality) that must accompany the superior party’s failure to respond to that special disability before transacting

relation to the *Amadio* principle in particular, see, eg, *Berbatis* (2003) 214 CLR 51, 96 [111]–[112] (Kirby J); *Qantas Airways Ltd v Dillingham Corporation* (Unreported, Supreme Court of New South Wales, Rogers J, 8 April 1987) 41, quoted in Paul Finn, ‘Commerce, the Common Law and Morality’ (1989) 17 *Melbourne University Law Review* 87, 94.

⁸⁶ See, eg, the discussion of unconscionable dealing in *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ) (*World Best Holdings*), quoted in *Lopwell Pty Ltd v Clarke* [2009] NSWCA 165 (14 August 2009) [40] (Macfarlan JA).

⁸⁷ See *World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ), quoted in *Lopwell Pty Ltd v Clarke* [2009] NSWCA 165 (14 August 2009) [40] (Macfarlan JA).

⁸⁸ See Bigwood, ‘Curbing Unconscionability’, above n 73, 219.

⁸⁹ See also *Louth v Diprose* (1992) 175 CLR 621, 637 (Deane J) (‘unfair or “unconscionable”’).

⁹⁰ *World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ). Spigelman CJ was here referring to the *Retail Leases Act 1994* (NSW), but his Honour’s treatment of ‘unconscionability’ in that context were taken in *Lopwell Pty Ltd v Clarke* [2009] NSWCA 165 (14 August 2009) [38]–[40] (Macfarlan J) to pertain to unconscionable dealing generally.

with the party so afflicted. It turns out that, in *Berbatis*, the majority of the High Court has already emphasised that the special disadvantage criterion is no trifling threshold.⁹¹ Now, in *Kakavas*, a unanimous High Court has additionally provided that the knowledge requirement for unconscionable dealing is that of *actual* knowledge (or its equivalent),⁹² and that there must also be ‘proof of a predatory state of mind’, no less.⁹³ The cumulative effect of both decisions, therefore, is double insurance against transactional interference, seriously constricting the ameliorative potential of the *Amadio*-style unconscionable dealing jurisdiction. Assuming that to be the intention of the Court, is it a consequence that can and ought to be defended? Should the jurisdiction be so enfeebled? The answer to those questions, in my view, lies partly in an assessment of the Court’s reasons in *Kakavas*, and partly in wider considerations of legal theory and policy that, unfortunately, tend not to be openly canvassed in the leading cases in the field — *Kakavas* affording no exception on this occasion.

I shall now consider each of those matters in turn.

C *The High Court’s Reasons: Victimisation, Exploitation and Knowledge*

As already mentioned, the Court in *Kakavas* is explicit that the basis of equity’s jurisdiction to relieve against *Amadio*-style unconscionable dealing is the detection and correction of ‘equitable fraud’,⁹⁴ that equitable fraud here means ‘victimisation’,⁹⁵ and that victimisation here means ‘unfair exploitation of the weakness of the other party’.⁹⁶ But what we do not see in the judgment, or indeed in those of the High Court when it has previously considered and applied the same doctrine, is a credible conceptual account of interpersonal market-transaction exploitation. What does ‘exploitation’ *mean* in this context? And why does (or why should) the law *care* about it? Presumably the

⁹¹ (2003) 214 CLR 51. For discussion, see Bigwood, ‘Curbing Unconscionability’, above n 73, 209–11, 222–7. Before that case, and in the light of the outcome in cases such as *Louth v Diprose* (1992) 175 CLR 621 and *Bridgewater v Leahy* (1998) 194 CLR 457, one might be forgiven for thinking that proof of special disadvantage was not so difficult to achieve.

⁹² *Kakavas* (2013) 298 ALR 35, 66–8 [150]–[159], 68 [162].

⁹³ *Ibid* 68 [161]. Just to be clear here, although there can be no predatory state of mind without actual knowledge, it does not follow that predation follows from actual knowledge (although it often will in fact). Hypothetically, one could actually know of another’s special disadvantage but act in good faith nonetheless, that is, when deriving an advantage through it.

⁹⁴ *Ibid* 39 [17], 66 [152].

⁹⁵ *Ibid* 39 [18], 68 [158], 68 [161].

⁹⁶ *Ibid* 68 [161].

law cares about interpersonal exploitation because such exploitation is somehow ‘wrong’, ‘unfair’ or ‘unjust’; but what, exactly, is ‘wrong’, ‘unfair’ or ‘unjust’ about interpersonal exploitation in the formation of bargain transactions?

1 *What ‘Exploitation’ Means*

Interestingly, the language of ‘exploitation’ was introduced quite late into High Court formulations of the equitable jurisdiction to relieve against an unconscionable dealing. The term featured nowhere, for example, in *Blomley v Ryan* in 1956.⁹⁷ Nor was it mentioned in the leading judgments of Mason J and Deane J in *Amadio* in 1983.⁹⁸ The term was used quite liberally by Brennan J in his judgment in *Louth v Diprose* in 1992,⁹⁹ but it was only tangentially employed subsequently in the joint majority judgment of Gaudron, Gummow and Kirby JJ in *Bridgewater v Leahy* in 1998.¹⁰⁰ In 2003, each of the majority judges in *Berbatis* made reference to ‘unfair’ or ‘unconscientious’ exploitation in connection with the *Amadio* principle;¹⁰¹ and in *Kakavas*, the full bench’s judgment is simply littered with the locutions of ‘exploitation’, there being more than a dozen references to that term or its derivatives throughout.¹⁰² Other senior courts within the British Commonwealth have employed the ‘exploitation’ concept in recent years as well.¹⁰³

In my experience, though, the *meaning* of exploitation in the present context is typically assumed by courts and commentators, rather than supplied. This is lamentable because exploitation claims are never ‘free-floating’. The meaning of exploitation must refer to and arise out of the uses to which it is being put. Outside of the law, certainly, there seem to be as many meanings of the term ‘exploitation’ as there are authors who have utilised it from time to

⁹⁷ (1956) 99 CLR 362.

⁹⁸ (1983) 151 CLR 447, 461–8 (Mason J), 468 (Wilson J), 469–481 (Deane J). Only Dawson J uses the term in his judgment: at 489, 490.

⁹⁹ (1992) 175 CLR 621, 626, 627, 628, 630, 631, 632.

¹⁰⁰ (1998) 194 CLR 457, 490 [115] (describing the position of special disadvantage as being one that ‘renders one party subject to exploitation by another’).

¹⁰¹ *Berbatis* (2003) 214 CLR 51, 64 [14] (Gleeson CJ), 75 [50], 76 [52] (Gummow and Hayne JJ), 112 [172] (Callinan J).

¹⁰² See, eg, *Kakavas* (2013) 298 ALR 35, 37 [5], 37 [10], 38 [11], 43 [34], 59 [124], 62 [132], 63 [135], 65 [147], 68 [160]–[161].

¹⁰³ See, eg, *ASB Bank Ltd v Harlick* [1996] 1 NZLR 655, 662 (Gault J for Gault, Henry and McGechan JJ) (New Zealand Court of Appeal); *Canadian Imperial Bank of Commerce v Ohlson* (1998) 154 DLR (4th) 33, 44 (Conrad JA for Bracco and Conrad JJA and Clark J) (Alberta Court of Appeal).

time for a variety of purposes.¹⁰⁴ Within the law, however, one would expect the term to possess a dedicated conceptual meaning, especially when it is being invoked, as it clearly now is, in a *legal justificatory way* — that is, to stigmatise D's conduct as unconscionable, and to subject D, accordingly, to adverse legal treatment in the manner of state-assisted transaction avoidance or imposition of an enforcement disability.

Now, any legal, philosophical or ordinary dictionary will define the exploitation concept abstractly to mean something along the lines of: 'Taking unjust advantage of another for one's own advantage or benefit'.¹⁰⁵ It will be noticed immediately that the term is innately pejorative, at least when it is used in connection with 'persons' as opposed to 'mere things';¹⁰⁶ 'exploitation', whether active or passive, can carry no normatively neutral connotations. It is for this reason that courts' repeated use of such phrases as 'unconscientious exploitation'¹⁰⁷ or 'unfair exploitation'¹⁰⁸ is quite tautologous, as strictly speaking there can be no other kind of exploitation. It is also because a notion of taking 'unjust' or 'unfair' advantage lies at the basis of our objection to the practice that people are likely to disagree on what is or is not exploitative in particular contexts or relationships, or on a particular set of undisputed facts. As Richard Arneson has written:

In a morally loaded sense of the term, exploitation is unfair use. The exploiter uses people ... in a way that is somehow unfair. There will, then, be as many competing conceptions of exploitation as theories of what persons owe to each other by way of fair treatment.¹⁰⁹

It follows, then, that what counts as an 'unfair use' of a person (for the purpose of denominating such a use 'exploitative') is contextually contingent:

¹⁰⁴ In moral and political philosophy, where most of the writing on exploitation is to be found, see, eg, Andrew Reeve (ed), *Modern Theories of Exploitation* (Sage Publications, 1987); Wertheimer, above n 76.

¹⁰⁵ Joseph R Nolan et al, *Black's Law Dictionary* (West Publishing, 6th ed, 1990) 579 ('Exploitation'). Ordinary and philosophical sources provide similar definitions. J B Sykes (ed), *The Concise Oxford Dictionary of Current English* (Oxford University Press, 7th ed, 1982) 340 defines it as, inter alia, 'work[ing], turn[ing] to account ...; utiliz[ing] (person, etc.) for one's own ends, esp. (derog.)'. For a catalogue of philosophical definitions of exploitation, see Wertheimer, above n 76, 10–12.

¹⁰⁶ See Robert E Goodin, 'Exploiting a Situation and Exploiting a Person' in Andrew Reeve (ed), *Modern Theories of Exploitation* (Sage Publications, 1987) 166, 173.

¹⁰⁷ *Louth v Diprose* (1992) 175 CLR 621, 626, 627, 630 (Brennan J).

¹⁰⁸ *Kakavas* (2013) 298 ALR 35, 68 [161].

¹⁰⁹ Richard Arneson, 'Exploitation' in Lawrence C Becker and Charlotte B Becker (eds), *Encyclopedia of Ethics* (Garland Publishing, 1992) vol 1, 350, 350.

it is relative to the social institution, formal or informal, that is the context of the relationship or encounter between the parties involved;¹¹⁰ it depends very much on the ‘game’ that the parties are (or understand themselves to be) playing.¹¹¹ Given that ‘pressing for advantage’ is an accepted feature of the free competitive bargaining game,¹¹² then, one would naturally expect judgments of exploitation in contract formation to be rare, the more so when both parties understand, or at least are capable of understanding, the ‘risky’ nature of the activity at hand. The High Court was right in *Kakavas*, therefore, to emphasise the normal risks inherent in lawful business, and also to stress the importance of relational context: that we might legitimately expect and demand higher levels of individual responsibility on the part of millionaire high-rollers than for elderly pensioner widows, despite both being engaged in essentially the selfsame market activity.

A final point to emphasise about the exploitation concept is that, in the context of the classical liberal conception of commerce at least,¹¹³ exploitation must be understood as a purely procedural concern: as a *method of gain* rather than as a gain *simpliciter*. Our objection to the practice must thus reside in some feature of the *means* chosen by the alleged exploiter to attain his or her transactional ends, rather than in the demerits of the ends that those means actually achieved. Exploitation is thus different from theft, say, even though a non-consensual diversion of value occurs in both events: ‘Taking an advantage is not the same thing as taking [the] good itself.’¹¹⁴ Rather, ‘[t]aking advantage of [the] structural weakness[es] of other parties to a bargaining game is, at root, what talk of economic exploitation is all about.’¹¹⁵

¹¹⁰ See Don E Marietta Jr, ‘On Using People’ (1972) 82 *Ethics* 232, 235.

¹¹¹ See Goodin, ‘Exploiting a Situation and Exploiting a Person’, above n 106, 183; Allen W Wood, ‘Exploitation’ (1995) 12(2) *Social Philosophy & Policy* 136, 151–2.

¹¹² Eleanor Holmes Norton, ‘Bargaining and the Ethic of Process’ (1989) 64 *New York Universities Law Review* 493, 510. See also *Walford v Miles* [1992] 2 AC 128, 138 (Lord Ackner for Lords Keith, Ackner, Goff, Jauncey and Browne-Wilkinson).

¹¹³ As to what this conception means and entails, see Rick Bigwood, ‘Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part I’ (2000) 16 *Journal of Contract Law* 1; Rick Bigwood, ‘Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part II’ (2000) 16 *Journal of Contract Law* 191. Outside of the classical liberal conception, exploitation might well mean and entail something else: see, eg, Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, 1974) 253–62 (regarding the Marxian conception of exploitation).

¹¹⁴ Goodin, ‘Exploiting a Situation and Exploiting a Person’, above n 106, 168.

¹¹⁵ Robert E Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press, 1985) 194 (citations omitted).

What follows from this is that although the idea of ‘advantage-taking’ is at the heart of the exploitation concept, what exploiters unfairly or unjustly ‘take advantage of’ in an act of interpersonal exploitation is an ‘advantage’ of a *relative* and *strategic* kind — superior bargaining power, ability or opportunity — rather than an ‘advantage’ of a *material* or *end-state* kind (the beneficial transaction itself).¹¹⁶ Again, this aligns with the *Amadio* formulation of unconscionable dealing: that, in order to succeed, the claimant must show that she or he was specially disadvantaged relative to the other party to the impugned transaction, and that that other party had taken ‘unfair or unconscientious advantage ... of the opportunity thereby created’.¹¹⁷ It is also consistent with the *Kakavas* Court’s general observation that the unconscionable dealing doctrine is not engaged by the fact that the claimant has suffered loss or unfairness in the terms of the transaction in question, ‘even loss [or substantive unfairness] amounting to hardship’.¹¹⁸ In saying that, the Court relied on its earlier-expressed views in *Tanwar Enterprises Pty Ltd v Cauchi*,¹¹⁹ where Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ also notably described the ‘governing equitable principle’ in cases of undue influence and ‘catching bargains’ in purely procedural terms: as being ‘concerned with the production by *malign means* of an intention to act’.¹²⁰

2 The ‘Elements’ of Exploitation

Broadly speaking, in non-legal terms, the elements of an interpersonal exploitation claim (at least, in relation to an economic transaction) are twofold: (1) exploitable circumstances — peculiar asymmetries in bargaining power, ability or opportunity *inter se*; and (2) taking unfair advantage of the (strategic) opportunities thereby arising — the ensuing *act* of exploitation itself. Obviously, when presented in this way, one can see immediately the substantial correspondence between the componentry of an exploitation claim and the twofold *Amadio* proof criteria of (1) ‘special disadvantage’,¹²¹ and (2) ‘unfair or unconscientious advantage [being] taken of the opportunity

¹¹⁶ See Goodin, ‘Exploiting a Situation and Exploiting a Person’, above n 106, 167–8, 172.

¹¹⁷ *Amadio* (1983) 151 CLR 447, 462 (Mason J) (emphasis added).

¹¹⁸ (2013) 298 ALR 35, 39 [19].

¹¹⁹ *Ibid*, quoting *Tanwar* (2003) 217 CLR 315, 325 [26].

¹²⁰ *Tanwar* (2003) 217 CLR 315, 325 [23] (emphasis added).

¹²¹ Indeed, the special disadvantage requirement has been judicially described precisely in terms of rendering the specially disadvantaged party ‘subject to exploitation’ (*Bridgewater v Leahy* (1998) 194 CLR 457, 490 [115] (Gaudron, Gummow and Kirby JJ)) or ‘susceptible to exploitation’ (*Kakavas* (2013) 298 ALR 35, 63 [135]).

thereby created'.¹²² The apparent simplicity of those conditions, however, belies the rather complex judgements that need to be made under each criterion.

(a) *Exploitable Circumstances*

It is axiomatic that only very serious disparities in relative bargaining power, ability or opportunity will qualify in law as 'exploitable circumstances'.¹²³ After all, the very stability of transactions is ultimately at stake. What is significant about exploitable circumstances is that they translate into *interpersonal bargaining power*, that is, a capacity, on the part of the advantaged party, to direct, actively or passively, the transactional decision-making of the other, disadvantaged party, in a direction intended by the advantaged party. This is a power that the advantaged party might 'exploit' and hence 'abuse'. There is seemingly no limit to the *sources* of exploitable circumstances, hence of interpersonal bargaining power: love, fear, family circumstances, pressing need, ignorance, error, permanent or temporary incapacity, economic circumstances, dependence, and so on might, severally or in combination, and of course if sufficiently serious, produce relevant interpersonal bargaining power.¹²⁴

Notable here, too, is the substantial correspondence existing between what counts in law as an 'exploitable circumstance' and the law's conception of 'responsible', hence ultimately 'binding', consent. Exploitable parties are, for whatever reason, unable to act fully legally 'responsibly' in relation to their jural acts; hence, subject to defences on the other side, they are not held fully legally 'responsible' for any transactional assent that was signified under conditions of exploitation. This is either because such parties were not, at the time of assenting, possessed of the normal capacities, physical and mental, required for playing in games of strategy, advantage or power (such as free competitive bargaining), or else they lacked, at that relevant time, a fair

¹²² This correspondence is no accident, as legal accounts of exploitation, or indeed non-legal accounts of exploitation relevant to the law, will typically have been drawn from substantive legal doctrines that purport to regulate the exploitation concern, such as unconscionable dealing and undue influence: see, eg, Wertheimer, above n 76, ch 2 ('Unconscionable Contracts').

¹²³ Judges have thus been at pains to distinguish 'special disadvantage' from mere 'inequality of bargaining power': see, eg, *Amadio* (1983) 151 CLR 447, 462 (Mason J); *Berbatis* (2003) 214 CLR 51, 64 [11], [14] (Gleeson CJ).

¹²⁴ Cf John R S Wilson, 'In One Another's Power' (1978) 88 *Ethics* 299, 303–7.

opportunity to exercise their otherwise normal capacities.¹²⁵ This marks a critical point when the law's normal insistence on individual responsibility and self-reliance for transacting parties might well surrender to a reasonable expectation, on the part of the weaker, hence vulnerable, party, that the superior party must accept some responsibility for the transactional fate of that vulnerable party. That is, the superior party must accept some responsibility, if she or he, with sufficient knowledge of the 'exploitable circumstances', chooses to proceed to take value from the weaker party without first taking adequate steps in the circumstances to correct for the serious relative disequilibrium *inter se*.¹²⁶

(b) *The 'Act' of Exploitation Itself*

Obviously, being 'exploitable' is not the same thing as being 'exploited'. The peculiarly advantaged party must actually *do something* — she or he must *exploit* — the interpersonal power, hence special opportunity, that she or he enjoys by virtue of the other party's known relative condition or circumstances. Whether it is active or passive, then, 'exploitation is never an accidental or wholly casual interpersonal process. ... [T]here is a state of mind requirement'.¹²⁷ Exploiters must act in some sense *deliberately* in relation to their exploitees and their exploitees' special condition or circumstances. Specifically, the exploiter must act purposively or with reckless disregard for the special weakness or vulnerability of his or her exploitée: he or she must either *intend* to take advantage of his or her exploitée's known weakness or vulnerability, or else *act in reckless disregard* of the probable existence of that condition.¹²⁸

I have argued in the past¹²⁹ that, although exploitation involves 'intentionality' in either of the above two senses, it does not further imply, definitionally at least, *conscious impropriety* such as 'bad faith' or 'subjective dishonesty' on

¹²⁵ Cf Hart's conditions of excuse in relation to criminal responsibility, which I believe commute, *mutatis mutandis*, to the law relating to defeasible contracts (transactions) as well: H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 1968) 152.

¹²⁶ Interestingly, the Court in *Kakavas* quite frequently uses the language of responsibility-shifting in its judgment: see, eg, *Kakavas* (2013) 298 ALR 35, 39 [18], 40 [21], 43 [34], 66 [149].

¹²⁷ Bigwood, *Exploitative Contracts*, above n 70, 151.

¹²⁸ Cf John Lawrence Hill, 'Exploitation' (1994) 79 *Cornell Law Review* 631, 680.

¹²⁹ See Bigwood, *Exploitative Contracts*, above n 70, 151–4.

the part of the would-be exploiter.¹³⁰ This is consistent with the prior jurisprudence in the fields of undue influence and unconscionable dealing. For example, in *Johnson v Smith*, Allsop P said:

As to unconscionable dealing or conduct, it can be accepted that neither the appellant nor his father acted with any dishonesty. Nevertheless, it is the attempt to retain the benefit obtained from the special disadvantage of his mother that is the issue. In many cases (though not this one) this is accompanied by conduct that is capable of clear moral or ethical criticism — cheating, trickery, extortion or plain dishonesty. Nevertheless, what lies at the heart of the doctrine is that advantage is taken of the special disadvantage. This may occur because of the unconscientious use of power arising or existing in the circumstances or (as here) the unconscientious attempt to retain the benefit obtained from the person with the special disadvantage.¹³¹

In the same case Young JA (Allsop P and Hodgson JA agreeing) rejected a submission that the subjective motivation of the defendant was a determinative factor in an unconscionability claim. His Honour concluded:

There does not appear to be much in the way of precedent considering whether a person whose subjective motives are pure can, nonetheless, be held to be acting unconscionably. No authority was cited to us. However, when one considers the facts in cases such as *Bridgewater v Leahy*, one finds support for what the primary judge ruled and against the present submission.¹³²

In his Honour's view:

There are situations where a person who has no active intention of doing another down may still be guilty of unconscientious conduct if he or she accepts 'the benefit of an improvident bargain by an ignorant person acting without independent advice which cannot be shown to be fair'.¹³³

¹³⁰ Ibid 154:

Hence, even acts motivated by paternalism can in theory be exploitative if the actor wrongfully (wholly instrumentally and without proper authority for exercising the paternalism) takes unfair advantage of the object's inability to act legally autonomously relative to the actor in order to produce a consequence that the actor seeks for the object, regardless of the actor's subjective 'good reasons' for so acting.

Cf Wilson's discussion of paternalism, which is consistent with this line of approach to exploitation: Wilson, above n 124, 311–15.

¹³¹ [2010] NSWCA 306 (17 November 2010) [5].

¹³² Ibid [100] (citations omitted).

¹³³ Ibid [101], quoting *Nichols v Jessup* [1986] 1 NZLR 226, 234 (McMullin J).

On this view, the mental componentry of exploitation can be framed in such a way that the alleged exploiter need only intend to perform those acts or omissions that objectively would constitute the wrong of exploitation — here, ‘taking unfair advantage of the other party for one’s one benefit or advantage’ — there being no additional requirement that he or she must intend to act wrongly in that particular way. In other words, as with dishonesty itself,¹³⁴ one need not know or believe that one is acting exploitatively in order to act exploitatively. That, with respect, strikes me as correct.

In *Kakavas*, however, the High Court states that ‘unfair exploitation of ... weakness’, which is necessary to justify equitable intervention on the basis of unconscionable dealing, ‘requires proof of a *predatory state of mind*’.¹³⁵ Unfortunately, no elaboration follows as to what that entails, precisely. The Court merely contrasts predation with ‘[h]eedlessness of, or indifference to, the best interests of the other party’.¹³⁶ Such a contrast, however, is a tad stark for legal operational purposes. For if D were to transact with P while in a state of *conscious* indifference toward the substantial likelihood that P was specially disadvantaged relative to D, then that must surely count as a ‘predatory state of mind’, even though D’s conduct is merely reckless (intentional in an oblique sense) as opposed to fully intentionally exploitative or predatory.¹³⁷ A

¹³⁴ Cf *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 162 [173] (*‘Farah’*):

As a matter of ordinary understanding, and as reflected in the criminal law in Australia, a person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards (citations omitted).

¹³⁵ *Kakavas* (2013) 298 ALR 35, 68 [161] (emphasis added).

¹³⁶ *Ibid.*

¹³⁷ To clarify, I understand ‘intention’ in its core sense to involve “aiming at” as part of a plan’: Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 79. As Evans has explained, ‘[a]n act will be intentional in a full sense if it was anticipated, wanted, and the agent acted for the reasons that led him to want it’: Jim Evans, ‘Choice and Responsibility’ (2002) 27 *Australian Journal of Legal Philosophy* 97, 106. Conduct done with oblique intention, or reckless conduct, in contrast, ‘is conduct done in the knowledge that it carries with it an unreasonable risk of some adverse consequence’: Cane, above n 137, 80. As Evans explains at 106:

Reckless acts are a proper sub-set of acts that are obliquely intended. [They are] those *adverse* acts (such as causing an unwanted consequence) that the agent foresaw to a level less than inevitability, the prospect of which did not motivate her, but which she was willing to run an *unacceptable* risk of committing, in the pursuit of the things that did motivate her’ (emphasis in original).

Recklessness in the present context thus implies that D *knew* of the *unreasonable* risk that P was seriously unable to conserve her own best interests relative to D in the particular bar-

‘predatory state of mind’ requirement, however, does seem to foreclose the possibility of ‘pure heart’-type exploitation/victimisation, such as that which is sometimes found to have occurred in Class 2 (‘presumed’) undue influence cases.¹³⁸ I cannot apprehend why it ought to be any different in relation to unconscionable dealing claims,¹³⁹ and neither, it would seem, could the New South Wales Court of Appeal in *Johnson v Smith*.¹⁴⁰

It is unfortunate, then, that the High Court in *Kakavas* did not more fully explain its position on the psychological fundamentals of an unconscionable dealing claim. It is possible, though, that the Court is not committing us to any higher conception of the mental componentry of exploitation than was articulated above, as one of the meanings ascribed to ‘predatory’ by the *Shorter Oxford English Dictionary* is simply ‘exploitative’,¹⁴¹ and the law already accepts that exploitation might be active or passive. However, another meaning ascribed to the word by the same source is ‘ruthlessly acquisitive at the expense of others’,¹⁴² which, although suitable to depicting instances of so-called ‘active’ exploitation,¹⁴³ does not comfortably portray those more ‘passive’ manifestations of the phenomenon.¹⁴⁴ On my understanding, from the standpoint of the mental componentry of exploitation in the so-called ‘passive’ cases,¹⁴⁵ D’s conduct would be culpable (‘exploitative’) in the sense that it was possible *ex ante* the impugned transaction for D to have avoided the outcome of his or her power over P through a choice that responded to

gaining encounter, but *chose* to transact with P nonetheless, that is, ‘in conscious disregard of the likelihood of exploitation’: Hill, above n 128, 685.

¹³⁸ See, eg, *Allcard v Skinner* (1887) 36 Ch D 145, 172 (Cotton LJ), 190 (Bowen LJ) (defendant acquitted of ‘selfish motive’ or ‘selfish feeling’); *Cheese v Thomas* [1994] 1 WLR 129, 138 (Sir Donald Nicholls V-C) (defendant absolved of acting ‘morally reprehensibly’).

¹³⁹ It cannot be because unconscionable dealing is supposedly about the ‘conduct of the stronger party’, whereas undue influence supposedly concerns ‘the quality of the consent or assent of the weaker party’: *Amadio* (1983) 151 CLR 447, 474 (Deane J). That is a distinction that cannot be sustained in theory or practice: see Rick Bigwood, ‘Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing — Kiwi-Style?’ (2011) 42 *Victoria University of Wellington Law Review* 83, 113–14.

¹⁴⁰ [2010] NSWCA 306 (17 November 2010).

¹⁴¹ *Shorter Oxford English Dictionary* (Oxford University Press, 5th ed, 2002) vol 2, 2319 (‘predatory’).

¹⁴² *Ibid.*

¹⁴³ See, eg, *Louth v Diprose* (1992) 175 CLR 621.

¹⁴⁴ See, eg, *Bridgewater v Leahy* (1998) 194 CLR 457 and *Amadio* (1983) 151 CLR 447 itself.

¹⁴⁵ For example, where P initiates the transaction with D who then acquiesces in receiving a benefit from P with knowledge of P’s relevant impairment that D did not cause and was not otherwise responsible for repairing: see *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735, 741–2 [7] (Tipping J for Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ).

the subjectively known substantial likelihood that a beneficial transaction would follow from the power–vulnerability relationship, but D *deliberately* chose not to avoid that outcome, hence running the unreasonable risk of the transaction that did in fact causally follow from P’s inability to conserve his or her own best interests relative to D when deciding to transfer value to D in that particular way.

Putting aside now those sorts of state-of-mind nuances, one thing that does follow inexorably from the Court’s conclusion in *Kakavas* that equity’s unconscionable dealing doctrine disciplines nothing less than exploitation is that the level of superior-party awareness of the weaker party’s special disability must be actual, or subjective, knowledge, or its functional equivalent in equity: wilful blindness, ‘shut-eye’ knowledge or ‘contrived ignorance’.¹⁴⁶ An exploitative intention could be built on no lesser degree of cognitive awareness of P’s exploitable circumstances. The Court achieved criterial alignment, then, by rejecting constructive notice as a plausible basis for supporting a judgment of equitable fraud or victimisation in this context. The Court might also have explicitly rejected, but nonetheless has implicitly rejected, here the standard of constructive *knowledge*, which strictly speaking is qualitatively different from constructive *notice* (the term actually used in the judgment in *Kakavas*).¹⁴⁷ On my understanding of it, Mason J’s descrip-

¹⁴⁶ Although expounded in a different context (knowing assistance to a breach of fiduciary duty), the five-scale classification of knowledge in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509, 575–6 [250] (Peter Gibson J) (*‘Baden’*) is useful for identifying different knowledge states outside of that context as well, for example, for the purposes of thinking about the appropriate level of awareness to establish unconscionable dealing. The *Baden* categories of knowledge are:

- (i) actual knowledge; (ii) wilfully shutting one’s eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

The first three categories are generally taken to involve ‘actual knowledge’, as understood both at common law and in equity, whereas the last two categories represent forms of ‘constructive knowledge’ in equity: *Farah* (2007) 230 CLR 89, 163 [174]. Although the Court in *Kakavas* (2013) 298 ALR 35, 67 [155]–[157] clearly approves of level (ii) ‘wilful ignorance’ as the equivalent of actual knowledge in the present context, there is no reason to think that it would exclude level (iii) knowledge from sufficing to establish unconscionable dealing.

¹⁴⁷ Although often loosely (and perhaps unintentionally) equated, ‘knowledge’ and ‘notice’ are not strictly synonymous: see the discussion in Bigwood, *Exploitative Contracts*, above n 70, 253.

tion of knowledge in *Amadio*¹⁴⁸ — ‘if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person’¹⁴⁹ — might well capture ‘constructive knowledge’ (‘that the stronger party is aware of circumstances that would lead a reasonable person to know of the vulnerable party’s special disability’)¹⁵⁰ but not necessarily ‘constructive notice’ as such (‘the stronger party knows circumstances which would put a reasonable person on inquiry as to the possibility of the other party being under a special disability but it fails to inquire’).¹⁵¹ In any event, it is unnecessary here to resolve the difference between constructive knowledge and constructive notice, because on an ‘exploitation’ account of unconscionable dealing, neither level of cognition can suffice to enliven the *Amadio* principle.

3 *What Is Wrong with (Unfair/Unjust about) Exploitation?*

Exploitation is not simply the free and conscious use of interpersonal power for gain, as there is an element of ‘wrongness’, ‘unfairness’ or ‘unjustness’ in exploitation that distinguishes it from other, legitimate, forms of advantage-taking (utilisation) in free-market exchange encounters. What, then, is the element of opprobrium in an exploitative contract in particular? And why does the law care about such exploitation? Obviously, the answers to those questions relate to the law’s professed enmity towards ‘victimisation’ (another largely under-examined juridical term), but they also provide a platform for exploring the question of whether the law’s conception of victimisation by way of unconscionable dealing ought to be limited conceptually and doctrinally to cases of naked exploitation.

Now, common to all theories of exploitation is an attempt, by the proponent of the particular theory, to explicate the wrongness, unfairness or unjustness that defines the act of interpersonal exploitation. Although courts,

¹⁴⁸ That is, before it was explained by the Court in *Kakavas* as denoting something different than what it appears to suggest.

¹⁴⁹ *Amadio* (1983) 151 CLR 447, 467.

¹⁵⁰ Jeannie Marie Paterson, ‘Knowledge and Neglect in Asset-Based Lending: When Is It Unconscionable or Unjust to Lend to a Borrower Who Cannot Repay?’ (2009) 20 *Journal of Banking and Finance Law and Practice* 18, 27. This basically corresponds to category (iv) knowledge in *Baden*: see above n 146. Of that category of knowledge, the High Court has said that ‘the morally obtuse cannot escape by failure to recognise [a fact] that would have been apparent to an ordinary person applying the standards of such persons’: *Farah* (2007) 230 CLR 89, 164 [177] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁵¹ Paterson, above n 150, 28. This corresponds roughly to category (v) knowledge in *Baden*: see above n 146.

including the High Court in *Kakavas*, are increasingly resorting to the language and concept of exploitation to rationalise the unconscionable dealing doctrine, and hence to justify state interference with transactions in the name of that particular doctrine, no attempt is ever really made to expound the unfairness that inheres in the act of interpersonal exploitation, such that the law would want to police and discipline it. Perhaps the courts consider such unfairness to be self-evident, rendering any explanation unnecessary, although that is hard to imagine given the essentially contested nature of the exploitation concept itself.

One matter, however, is reasonably clear, at least regarding the antipodean conception of interpersonal exploitation, as expressed through equity's unconscionable dealing doctrine, which doctrine has generally respected the intellectual and institutional forms of order presupposed by the classical liberal conception of property transfer and exchange.¹⁵² That is to say, the unfairness that inheres in an act of interpersonal exploitation must be sought in a characteristic of the *processes* of the relationship or transaction in question, rather than in the outcome of that relationship or transaction. As mentioned earlier, this is in fact implicitly recognised by the Court in *Kakavas*.¹⁵³ What follows, then, at least to my mind, is that the law's objection to exploitation must concern the *manner* in which one party has behaved towards the other party relative to the *norms of interpersonal treatment* that governed, or ought to have governed, the parties' particular interaction.

Many mainstream (non-Marxian) theories of economic exploitation that are not rooted in end-states or objective exchange values define the exploitation concept in terms of a wrongful use of persons:

The distinction between fair and unfair interaction that is crucial for identifying exploitation parallels the distinction in Kant's ... ethics between using a person as a means and using a person as a mere means to one's goals. Using someone as a mere means is failing to treat that person with the respect due every rational agent.¹⁵⁴

¹⁵² See generally Bigwood, 'Observing Basic Distinctions Part I', above n 113; Bigwood, 'Observing Basic Distinctions Part II', above n 113.

¹⁵³ *Kakavas* (2013) 298 ALR 35, 39 [19], quoting *Tanwar* (2003) 217 CLR 315, 325 [26] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

¹⁵⁴ Arneson, above n 109, 350–1. See also Wood, above n 111; Goodin, 'Exploiting a Situation and Exploiting a Person', above n 106; Judith Farr Tormey, 'Exploitation, Oppression and Self-Sacrifice' (1973) 5 *Philosophical Forum* 206; Wilson, above n 124.

On this view, the law's enmity towards market-transaction exploitation is closely associated with its objection to conversion under tort law and theft under the criminal law. Such exploitation involves an unauthorised interference with the inviolable domain of a person's autonomy and proprietary integrity. The result of exploitation in transactional contexts is that the exploiter selfishly infringes upon the exploitee's general 'right' (here really a 'legal immunity') not to have resources transferred away from him or her, under the colour of an objectively 'valid' contract, without his or her *responsible* consent (or otherwise without lawful justification). By failing to observe the side-constraints that the law engrafts upon a party's contractual liberty when transacting with another party known to be labouring under a relative special disadvantage, the exploiter privileges his or her own self-interest while ignoring a basic demand articulated in the liberty principle, which is to always respect the special status of other individuals as 'freely choosing, rationally valuing, specially efficacious ... moral personalit[ies]'.¹⁵⁵

Exploitation, hence unconscionable dealing, thus involves the 'merely instrumental utilisation' of a fellow person, the exploitee, which is discordant with what McHugh J affirmed as '[o]ne of the central tenets of the common law'¹⁵⁶ (and presumably of equity as well), namely, that individuals must be recognised, respected and protected as autonomous subjects and independent responsible agents. The exploiter freely and consciously, actively or passively, enlists the assistance of another self-determining moral agent as a mere tool or expendable resource in the furtherance of the exploiter's own transactional goals, when that other moral agent is sufficiently known to be suffering from a condition or acting under circumstances that would prevent him or her from acting 'legally responsibly' in relation to a decision to enter into a lawful transaction with the exploiter. Thus, when a court finds that a person is specially disadvantaged relative to another person for the purposes of equity's unconscionable dealing doctrine, hence that he or she is 'susceptible to exploitation'¹⁵⁷ by that other person, it must be signifying that the first person is susceptible to being used merely instrumentally in a relationship or encounter with the other person alleged to have acted 'unconscionably' (or 'unconscientiously') towards him or her. Hence, the first person was, when entering into the impugned transaction, unable to pursue fully autonomously his or her own operative goals in, or in relation to, that transaction (as

¹⁵⁵ Charles Fried, *Right and Wrong* (Harvard University Press, 1978) 29.

¹⁵⁶ *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 223 [114].

¹⁵⁷ *Kakavas* (2013) 298 ALR 35, 63 [135].

opposed to the operative goals of the person alleged to have acted exploitatively or unconscientiously).¹⁵⁸ If no defence is available to the unconscionable dealer, exploitation of another person's special disability must, on this view, qualify as a sufficient reason for equitable interference with a transaction apparently concluded at common law, regardless of the substantive merits of that transaction in normal market exchange terms.

*D Policy and Purposes: Should the Unconscionable Dealing Doctrine
Be Limited to Regulating Naked Exploitation?*

As mentioned earlier, on one level the Court's decision in *Kakavas* is to be commended. It restores conceptual coherence between the announced animating concern of equity's unconscionable dealing jurisdiction — exploitation avoidance and correction — and the formal doctrinal criteria (proof elements) that are intended to serve in the administration of particular allegations of interpersonal exploitation: special disadvantage on the one side, and actual knowledge coupled with a predatory mind-state on the other. Although one might consider constructive knowledge, say, to be a perfectly appropriate level of awareness to support state interference with bargains struck between normal persons and those demonstrated to be specially disadvantaged at the moment of transaction formation, it simply cannot suffice if the singular basis for such interference is *exploitation*. According to the High Court, then, a clear difference exists between behaving unconscionably (or unconscientiously) and behaving obtusely or even callously.

All of that strikes me as exemplary logic; but is it desirable as a matter of legal policy? For on another level, this writer, at least, is left wondering whether the equitable doctrine of unconscionable dealing *ought* to be so narrowly construed and applied. On my understanding, there is nothing inherent in the equitable doctrine, or in the general concept of 'victimisation' captured within it ('unconscientious use of power'), that demands that such an enfeebling juristic view be taken. Although it is true that cases such as *Blomley v Ryan* and *Louth v Diprose* might sensically be described as involving naked exploitation or predation on the part of the superior party, I am sceptical that cases like *Amadio* and *Bridgewater v Leahy* can realistically be said to portray quite the same level of opprobrious conduct. Granted, as the Court in *Kakavas* pointed out,¹⁵⁹ Deane J in *Amadio* described the bank's

¹⁵⁸ See generally Marietta, above n 110.

¹⁵⁹ *Kakavas* (2013) 298 ALR 35, 67 [157].

officer (Mr Virgo) as having ‘simply closed his eyes to the vulnerability of Mr and Mrs Amadio and the disability which adversely affected them’.¹⁶⁰ However, no mention is made of the fact that, in the opening sentence of the very same paragraph, his Honour was also at pains, ‘in fairness’, to stress ‘that there is no suggestion that Mr Virgo or any other officer of the bank has been guilty of dishonesty or moral obliquity in the dealings between Mr and Mrs Amadio and the bank’.¹⁶¹ With respect, a denial of moral obliquity, or indeed any similar attempt to mitigate the condemnation inherent in the stigmatisation of the advantaged party’s conduct, is not something one would expect to read in relation to someone who is supposedly, in equity’s contemplation, a predatory exploiter!

What we do not see in the *Kakavas* decision, or indeed in any of the earlier High Court pronouncements on the equitable jurisdiction to relieve against an unconscionable dealing, is open-minded reflection on the theoretical underpinnings, or even the law’s basic policies and purposes, in this area of the law.¹⁶² Of course, the Court rationalises intervention in terms of an abhorrence of equitable fraud in the manner of unfair advantage-taking or exploitation, but, as discussed above, the exploitation concept is not dissected and explained. No doubt the restrictive conception of unconscionable dealing resulting from *Kakavas* can readily be justified if the considered aim of the jurisdiction is, say, to privilege, at the expense of specially disadvantaged parties, the contractual liberty of advantaged parties, transactional security, the tolerable risks and natural game element in legal commercial activity, and the self-ownership of natural advantages such as negotiation skill and position. Certainly during the past decade the High Court has openly pursued the desideratum of contractual certainty.¹⁶³ But no legal value is absolute, and contractual certainty is one that has steadily been nibbled away at by specific equitable doctrines such as unconscionable dealing (not to mention various statutory inroads in the field) over time. It is, as elsewhere in the law, all a matter of striking an appropriate balance between individuals’ competing ‘justice interests’ in transactional life: D’s interest in being free to pursue his or her economic projects through cooperative exchange with P; and P’s in being secure from merely instrumental utilisation at the hands of D. As matters

¹⁶⁰ (1983) 151 CLR 447, 478.

¹⁶¹ *Ibid.*

¹⁶² Kirby J’s dissenting judgment in *Berbatis* is an exception to this observation: see *Berbatis* (2003) 214 CLR 51, 82 [71], 83–4 [75]–[76], 91–2 [98], 95 [109].

¹⁶³ See, eg, *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471.

stand in the light of the Court's pronouncements in *Kakavas*, the requirement of proof of exploitation pushes the balance significantly in D's favour, as exploitation is a very high justificatory threshold for intervention, and hence gives very weak protection to any countervailing expectation on P's part that his or her resources will be protected from non-consensual appropriation by the Ds of this world.

We might, therefore, legitimately ask whether exploitation ought to be seen as *too high* a threshold for present purposes. Although it is clearly a sufficient reason for state intervention with an apparently concluded transaction, should proof of exploitation be regarded as *necessary* for that purpose? The High Court in *Kakavas* clearly considers it so, although nowhere does the Court rigorously defend or justify that stance. We can assume that it is for the usual policy reasons (for example, protection of contractual liberty and transactional security),¹⁶⁴ as well as, to some extent, obeisance to the past (for example, reference is twice made¹⁶⁵ to Lord Hardwicke LC's formulation of equitable fraud in the 18th century English case of *Earl of Chesterfield v Janssen*).¹⁶⁶ However, as mentioned earlier, there is no reason why the doctrine ought to be straightjacketed by its historical British antecedents. It is not inherently incapable of being developed by a senior Australian court willing to apply

¹⁶⁴ I assume this because of the Court's reference to the inappropriateness of the *Amadio* principle being engaged by mere inadvertence, or even indifference, to the weaker party's circumstance in 'an *arm's-length commercial transaction*': *Kakavas* (2013) 298 ALR 35, 68 [161] (emphasis added). I puzzle over what that italicised phrase means, exactly, as it is not explained anywhere in the judgment. First, whether the transaction is at 'arm's-length' or not is conceptually irrelevant to unconscionable dealing, as the problem in such cases is generally not serious dependency but rather poor judgemental capabilities or simple ineptitude. Typically the parties are at 'arm's length' (ie, independent), only not on an equal footing. The equitable regulation of trust or dependency relationships is best achieved through Class 2 undue influence (see, eg, *Johnson v Buttress* (1936) 56 CLR 113), rather than *Amadio*-style unconscionable dealing.

The reference then to a 'commercial transaction' is not clear either: see above n 29. It might refer to bargain-type transactions rather than to ones of gift, regardless of whether the parties involved are 'commercial players' (or 'in business') or not. (Here, obviously, Crown was in business but Mr Kakavas was not; but still the Court treated this, quite rightly, as a 'commercial transaction'.) This is because the law has long recognised that the jurisdiction might apply more leniently in the context of gifts, for example by possibly relaxing or jettisoning altogether the need for D's knowledge of P's special disability: see *Wilton v Farnworth* (1948) 76 CLR 646, 649 (Latham CJ), 655 (Rich J); *Scott v Wise* [1986] 2 NZLR 484, 492–3 (Somers J), quoted in *Dark v Boock* [1991] 1 NZLR 496, 502 (Heron J). However, no such relaxation of the criteria is evident in the gift case of *Louth v Diprose* (1992) 175 CLR 621, although that was an easy case of predation anyway.

¹⁶⁵ *Kakavas* (2013) 298 ALR 35, 39 [17], 41 [25].

¹⁶⁶ (1751) 2 Ves Sen 125; 28 ER 82.

itself to that possibility.¹⁶⁷ Many, if not most, legal and equitable doctrines have evolved over time, usually in the direction of greater liberalisation. Nor is the unconscionable dealing doctrine inherently limited by the concept of ‘conscience’, or indeed of ‘victimisation’. As the High Court has previously acknowledged,¹⁶⁸ the meaning of terms such as ‘unconscionable’ and ‘unconscientious’ varies according to context and uses to which they are being put. The same can be said of equitable fraud, which, as Sheridan once reminded us in his work on the subject, cannot be ‘placed under the genus of a single standard’, for it embraces a wide variety of conduct ranging from ‘the depths of depravity to the misplaced kindly intention’.¹⁶⁹

We are often told that, in the present context, equitable fraud means ‘unconscientious use of the power arising out of the circumstances and conditions of the contracting parties’,¹⁷⁰ which is ‘victimisation’. Such victimisation can be active or passive,¹⁷¹ the latter of which is victimisation by an omission of some sort (usually failure to correct for P’s known special disadvantage, which D did not cause or was not responsible for repairing, before accepting a transactional benefit from P). Thus, the verb ‘use’ in the phrase ‘unconscientious use of the power’ need not imply an overtly active relationship; neither, I suggest, ought it necessarily to entail deliberateness, although I accept that some level of agency-responsible ‘blame’ on D’s part is required in this field. At least outside of fiduciary contexts or relations, judgments of unconscionability tend to demand some level of ‘wrongdoing’, ‘fault’ or ‘blame’ on the part of the one alleged to have acted against conscience.¹⁷² Certainly, *Amadio*-style unconscionable dealing is not a strict-liability claim. The question that I would pose in the light of *Kakavas*, however, is whether ‘exploitation’ might

¹⁶⁷ Indeed, the modern principle has already been emancipated to some extent from the older line of cases so as to present a principle of broader operation, applying potentially to a wide range of interactions. Cf *Blomley v Ryan* (1956) 99 CLR 362, 386 (McTiernan J), quoting Frederick Thomas White et al, *A Selection of Leading Cases in Equity* (Sweet and Maxwell, 7th ed, 1897) vol 1, 313.

¹⁶⁸ *Tanwar* (2003) 217 CLR 315, 324–5 [20]–[26] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ); *Berbatis* (2003) 214 CLR 51, 72–3 [42]–[43] (Gummow and Hayne JJ). See also G Dal Pont, ‘The Varying Shades of “Unconscionable” Conduct — Same Term, Different Meaning’ (2000) 19 *Australian Bar Review* 135.

¹⁶⁹ L A Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Sir Isaac Pitman & Sons, 1957) 241.

¹⁷⁰ *Hart v O’Connor* [1985] AC 1000, 1024 (Lord Brightman), quoting *Earl of Aylesford v Morris* (1873) [LR] 8 Ch App 484, 491 (Lord Selbourne LC).

¹⁷¹ *Hart v O’Connor* [1985] AC 1000, 1024 (Lord Brightman).

¹⁷² John Glover, ‘Equity and Restitution’ in Patrick Parkinson (ed), *The Principles of Equity* (LBC Information Services, 1996) 92, 103.

involve too high a level of agency-responsible blame to insist upon in this area, all things considered. Why should unconscionable dealing be *limited* to (and by) proven exploitation? And if it ought not to be so limited, what degree or manner of agency-responsible conduct *less than* exploitation ought minimally to qualify as a sufficiently compelling justification for state interference with a transaction in the name of equity's 'conscience'?

I have in the past argued for a paradigm shift from 'exploitation' to blameable 'negligence' in relation to contracts achieved by unfair advantage. I called this a principle of 'transactional neglect',¹⁷³ and at least one other Australian author has considered such a principle to be a plausible basis for intervention, at least in asset-based lending scenarios.¹⁷⁴ My principle of transactional neglect essentially described D's corrective liability for a failure to take reasonable precautions against the risk of transactional harm to P, when D and P were, sufficiently knowingly to D at the time, bargaining under conditions that would have made exploitation possible. I had in mind, especially, Class 2 undue influence and *Amadio*-style unconscionable dealing cases of the more passive variety. In such cases, the interpretation of D's conduct can be equivocal from the standpoint of supporting a judgment of exploitation. Such a judgment would of course require a finding that D had *deliberately* (intentionally, recklessly) chosen not to respond to the subjectively known substantial likelihood that P was unable to act legally autonomously relative to D in any interaction between them. The natural (and better) inference might be that D had merely neglected — carelessly failed — to respond to an unreasonable risk of a foreseeable outcome, namely, that P will be used merely instrumentally by D if D does not act to avoid the outcome of his or her known power over P through a choice that responds to the likelihood of the foreseeable outcome (of which P later complains). Indeed, the most obvious instantiation of transactional neglect I was imagining, based on the cases (including *Amadio*) as they were understood at the time, was where D had reason to know of P's special disadvantage (if not actual knowledge thereof). With that knowledge, however, D then failed to take reasonable precautions against the realistic chance of P being specially disadvantaged relative to D in the transaction proposed. But if D had acted as a reasonable person with D's knowledge would have acted in the circumstances, D would have predicated his or her actions upon the assumption of the possible existence of P's special disadvantage and taken such precautions as are reasonable in the circum-

¹⁷³ Bigwood, 'Contracts by Unfair Advantage', above n 30.

¹⁷⁴ Paterson, above n 150. Cf N C Seddon, 'The Duty of Sensitivity: The Problem of Non-Communication in Contract Law' (1974) 48 *Australian Law Journal* 126.

stances to reduce the chance to an acceptable level.¹⁷⁵ This was, I thought, consistent with Mason J's *apparent* endorsement of constructive knowledge in *Amadio* (that is, at least the fourth category of knowledge on the *Baden* scale, and possibly even the fifth category in some cases),¹⁷⁶ which is consistent with the rationale behind that species of knowledge, namely, that 'the morally obtuse cannot escape by failure to recognise [a fact] that would have been apparent to an ordinary person applying the standards of such persons'.¹⁷⁷

Also, it should be mentioned that my principle of transactional neglect is still fault-based, as generally demanded by equitable conscience-based grounds for intervention, in the sense that liability¹⁷⁸ is consistent with a judgment that D was blameable, in normal agency-responsibility terms,¹⁷⁹ for his or her failure to meet the relevant standard of conduct in securing P's reliable transactional consent. This is so, despite the fact that D made *no choice* to run the unreasonable risk of P being seriously unable to conserve his or her own interests in the transaction in question.¹⁸⁰ This is because, in the types of cases envisioned, it was possible for D to have understood the unreasonable risk of his or her conduct and, through reasonable choice, to have acted differently as a result.¹⁸¹ D's failure to respond to P's relative position of special disadvantage, despite having the power through reasonable choice to have done so, indicates a lack of concern for D's legal neighbour, P.¹⁸² Such concern, if present, would have prevented a non-consensual transfer of value from P to D (or to a third person at D's direction).

Needless to say, I anticipated objections to a negligence-based conception of 'unconscionable contracts' (such as those involving invocation of the

¹⁷⁵ Cf American Law Institute, *Restatement (Second) of Contracts* (1981) §19 cmt (b).

¹⁷⁶ See above n 146.

¹⁷⁷ *Farah* (2007) 230 CLR 89, 164 [177] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁷⁸ Meaning here simply vulnerability to state-assisted transaction avoidance or imposition of an enforcement disability. In analogising to the concept of negligence in tort law, I was *not* arguing for a new tort: see Bigwood, 'Contracts by Unfair Advantage', above n 30, 67.

¹⁷⁹ On the concept of agency-responsibility, though apropos negligence in particular, see generally Evans, above n 137, especially 111–12, 119.

¹⁸⁰ By hypothesis, negligence involves D not advertent to the risk at all.

¹⁸¹ '[F]or an agent to be blamable for producing an outcome it must have been possible for him to avoid the outcome through choice that responded to the possibility that he might produce such an outcome': Evans, above n 137, 121.

¹⁸² *Ibid* 107–8: 'the mind of a person capable of practical deliberation must be capable of bringing to that person's attention concerns that are relevant to a contemplated act. ... [L]ack of thought can indicate lack of adequate concern.'

Amadio principle), especially the fear that an apparent weakening of the basis for intervention in this field might threaten the general security of concluded transactions. But I ultimately dismissed those concerns by emphasising the ‘all things considered’ nature of the responsibility–liability regime I was advocating.¹⁸³ Drawing on Peter Cane’s fine book on *Responsibility in Law and Morality*,¹⁸⁴ I began with the premiss that the law’s ‘responsibility practices’ were complex, and that they varied significantly from one legal context to another.¹⁸⁵ This variability, Cane argued, is the result of certain normative contextual choices having been made by law-makers in the relevant contexts.¹⁸⁶ It can only properly be ‘understood via analysis of how conflicting values, interests, principles, goals, etc are implicated in the particular juristic contexts in which they figure (tort law, criminal law, contract law, etc)’.¹⁸⁷ Basically, the argument proceeded:

the aim in each context, though especially in private law, is to strike an appropriate balance between individuals’ interests as ‘agents in freedom of action’ and their interests as potential ‘victims’ (of such other agents acting freely). This balance is struck differently across diverse areas, and for a variety of reasons (some external to the immediate parties involved, eg, broader societal interests, goals or policies). In some contexts (or sub-contexts), only agency-responsible ‘fault’ or ‘blame’ on the part of D for the harm of which P complains will trigger ‘liability’ or adverse legal treatment against D, such as an obligation of repair or appropriate punishment (as the case may be). This strikes the required balance in a way that gives weight to D’s freedom of action at the expense (to some extent, at least) of P’s interest in freedom from harm (ie, in being secure in his or her person and property).¹⁸⁸

As mentioned earlier, when applying this reasoning to *Amadio*-style unconscionable dealing, it can be seen that agency-responsible fault is of course required on D’s part. Otherwise, D is simply punished for having randomly encountered P, and subjected to legal sanctions for states of affairs for which he or she was not justly responsible. But this does not reveal the *level* of fault or blame that is appropriate in this context. Other factors come into play: for

¹⁸³ See Bigwood, ‘Contracts by Unfair Advantage’, above n 30, 83.

¹⁸⁴ Cane, *Responsibility in Law and Morality*, above n 137, especially ch 6.

¹⁸⁵ Bigwood, ‘Contracts by Unfair Advantage’, above n 30, 81.

¹⁸⁶ See Cane, *Responsibility in Law and Morality*, above n 137, especially chs 3, 6. See also Peter Cane, ‘Mens Rea in Tort Law’ (2000) 20 *Oxford Journal of Legal Studies* 533.

¹⁸⁷ Bigwood, ‘Contracts by Unfair Advantage’, above n 30, 81.

¹⁸⁸ *Ibid.*

example, security of transactions and transactional liberty, not disincentivising parties from putting their natural advantages to their most highly valued uses, etc. On that view, requiring proof of exploitation before visiting adverse treatment upon D slants the balance significantly in favour of D's freedom of action and the security of transactions, at the expense of P's countervailing interest in not having value transferred away from him or her without his or her consent. A negligence standard, in contrast, which is still fault-based, strikes this balance in a much more neutral way as between P's and D's respective justice interests, just as the rules governing negligence liability in tort law generally do.¹⁸⁹ Of course, potential exists for a negligence-based standard of unconscionable dealing to reduce the desiderata of security, certainty and predictability generally sought in relation to transactions, especially commercial transactions, but it is to be borne in mind that D's 'duty of transactional care' would only be triggered by conditions that make exploitation possible, that is, relative special disadvantage. If the courts continue to treat that criterion of unconscionable dealing as a significant threshold, then equitable intervention on the basis of the doctrine would also continue to be parsimoniously allowed. Although it would no longer be necessary that D actually know of P's exploitable circumstances in order to be guilty of transactional neglect, constructive notice (or category (v) knowledge in *Baden*) may still not suffice. At a minimum, there must be constructive knowledge (category (iv) knowledge) by D of P's relative special disadvantage, such that D could fairly be adjudged to have acted 'morally obtusely' if he or she failed to reasonably predicate his or her actions upon the assumption of the possible existence of such a relevant disadvantage before transacting with P.

In the light of what is said in *Kakavas*, however, a conception of unconscionable dealing based on a principle of 'transactional neglect' is no longer viable as a standard of opprobrium for equitable intervention with transactions, especially commercial transactions, even in those cases falling at the passive end of the victimisation spectrum. To be sure, the Court explicitly states that '[i]nadvertence, or indifference, falls short of the victimisation or exploitation with which the [*Amadio*] principle is concerned'.¹⁹⁰ That, of course, must be true if, as the Court's judgment implies, 'victimisation' and 'exploitation' are coterminous in the present context. However, while exploitation is certainly a species of victimisation, it does not exhaust that concern.

¹⁸⁹ *Ibid* 83–4.

¹⁹⁰ *Kakavas* (2013) 298 ALR 35, 68 [161].

Surely P is a victim regardless of whether D acted exploitatively or merely obtusely. In both cases D failed to be influenced by side-constraints on his or her transactional freedom once he or she, as an honest and reasonable person, had become sufficiently aware of P's relative special disadvantage, resulting in P being used merely instrumentally for the advancement of D's own ends. The only thing that varies as between the 'exploitative' merely instrumental user and the 'neglectful' merely instrumental user is the *quality of the will* that accompanied the user's failure to meet the legal standard of 'caring for' the relevant interests of his or her victim, and hence their consequent receipt of the impugned benefit.

In the final analysis, the *Kakavas* decision ought to, in theory at least, leave available to D the opportunity of subsequently displacing any prima facie interpretation of D's conduct as exploitative by showing that, despite appearances, D in fact possessed no 'exploitative will' or 'predatory state of mind' toward P at the moment of transaction formation. On this view, D should be able to sustain an impugned transaction that resulted from the unequal power relation between P and D via the rejoinder: 'But I was only negligent, Your Honour!' Logically a defence along such lines ought to be available if, as is the effect of *Kakavas*, the *exclusive* regulative precept behind *Amadio*-style unconscionable dealing is anti-exploitation. However, it is difficult to imagine that D could ever justly absolve him- or herself of 'liability' in that particular way. Perhaps a court would in such circumstances simply find D to have been guilty of wilful blindness, thus avoiding any circumvention, as the majority of the Court did in *Amadio*. It smacks of disingenuity, however, to denounce D's conduct as contrived ignorance while in the same breath acquitting D of 'dishonesty or moral obliquity' in his or her dealings with P. But that is exactly what Deane J did in *Amadio*. Would it not have been more realistic to acknowledge that our objection to what the bank's officer had done in that case was to take an inadvertent, but nonetheless unreasonable, risk in relation to a foreseeable outcome? He certainly failed to take reasonable precautions against the clearly foreseeable risk that the elderly Amadios were seriously unable to conserve their best interests vis-à-vis the bank when they were deciding whether to secure the business debts of their son. But that is just agency-responsible negligence.

IV CONCLUDING REMARKS

Writing of Australian law in 1988, Professor Paul Finn observed that there is ‘a transparent moral dimension in our emerging unconscionability doctrine’,¹⁹¹ ‘an evident change in the standards of conduct which the law is exacting from persons in their voluntary or consensual dealings with others’.¹⁹² With then recent decisions such as *Amadio* in mind, he identified ‘neighbourhood’-like responsibilities such as ‘good faith and fair dealing’ as emergent phenomena in such cases, the ‘emphatic concern’ of which was ‘regard for others’, especially the vulnerable.¹⁹³

How times have changed! The same author, this time as Justice Paul Finn, in 2010 wrote:

Readily apparent in High Court decisions of the past decade are (1) a marked preoccupation with doctrine and close doctrinal analysis not overtly influenced by policy considerations; (2) a corresponding retreat from open consideration of ‘values’ ... ; (3) a varying but diminished regard for consequentialist considerations in shaping doctrine; and (4) affording greater weight to precedent. ... [T]he renewed emphasis upon doctrine has not precluded innovation. But given innovation is rooted in doctrine, it has a particular orientation which is contrived by doctrinal analysis. The perceived potential of individual doctrines themselves provide the impetus to development. Gone are the imperatives of inspiring ideas: ‘popular sovereignty’, ‘good administration’, ‘fairness’, ‘unjust enrichment’ and the like. To the extent that policy informs judicial reasoning, it is left unspoken.¹⁹⁴

¹⁹¹ Finn, ‘Commerce, the Common Law and Morality’, above n 85, 87.

¹⁹² *Ibid* 90.

¹⁹³ *Ibid* 92, 94. See also Justice Paul Finn, ‘The Courts and the Vulnerable’ (1996) 162 *The Law Society of the Australian Capital Territory Gazette* 61.

¹⁹⁴ Justice Paul Finn, ‘Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract’ in Mary Hiscock and William Van Caenegem (eds), *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education* (Edward Elgar, 2010) 145, 149 (citations omitted). Others have been similarly critical of the modern High Court’s failure to engage with policy in the contractual arena: see, eg, Andrew Stewart and J W Carter, ‘The High Court and Contract Law in the New Millennium’ (2003) 6 *Flinders Journal of Law Reform* 185, 213; Andrew Stewart, ‘What’s Wrong with the Australian Law of Contract?’ (2012) 29 *Journal of Contract Law* 74, 81; J W Carter et al, ‘Contractual Penalties: Resurrecting the Equitable Jurisdiction’ (2013) 30 *Journal of Contract Law* 99, especially 128–32. The last article, in particular, is excellent and many of the objections that the authors level against the High Court’s reasoning in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 could equally be raised in relation to the *Kakavas* decision.

Kakavas, no doubt, would provide further grist for Finn's mill, despite the Court acknowledging in its preliminary general observations that equity's conscience is 'a construct of values and standards' against which the conduct of individuals is to be judged,¹⁹⁵ and despite its reiterating Lord Stowell's famous dictum about equity looking 'to every connected circumstance that ought to influence its determination upon the real justice of the case'.¹⁹⁶ For although the Court expressly denies that inadvertence (D being careless toward P), and indeed even indifference (D not caring about P), does not suffice to warrant a judgment of 'unconscientious advantage-taking', it must be acknowledged that nowhere in the Court's reasons do we find a robust and systematic analysis of the values and standards that inform, or should inform, equity's unconscionable dealing jurisdiction. Nor is there discussion on what is, or is not, 'the real justice' of cases of this kind: cases of contracts by 'unfair advantage'. General reference is made to normative concepts like 'victimisation' and 'exploitation', and to indefinite slogans such as 'an arm's-length commercial transaction', but none of those are explored or explained in any detailed and nuanced way.

The High Court might, of course, be perfectly right to restrict the unconscionable dealing doctrine by holding the Ds of this world to extremely low standards of commercial morality in dealing — here to a responsibility simply to refrain from naked exploitation — but if the goal in this context is to protect the transactionally 'vulnerable' when their (very serious) vulnerabilities are sufficiently known to their transactional opponents, a doctrine that is directed only at regulating against interpersonal exploitation is hardly significant protection against non-consensual transfers of value via the facilitative institution of contract.

At the end of the day, regardless of whether D failed to administer to P's relative special disadvantage exploitatively or merely negligently, he or she has in any event failed to show proper respect for P's equal status as a 'freely choosing, rationally valuing, specially efficacious ... moral personality'.¹⁹⁷ That, in my respectful view, ought to suffice, at least to warrant the *minimal* rectificatory response of transaction avoidance (or imposition of an enforcement disability) as against D (if not as against innocent transferees for value claiming through or under D). I can see no *conceptual* reason why 'victimisation' ought to be limited to proven exploitative acts, since interpersonal power

¹⁹⁵ *Kakavas* (2013) 298 ALR 35, 39 [16], citing Gummow, above n 34, 44–51.

¹⁹⁶ *The Juliana* (1822) 2 Dods 504, 521; 165 ER 1560, 1567.

¹⁹⁷ Fried, above n 155, 29.

can be used ‘unfairly’ or ‘unconscientiously’, if not deliberately, provided, of course, that there is some agency-responsible blame on D’s part in relation to the impact of the power–vulnerability relationship upon P’s relevant interests. If the High Court can accept that the attempted enforcement of a contract that was induced by a misrepresentation that was wholly innocent involves ‘a moral delinquency’ in the eyes of equity,¹⁹⁸ it is difficult to comprehend why such a restrictive approach is now being taken in the arena of transactions that result from unfair advantage, especially when D is *not* wholly innocent and has, at best, been guilty of ‘transactional neglect’. Granted, the general security of transactions is at stake; but that is already safeguarded by the High Court’s earlier insistences upon a high threshold standard for proof of special disadvantage. Mr Kakavas’s gambling addiction simply did not meet that standard. The High Court did not need to go further in order to dispose of his appeal, but in doing so it has significantly diluted the ameliorative potential of the *Amadio* principle and, of course, of s 20 of the *ACL* through it.

¹⁹⁸ *Tanwar* (2003) 217 CLR 315, 325 [25] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), quoting *Redgrave v Hurd* (1881) 20 Ch D 1, 12–13 (George Jessel MR).