THE *AMADIO* PRINCIPLE FOUR DECADES ON: STILL FIT FOR APPARENT PURPOSE?

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It has been over 40 years since the High Court of Australia's landmark decision in The Commercial Bank of Australia Ltd v Amadio *('*Amadio*'). In this article we consider whether the principle applied by a majority of the judges in* Amadio *is still fit for its apparent purpose — 'apparent' because even the judges in* Amadio *did not spell out the normative foundations of the equitable jurisdiction to relieve against an 'unconscionable dealing'. Their Honours referred instead to a jural precept against unfair or unconscientious advantage-taking of an* inter partes *opportunity for transactional gain when that opportunity arises from one transacting party's sufficient awareness of the other party's relative autonomy-disabling 'special disadvantage' before the impugned transaction was concluded. Subsequent benches of the High Court have taken this explanation to signify that the equitable doctrine of unconscionable dealing disciplines 'exploitation', 'victimisation' or 'predation' in transaction formation (or enforcement or retention, if these represent materially different concerns, though we are doubtful). But there is nothing in* Amadio *that necessitates the jurisdiction being so narrowly circumscribed and, we argue, this modern construal of the* Amadio *principle is unduly restrictive of the ameliorative capability of the principle in its original form. We argue that it is time for a big-picture reset of the equitable unconscionable dealing jurisdiction, which will require Australia's most senior courts to engage with the theoretical core of that jurisdiction in a way that they have hitherto failed to do, even before* Amadio *was decided. We additionally suggest that, regardless of the type of transaction sought to be vitiated in the name of 'unconscionable dealing', the jurisdiction should extend to careless, as well as deliberate, failures by the stronger party to take whatever steps were*

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necessary and reasonable to avoid 'taking unfair advantage of' another who is sufficiently known, by the stronger party, to be specially disadvantaged relative to them.

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I Introduction

Four decades have passed since the landmark decision of the High Court of Australia in *The Commercial Bank of Australia Ltd v Amadio* ('*Amadio*').[1] In that case, a majority of the Court set aside a mortgage guarantee provided by elderly migrant parents to support an overdraft facility from a bank in favour of a company controlled by the parents' son.[2] Such intervention was by reason

[1] (1983) 151 CLR 447, 447 ('*Amadio*'). For a discussion about the significance of the case (especially the judgment of Mason J therein) for modern Australian law — including the ongoing problematics with that case — see generally Pauline Ridge, 'Sir Anthony Mason's Contribution to the Doctrine of Unconscionable Dealing: *Amadio's Case*' in Barbara McDonald, Ben Chen and Jeffrey Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022) 376.

[2] In separate judgments, Mason J and Deane J applied the doctrine of unconscionable dealing to relieve the parents of their obligations under the mortgage guarantee: *Amadio* (n 1) 464–8 (Mason J), 474–81 (Deane J). Additionally, Wilson J agreed with Deane J's conclusion and supporting reasons: at 468. Contrastingly, Gibbs CJ held that the parents were not in a position of special disadvantage relative to the bank so as to attract the equitable jurisdiction to relieve against an unconscionable dealing: at 459–60. His Honour granted relief on the narrower ground that the bank had made a transaction-inducing misrepresentation by failing to disclose to the parent sureties, when duty-bound to do so, the 'unusual features' of the relationship between the bank and the debtor son: at 457–9. And Dawson J dissented on both exculpatory grounds: at 486–90.

of a 'well-known head of equity' articulated by the High Court some 27 years earlier in *Blomley v Ryan* ('*Blomley*').[3] The principle applied was that a legal transaction resulting from the unconscientious use, by one party, of an opportunity arising from a known position of relative special disadvantage affecting the other party will not be enforced — or will be set aside — upon the successful application of the party of whom unfair advantage was shown to have been taken.[4] In contrast to other, nearby grounds of transactional relief, such as duress and undue influence, this principle, which is administered via the doctrine of 'unconscionable conduct' (or, more aptly, of 'unconscionable dealing'),[5] has been applied by, or has otherwise featured in considered dicta of, the High Court on no fewer than seven occasions since *Amadio* was decided in 1983.[6] Obviously, this principle has occupied the lower-tier courts of Australia much more frequently than that.[7]

That the doctrine continues to feature so regularly in the case law attests to the *Amadio* principle's continued relevance and ongoing utility to the vulnerable in transactions in contemporary Australia. Indeed, the enduring influence

[3] (1956) 99 CLR 362, 415 (Kitto J) ('*Blomley*'). Cf at 405–6 (Fullagar J). For earlier articulations, see, eg, *Reed v Buck* (1884) 10 VLR (Eq) 33, 37 (Molesworth J); *Harrison v The National Bank of Australasia Ltd* (1928) 23 Tas LR 1, 8 (Crisp J); *Wilton v Farnworth* (1948) 76 CLR 646, 655 (Rich J, Dixon J agreeing at 656) ('*Wilton*').

[4] See *Amadio* (n 1) 461, 467–8 (Mason J), 474 (Deane J, Wilson J agreeing at 468); *Blomley* (n 3) 415 (Kitto J). The transaction can be set aside completely or on terms: see, eg, *Bridgewater v Leahy* (1998) 194 CLR 457, 493 [124] (Gaudron, Gummow and Kirby JJ) ('*Bridgewater*'), citing *Maguire v Makaronis* (1997) 188 CLR 449, 474–5 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[5] In *Amadio* (n 1), Mason J used the nomenclature of 'unconscionable conduct': at 461, 463–4, 468; whereas Deane J called the doctrine 'unconscionable dealing', which we consider a more targeted, hence better, label: at 469, 474–5, 480–1 (Deane J, Wilson J agreeing at 468). As Mason J himself acknowledged, 'unconscionable conduct' is a tag that historically underlay various equitable grounds including 'fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct' and that '[i]n one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience': at 461.

[6] See, eg, *Louth v Diprose* (1992) 175 CLR 621 ('*Louth*'); *Bridgewater* (n 4); *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 ('*C G Berbatis*'); *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 ('*Kakavas*'); *Thorne v Kennedy* (2017) 263 CLR 85 ('*Thorne*'); *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 ('*Kobelt*'); *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 ('*Stubbings*').

[7] A sampling of such cases, especially from state courts over the past decade or so, can be found in the text and footnotes herein: see, eg, *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 ('*Karam*'); *Aboody v Ryan* (2012) 17 BPR 32359 ('*Aboody*'); *Gunn v Meiners* (2022) 60 WAR 90 ('*Gunn*'); *Nitopi v Nitopi* (2022) 109 NSWLR 390 ('*Nitopi*').

of the *Amadio* principle is shown by its role in the realm of legislative protections available to victims of 'unconscionable conduct' in certain trade and commerce and financial services settings in this country,[8] such protections being typically accompanied by much weightier remedies than those that would be available if the equitable doctrine alone was successfully invoked.[9] Yet, despite the repeated attention that the *Amadio* principle has received at the hands of the High Court over the past four decades, jurisprudence in the field of the unconscionable dealing doctrine is marked by uncertainty. This uncertainty spans across the underlying rationale, supporting application criteria and forensic operation of the unconscionable dealing doctrine, as well as its relationship to other exculpatory doctrines and the statutory jurisdiction.[10] Courts that are bound to follow the High Court's pronouncements are now, at times, seemingly struggling to interpret and apply the doctrine in a manner that achieves intellectual and doctrinal consistency across several decades of case law, as delivered by differently constituted benches of the High Court.[11]

The reasons for the present uncertainties are several and varied. To some extent, the High Court's (at times) elusive expressions of principle in this field have been compounded by an apparent blurring of the boundaries between equitable unconscionability and statutory unconscionability. This occurred most

[8] See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') ss 20–2; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA–12CC ('*ASIC Act*'). See also Jeannie Marie Paterson, 'Unconscionable Bargains in Equity and under Statute' (2015) 9(2) *Journal of Equity* 188, 190–3, 199, 206–7.

[9] The traditional remedy in equity for unconscionable dealing is rescission (full or partial) or perhaps the refusal of specific performance: see *Bridgewater* (n 4) 493 [124] (Gaudron, Gummow and Kirby JJ); *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184, 1185 (Eyre CB). Under the *Australian Consumer Law* (n 8), however, the statutory remedies for unconscionable conduct 'within the meaning of the unwritten law' and 'in connection with goods or services' include injunction, damages and various other compensation orders, variation orders and rescissory-type relief: see at ss 232, 236–7, 243. Additionally, in an action brought by the regulator, a person who contravenes a provision in pt 2-2 of the *Australian Consumer Law* — which includes ss 20(1), 21(1) — may be ordered to pay to the Commonwealth a civil pecuniary penalty: see at s 224.

[10] See generally *Kakavas* (n 6); *Thorne* (n 6); *Kobelt* (n 6).

[11] A recent illustration of this phenomenon, we suggest, is *Nitopi* (n 7) 393–4 [6]–[9] (Bell CJ), 416–17 [114]–[121] (Ward P), 433–4 [197]–[201] (White JA). In a subsequent case, the New South Wales Court of Appeal ('NSWCA') acknowledged the 'evident tension' that now exists in the authorities regarding such matters as the level of knowledge required to be held by the superior party, the need for proof of 'exploitative or predatory conduct' (as opposed to 'inadvertence or indifference') and the relevance of the distinction between 'active and passive conduct on the part of the stronger party': *Wakim v Senworth Capital Pty Ltd* [2024] NSWCA 102, [45], [55] (Griffiths AJA, White JA agreeing at [1], Basten AJA agreeing at [8]) ('*Wakim*').

recently in *Stubbings v Jams 2 Pty Ltd* ('*Stubbings*').[12] But far and away the principal cause of the current problematics has, in our respectful view, lain in the apparent preference of the High Court, which has been dutifully echoed by lower and intermediate courts, for 'language [that] is rhetorically rich, dramatic, and correspondingly lacking in objective specificity of meaning' over detailed elaboration of the underlying normative justification for the jurisdiction.[13] It is this justification that, once elaborated, should explicitly shape the formulation of application criteria that can match the underlying normative rationale and be capable of clear articulation and stable administration across different types of transaction that might fall within the doctrine's reach. In contrast to the judgments in *Amadio* itself, the case law is now replete with the epithets of 'exploitation', 'victimisation', 'predation' and the like[14] — all morally loaded (hence essentially contestable) concepts — that are unexplained and apparently inconsistent with actual decisions rendered in the name of the jurisdiction, not the least being *Amadio* itself.[15] We will argue that the modern case law appears

[12] See generally *Stubbings* (n 6). For recent commentary on this aspect of the decision, see Mark Giancaspro, 'Still Jammed! Lingering Questions about the Statutory Unconscionability Doctrine Post *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409' (2023) 35(1) *Bond Law Review* 1, 21–4. On the unstable relationship between unconscionable dealing in equity and the statutory prohibition on unconscionable conduct, see generally Marcel Delany, 'Statutory Unconscionable Conduct: The Search for Rational Criteria' (2020) 14(2) *Journal of Equity* 206; Jeannie Marie Paterson et al, 'Beyond the Unwritten Law: The Limits of Statutory Unconscionable Conduct' (2023) 17(1) *Journal of Equity* 1.

[13] We are borrowing the phraseology from Herbert Fingarette, 'Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape' (1985) 42(1) *Washington and Lee Law Review* 65, 72.

[14] Even the word 'unconscionable' within the name of the doctrine carries linguistic connotations of serious misconduct: cf *Kobelt* (n 6) 106–7 [311] (Edelman J). This kind of misconduct could potentially rise well above what is necessitated by the doctrinal requirement articulated in *Amadio* (n 1) that there be proof of '*unconscientious*' advantage-taking, which seems much less linguistically dramatic: see at 461 (Mason J) (emphasis added). It might have been better, then, if the doctrine had simply been dubbed 'unconscientious dealing' rather than 'unconscionable conduct': cf Anthony J Duggan, 'Unconscientious Dealing' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 127. This is more consistent with the language used by Gibbs CJ than that used by Mason J and Deane J in *Amadio* (n 1): see at 459–60 (Gibbs CJ). Both Mason J and Deane J, however, refer to the gravamen of the doctrine in terms of '*unconscientiously* taking advantage' — but then their Honours call the doctrine '*unconscionable* conduct' and '*unconscionable* dealing' respectively: see at 461–4, 466, 468 (Mason J), 474–5, 477, 479–81 (Deane J, Wilson J agreeing at 468) (emphasis added).

[15] See generally *Amadio* (n 1). See below nn 230–4 and accompanying text. See also Rick Bigwood, *Exploitative Contracts* (Oxford University Press, 2003) 3, 125; Richard Arneson, 'Exploitation' in Lawrence C Becker and Charlotte B Becker (eds), *Encyclopedia of Ethics* (Routledge, 2nd ed, 2001) vol 1, 515, 515.

to have developed in a different, more restrictive, direction than was contemplated, or at least theoretically possible, in *Amadio*, and not necessarily for the better.[16] This, we believe, has had an unnecessarily constraining effect on the ameliorative potential of a doctrine that, properly theorised, is very well suited to moderating the impact of serious power–vulnerability relationships upon the transactional interests of the contracting (or otherwise disponing) parties in circumstances of special disadvantage in modern Australia.[17] Indeed, we suggest that a lack of adequate attention shown by the courts to the purpose of the doctrine, and the corresponding failure to link curial formulations of the doctrinal elements or considerations to that purpose, has been antithetic to the aims of equity in determining 'the real justice of' cases to which the jurisdiction in *Amadio* was directed:[18] ill-gotten contracts or other lawful transactions by 'unfair advantage'.[19]

The article proceeds as follows. In Part II, we attempt to isolate the normative foundations of the *Amadio* principle. This is an important first step, as no 'doctrine can be understood and applied without reference to the ends [that] it

[16] This is despite an initial, and apparently significant, weakening of the *Amadio* criteria by the High Court in *Bridgewater* (n 4): see Anne Finlay, 'Can We See the Chancellor's Footprint? Bridgewater v Leahy' (1999) 14(2) *Journal of Contract Law* 265, 270–2; *Amadio* (n 1) 462 (Mason J), 474 (Deane J, Wilson J agreeing at 468); *Bridgewater* (n 4) 470–2 [39]–[49] (Gleeson CJ and Callinan J), 492–3 [120]–[123] (Gaudron, Gummow and Kirby JJ). Regarding the problematics of the decision in *Bridgewater* (n 4), see also Joachim Dietrich, 'Bridgewater v Leahy: Unconscionability and the Flexibility of Equitable Remedies in the High Court' (1999) 73(2) *Australian Law Journal* 112, 116–19; Sze-Beng Tang, 'A Neoclassical Analysis of the Equitable Doctrine of Unconscionable Dealing' (2006) 27(2) *Adelaide Law Review* 227, 230–66.

[17] Although we do not deal with statutory unconscionability in this article, it warrants mention that statutory unconscionability under the *Australian Consumer Law* (n 8) is not limited to the unwritten law: at ss 20(1), 21. It is perhaps inevitable that the equitable conception of 'unconscionable conduct' will influence the courts' interpretations of statutory provisions that adopt equitable labels: see especially *Kobelt* (n 6) 94 [279] (Edelman J); Giancaspro (n 12) 23; Paterson et al (n 12) 15–20; Delany (n 12) 217–20. For that reason, it is vital that the equitable doctrine of unconscionable dealing — especially its underlying rationale and conceptual contours — be properly understood outside of the statutory unconscionability regime in Australia. Conversely, of course, the nuances of the equitable doctrine remain crucial in disputes outside the scope of the statutory regimes such as disputes between parties who are not transacting in 'trade or commerce': see *Australian Consumer Law* (n 8) s 21; *ASIC Act* (n 8) s 12CB. See, eg, *Thorne* (n 6) 91–4 [4]–[15], 111–12 [63]–[65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); *Williams v Maalouf* [2005] VSC 346, [1]–[10], [192] (Hargrave J) ('*Williams*').

[18] See *The Juliana* (1822) 2 Dodson's Admiralty Reports 504; 165 ER 1560, 1567 (Lord Stowell). See below Part III(C).

[19] See *Amadio* (n 1) 467–8 (Mason J).

serves'.[20] If, as the case law (rightly or wrongly) suggests, the doctrine that administers the principle is animated by an equitable precept of non-exploitation in transactions, we further speculate on how and why, exactly, interpersonal exploitation might be said to 'offend equity's conscience'.[21] If a precept of non-exploitation truly underlies the equitable jurisdiction to relieve against an unconscionable dealing, then it should follow that the requisite elements of an unconscionable dealing claim will reflect the component parts of a basic exploitation claim. Those elements — the doctrinal criteria of an unconscionable dealing claim — are discussed in Part III. This extends to a consideration of how the onus of proof functions in this jurisdiction, as well as a discussion about whether the traditionally expressed ingredients of an unconscionable dealing claim can properly be regarded as 'elements' of proof at all. Part III concludes with an examination of the mental dimension of an unconscionable dealing claim as currently formulated in the case law. In Part IV, we consider whether '[t]he stream of judicial exposition' of the *Amadio* principle has risen above the relevant judgments in *Amadio* itself and conclude that it has.[22] The post-*Amadio* narrowing of the normative justification for the unconscionable dealing jurisdiction is, in our view, indefensible from the standpoint of originating precedent, as well as from the underlying values and standards that are assumed by the courts but never, unfortunately, fully articulated. We conclude by reflecting on what went wrong and on how the *Amadio* principle might be made fit for its apparent, original purpose — including by reference to a concept that we will dub 'transactional neglect'.

[20] Lon L Fuller, 'Consideration and Form' (1941) 41(5) *Columbia Law Review* 799, 824. Although Lon L Fuller made this remark with respect to the consideration doctrine in contract law in particular, we consider the observation to be generically sage and applicable. Cf Melvin A Eisenberg, 'The Theory of Contracts' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge University Press, 2001) 206, 209. '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.'

[21] See, eg, *Amadio* (n 1) 489 (Dawson J), cited in *Louth* (n 6) 630 (Brennan J); *Paciocco v Australia & New Zealand Banking Group Ltd* (2015) 236 FCR 199, 271 [282] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]) ('*Paciocco*'). See also *C G Berbatis* (n 6) 72–3 [42], 76–7 [55] (Gummow and Hayne JJ).

[22] Cf *C G Berbatis* (n 6) 63 [10] (Gleeson CJ). See above nn 1–15 and accompanying text.

II Normative Foundations

> Unconscionable conduct, as a coherent basis for relief, ha[s], at its root, the protection of the vulnerable from exploitation by the strong …[23]

It is axiomatic, in our view, that, in order to satisfy basic rule of law requirements,[24] any substantive doctrine of law or equity must be 'conceptually sound and explicit in its policy underpinnings, and operational in terms of both the process of judicial inquiry it envisages and the remedial instruments available to a court to abate [the targeted] phenomena'.[25] What, then, is the underlying justification for judicial interference with legal transactions in the name of unconscionable dealing? In *Amadio*, Mason J referred to

> an underlying general principle which 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.[26]

In none of the *Amadio* judgments, however, was that 'underlying general principle' articulated in explicit terms.[27] Accordingly, if the normative foundations of the *Amadio* principle are to be properly identified at all, such identification must lie beyond that seminal case: either in prior or subsequent case law

[23] *Paciocco* (n 21) 271 [282] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]).

[24] We envision here, in particular, that aspect of the rule of law that requires the promulgation of rules, principles or directives that are sufficiently clear, coherent and stable so as to enable those who are subject to them to be properly guided by the knowledge of their content: see Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67, 69–70. Additionally, those who are authorised to make, administer and apply the rules, principles and directives must act consistently and in accordance with the law's tenor, thereby ensuring that the exercise of judicial power (in the present context) remains predictable and constrained by legal method as opposed to being arbitrary: see AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1961) 188, 193–6, 202–3; Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 8.

[25] MJ Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26(4) *University of Toronto Law Journal* 359, 385. See also Matthew Harding, 'Equity and the Rule of Law' (2016) 132 (April) *Law Quarterly Review* 278, 292–5.

[26] *Amadio* (n 1) 462. The language of this formulation follows closely with the language used by Kitto J in *Blomley* (n 3): at 415.

[27] See *Amadio* (n 1) 459 (Gibbs CJ), 462 (Mason J), 474 (Deane J, Wilson J agreeing at 468), 489 (Dawson J).

or perhaps in academic commentary — or, most likely, in a combination of the two.

A *From the Too Vague to the Too Specific?*

Now, given that the Australian legal system provides a (more or less) neutral facility to render legally effective the creation and, if necessary, enforcement or maintenance of 'binding' consensual or voluntary arrangements such as contracts and other dispositions,[28] it follows that it must also recognise a raft of so-called 'invalidating circumstances or conditions' that dispense from the normal consequences of such transactions (or dispositions) being concluded in legal form.[29] This is implied by the very notion of 'voluntary assumption', or 'consensual transfer', itself.[30] While it is uncontroversial that unconscionable dealing forms part of this raft of invalidating reasons, the more precise rationalisation of the doctrine within the wider raft remains a matter of ongoing debate and uncertainty.[31]

In our view, a convincing rationalisation of the equitable doctrine of unconscionable dealing in normative terms remains indispensable to the creation of a stable set of application criteria that are linked to and conceptually aligned with the underlying rationale. Ambiguity as to the doctrine's normative foundations can readily convert into confusion over its specific proof elements, which can in turn imperil the predictive certainty expected of private law adjudication when those proof elements are called upon for application to the

[28] See Bigwood, *Exploitative Contracts* (n 15) 67.

[29] This includes exculpatory categories such as mistake, misrepresentation, duress, undue influence and the like: see, eg, *Thorne* (n 6) 104 [41] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); *Louth* (n 6) 631–2 (Brennan J), quoting *Brusewitz v Brown* [1923] NZLR 1106, 1109 (Salmond J) ('*Brusewitz*').

[30] See HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 1968) 28–30, 34–5; HLA Hart, 'The Ascription of Responsibility and Rights' (1949) 49 *Proceedings of the Aristotelian Society* 171, 177–8. Cf *Agnew v Länsförsäkringsbolagens AB* [2001] 1 AC 223, 264–5 (Lord Millett) ('*Agnew*').

[31] See, eg, Felicity Maher, 'Clarity or Confusion? Duress, Undue Influence and the Unconscionable Conduct in the High Court' (2018) 12(1) *Journal of Equity* 91, 91–2; Rick Bigwood, 'Contract Vitiation' in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21st Century* (Federation Press, 2021) 153, 153–73; *BOM v BOK* [2019] 1 SLR 349, 399–403 [145]–[153] (Andrew Phang Boon Leong JA for the Court) ('*BOM*').

established facts, especially in so-called 'hard' or 'marginal' cases.[32] Proper conceptualisation of the doctrine is also necessary to facilitate the intellectual and practical differentiation of unconscionable dealing from other exculpatory doctrines within the raft that also regulate significant power–vulnerability relationships in transactional settings and which may be attracted by the same or similar fact patterns. Even accepting some inevitable overlap at the boundaries,[33] this kind of conceptual clarity is necessary, not least to justify the continued maintenance of the jurisdiction as a standalone category (ie apart from other recognised heads of transactional relief)[34] or else, perhaps, to support an argument for absorption of such existing heads into the unconscionable dealing jurisdiction itself.[35]

Unfortunately, the track record of Australian courts (and, albeit to a lesser extent, commentators) in articulating the distinct rationale underlying the unconscionable dealing jurisdiction is not as good as it could be.[36] In our

[32] See, eg, *Nitopi* (n 7) 393–4 [6]–[9] (Bell CJ), 416–17 [114]–[121] (Ward P); *Aboody* (n 7) 32375 [65] (Allsop P, Bathurst CJ agreeing at 32362 [1], Campbell JA agreeing at 32378 [82]); *Kobelt* (n 6) 39–41 [91]–[95] (Gageler J).

[33] Cf *Fistar v Riverwood Legion & Community Club Ltd* (2016) 91 NSWLR 732, 743 [48]–[50] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]).

[34] For example, one overseas court has indicated, without formally deciding on the matter, that unconscionable dealing is a 'redundant category' that should be absorbed into 'Class 1 undue influence': *BOM* (n 31) 399–401 [145]–[149] (Andrew Phang Boon Leong JA for the Court).

[35] This has been recommended, for example, for lawful act duress: see *Karam* (n 7) 165 [57] (Beazley, Ipp and Basten JJA).

[36] A number of commentators, from a number of different perspectives, have theorised about the conceptual underpinnings of the equitable jurisdiction to relieve against an unconscionable dealing. For a law and economics account of the jurisdiction rooted in the pursuit of economic efficiency, see Anthony J Duggan, 'Is Equity Efficient?' (1997) 113 (October) *Law Quarterly Review* 601, 611–18, 632–5. Sze-Beng Tang defends a procedurally focused account of the unconscionable dealing doctrine based on (what he calls) the 'neoclassical' conception of contract, albeit without fully articulating the precise nature of the procedural concern (or 'unfair tactics') targeted by the doctrine: Tang (n 16) 228, 230–1, 246–7. But see Bigwood, *Exploitative Contracts* (n 15) chs 3, 5–6. For a 'corrective justice' account of unconscionable conduct which, inexplicably, puts beyond its scope the critical question of the requirement of agency-responsibility (or fault) on the part of the stronger party for the weaker party's assent (ie beyond mere knowledge, by the stronger party, of the weaker party's special disadvantage), see Angela Carrera, 'Towards a Theory of Special Disadvantage in Unconscionable Bargains Law' (2015) 23 *Restitution Law Review* 21, 21–6. For an account of the unconscionable dealing jurisdiction in Australia, for the purpose of contrasting it with (what they argue is) a very different jurisdiction in England, while (in our view) overstating or misinterpreting aspects of the law on the Australian side of the comparison (and while also omitting to mention *BOM* (n 31), where the Court of Appeal of Singapore itself engaged in a significant comparative analysis of the two

respectful view, past and present attempts in this regard are marked by either unhelpful imprecision or a high degree of abstractness, or else they incorporate deeply normativised concepts — such as 'exploitation' or 'victimisation' — which themselves invite particularisation that, to date, has not been adequately supplied by the courts who invoke them.[37] This is troubling from a standpoint of wanting a robust normative justification for the doctrine, which is all the more necessary in the face of the courts' insistence that '[i]t is general principle, not a precisely expressed rule, that operates [in this area]'.[38] Moreover, to the extent that the doctrine is said to be rooted in equity's concept of 'a juridical conscience', which the High Court has described as 'a construct of values and standards [of personal conduct] against which the [defendant's] conduct … is to be judged', the precise content and interplay of those values and standards are likewise typically assumed, rather than elaborated, by the courts.[39]

The lack of rigorous judicial engagement with the theoretical core of the unconscionable dealing doctrine in Australia predates *Amadio*. In *Blomley*, for example, Kitto J made reference to the principle's purpose as 'den[ying] to those who act unconscientiously the fruits of their wrongdoing'.[40] However, his Honour did not proceed to articulate the precise nature of that wrongdoing except to imply that it involved 'something like fraud, for an undue advantage was

jurisdictions for the purposes of ultimately settling on a 'middle ground' doctrine of unconscionability for Singapore), see Ying Khai Liew and Debbie Yu, 'The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?' (2021) 45(1) *Melbourne University Law Review* 206. See also *BOM* (n 31) 391–9 [127]–[144] (Andrew Phang Boon Leong JA for the Court). For a 'theory of exploitation' in connection with unconscionable demands under on-demand guarantees rather than apropos the unconscionable dealing doctrine or the *Amadio* principle per se, see Thanuja Rodrigo, 'Unconscionable Demands under On-Demand Guarantees: A Case of Wrongful Exploitation' (2012) 33(2) *Adelaide Law Review* 481, 482–4, 488, 510–16.

37 See, eg, *Thorne* (n 6) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

38 *Aboody* (n 7) 32375 [63] (Allsop P, Bathurst CJ agreeing at 32362 [1], Campbell JA agreeing at 32378 [82]).

39 *Kakavas* (n 6) 400 [15]–[16] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). Canadian courts have been more self-consciously dedicated in this area in recent years: see, eg, *Downer v Pitcher* (2017) 409 DLR (4^{th}) 542, 555–66 [24]–[54] (Green CJ, Harrington and Hoegg JJA) ('*Downer*'); *Uber Technologies Inc v Heller* [2020] 2 SCR 118, 157–67 [54]–[79] (Abella and Rowe JJ for Wagner CJ, Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ), 200–5 [152]–[160] (Brown J) ('*Uber Technologies*').

40 *Blomley* (n 3) 429, citing *Cooke v Clayworth* (1811) 18 Ves Jr 12; 34 ER 222.

taken of [the plaintiff's] situation'.[41] In *Amadio* itself, Mason J saw the doctrine as a

> species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience.[42]

In the same case, Deane J, with whom Wilson J agreed, similarly remarked that

> [t]he concept underlying the jurisdiction to grant the relief is that equity intervenes to prevent the stronger party to an unconscionable dealing acting against equity and good conscience by attempting to enforce, or retain the benefit of, that dealing.[43]

One can, by reference to the doctrinal criteria enlisted and applied in *Blomley* and *Amadio*, deduce that an equitable precept against unfair advantage-taking in transaction formation (and perhaps also enforcement or retention) is at play here.[44] Notably, at this stage of the doctrine's development in Australia, reliance

[41] *Blomley* (n 3) 429, quoting *Evans v Llewellin* (1787) 1 Cox 333; 29 ER 1191, 1194 (Kenyon MR) ('*Evans*').

[42] *Amadio* (n 1) 461.

[43] Ibid 480 (Deane J, Wilson J agreeing at 468).

[44] See *Blomley* (n 3) 415 (Kitto J); *Amadio* (n 1) 461 (Gibbs CJ), 467 (Mason J), 474 (Deane J, Wilson J agreeing at 468), 489 (Dawson J). Space does not permit a discussion of the question of whether equity's objection to unconscionable dealing lies singularly in the 'procurement' of the impugned transaction or alternatively in its 'enforcement' or 'retention'. An emerging theme of judgments by intermediate courts is that the doctrine's scope encompasses the passive 'retention' of the benefit of a completed transaction after the stronger party learns of the other party's special disadvantage: see, eg, *Johnson v Smith* [2010] NSWCA 306, [5] (Allsop P) ('*Johnson*'); *Aboody* (n 7) 32377 [79] (Allsop P, Bathurst CJ agreeing at 32362 [1], Campbell JA agreeing at 32378 [82]); *Nitopi* (n 7) 396 [21], 397–400 [26]–[34] (Bell CJ), 426–7 [159] (Ward P); *Wakim* (n 11) [68] (Griffiths AJA, White JA agreeing at [1], Basten AJA agreeing at [8]), quoting *Bridgewater* (n 4) 479 [76] (Gaudron, Gummow and Kirby JJ), quoting *Hart v O'Connor* [1985] 1 AC 1000, 1024 (Lord Brightman for the Court) ('*Hart*'). Cf the argument about unconscionable retention raised in *Schwanke v Alexakis* (2024) 114 NSWLR 459, 508 [225] (Adamson JA, Ward P agreeing at 462 [1], Gleeson JA agreeing at 462–3 [5]). Two of us have discussed the point elsewhere: see Rick Bigwood and Pauline Ridge, 'Unconscientious Retention of Benefit: Can Unconscionability "Supervene" in Unconscionable Dealing Cases?' (2024) 18(1) *Journal of Equity* 1. It suffices for present purposes to indicate that we consider the moment of *procurement* (or acceptance) of the impugned benefit to be the correct point at which to assess the existence of 'unconscientious advantage-taking' on the part of the defendant and that any judgment as to a wrongful 'enforcement' or 'retention' must refer back to, or

on normatively loaded signifiers, such as 'exploitation' or 'victimisation', was nascent at best.[45]

Subsequently, however, Australian courts have become more explicit about what purports to underlie the law's corrective response to transaction-inducing unconscionable dealing. In *Tanwar Enterprises Pty Ltd v Cauchi*, five members of the High Court referred to cases of 'alleged undue influence and catching bargains [ie unconscionable dealing]' as being 'concerned with the production by malign means of an intention to act'.[46] We consider this a useful insight, at least to the extent that it resonates with the animating concern of other exculpatory doctrines of law and equity — namely, that no party to a transaction should be subjected, by or on behalf of the other party to the transaction, to an improper reason for intentional entry into a legal transaction or diversion of value away from the first-mentioned party.[47] Use of the adjective 'malign', though, implies that the means applied to induce the transaction or diversion of value must be 'evil' in nature or effect, which strikes us as an inapt descriptor for all manifestations of undue influence and unconscionable dealing, for example. Leaving aside undue influence,[48] it is possible that, for unconscionable dealing, 'exploitation' of the other party's special disadvantage, while *ex hypothesi* a wrongful exercise of interpersonal power for gain, might

derive its justificatory force from, a wrongful procurement or acceptance at some earlier point in time. This aligns with the considered position of the Supreme Court of New Zealand in *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735, 741 [5] (Tipping J for the Court) ('*Gustav*'). We do not, with respect, find the reasoning in the abovementioned decisions of the NSWCA to be persuasive based on the authorities cited, and the analogies drawn with doctrines other than unconscionable dealing, in those decisions.

45 Only Dawson J in *Amadio* (n 1) refers to the principle as requiring 'exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain': at 489. In *Blomley* (n 3), only McTiernan J refers to the concept of the claimant as a 'victimised party': at 386; although Kitto J did mention 'the "poor and ignorant man" who figures in the cases as a ready victim for the unscrupulous': at 429.

46 (2003) 217 CLR 315, 325 [23] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ) ('*Tanwar Enterprises*').

47 Exculpatory doctrines include duress, misrepresentation, undue influence and unconscionable dealing: Bigwood, *Exploitative Contracts* (n 15) 89, 131; Duggan, 'Unconscientious Dealing' (n 14) 129 [502].

48 See generally Rick Bigwood, 'Undue Influence as Constructive Fraud' (2019) 13(2) *Journal of Equity* 144; Rick Bigwood, 'The Undue Influence of "Non-Australian" Undue Influence Law on Australian Undue Influence Law: Farewell *Johnson v Buttress*? Part II' (2019) 35(3) *Journal of Contract Law* 187 ('Australian Undue Influence'). See especially at 206–7.

still count as transaction-vitiating exploitation even if honest or well intentioned on the part of the exploiter.[49]

In 2013, a seven-member bench of the High Court in *Kakavas v Crown Melbourne Ltd* ('*Kakavas*') unanimously stated that the 'abiding rationale' of the *Amadio* principle is to 'ensure that it is fair, just and reasonable for the stronger party to retain the benefit of the impugned transaction'.[50] Standing alone this is, with respect, an overly imprecise encapsulation of the gravamen of the jurisdiction, for it seems equally apt to enclose any number of transactions impugned under various exculpatory grounds, including duress and undue influence (neither of which depend, in every case, on proof of actual advantage-taking).[51] The Court's reference in *Kakavas* to the familiar triune of 'fair, just and reasonable', however, must be read in light of immediately preceding statements in their Honours' unanimous judgment — namely, that 'the concern which engages the principle is to prevent victimisation of the weaker party by the stronger'[52] and that

> [e]ssential to the principle stated by both Mason J and Deane J in *Amadio* is that there should be an unconscientious taking advantage by one party of some disabling condition or circumstance that seriously affects the ability of the other party to make a rational judgment as to his or her own best interests.[53]

[49] *Johnson* (n 44) [5] (Allsop P). See also at [100]–[101] (Young JA, Hodgson JA agreeing at [8]), citing *Nichols v Jessup* [1986] 1 NZLR 226, 234 (McMullin J) ('*Nichols*'); *Aboody* (n 7) 32375 [65] (Allsop P, Bathurst CJ agreeing at 32362 [1], Campbell JA agreeing at 32378 [82]); *Paciocco* (n 21) 276 [305] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]); *Hanna v Raoul* [2018] NSWCA 201, [99] (Beazley P, Macfarlan JA agreeing at [160], White JA agreeing at [163]) ('*Hanna*'). For the avoidance of confusion here, we do not consider these dicta to be unambiguous endorsement of the concept of 'transactional neglect' in the sense that we elaborate on in Part IV below. While exploitation must always, in some sense, be deliberate (eg intentional, reckless), it does not follow that it must be sourced exclusively in self-interest and bad intent (ie an intention always, somehow, to harm the weaker party or otherwise do them down): see below at Part III(B). In contrast, the negligence-based concept of 'transactional neglect' incorporates no mental element at all, as '[n]egligence is failure to meet a standard of conduct *regardless of* accompanying mental state': Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 79 (emphasis in original).

[50] *Kakavas* (n 6) 425 [118] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ), quoted in *Kobelt* (n 6) 57 [145] (Nettle and Gordon JJ).

[51] See Andrew Robertson and Jeannie Paterson, *Principles of Contract Law* (Lawbook, 6th ed, 2020) 764 [34.20], 775 [35.05], 782 [35.47].

[52] *Kakavas* (n 6) 424–5 [117]–[118] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[53] Ibid 425 [118].

Traditionally, in equity, 'victimisation' has been taken to signify 'an unconscientious use of the power arising out of [the] circumstances and conditions' of the parties, which 'can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances'.[54] In *Kakavas*, this was presented as being synonymous with 'unfair exploitation' of the claimant's weakness, whereby exploitation required proof, no less, 'of a predatory state of mind'.[55] If 'predation' represents the correct cognitive standard, though, it is difficult to see how more 'passive' instances of victimisation, such as those that occurred in *Amadio* itself, could plausibly be said to have met that threshold.[56] Although Deane J said that the bank manager in that case had 'simply closed his eyes to the vulnerability of Mr and Mrs Amadio and the disability which adversely affected them', his Honour was also, in the very same paragraph, at pains to acquit the manager, or any other officer of the bank, of any charge of 'dishonesty or moral obliquity in [relation to] the dealings between Mr and Mrs Amadio and the bank'.[57] This is sometimes referred to as *passive* exploitation — that is, where the weaker party initiated the impugned transaction, rather than the stronger party actively procuring it, such that the operative exploitation occurs largely by omission only.[58] Here, the complaint seems more to do with 'opportunism' than 'predation', with the latter implying an inevitably *active* relationship between the victimiser and their target.[59]

54 *Hart* (n 44) 1024 (Lord Brightman for the Court), citing *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, 491 (Lord Selborne LC) ('*Earl of Aylesford*'). This statement was approvingly adopted by some judges in *Bridgewater* (n 4) and *Kobelt* (n 6): see at 58 [149], 85 [258] (Nettle and Gordon JJ); *Bridgewater* (n 4) 479 [76], 493 [122] (Gaudron, Gummow and Kirby JJ). See also *Wu v Ling* [2016] NSWCA 322, [8] (Leeming JA, Payne JA agreeing at [21]) ('*Wu*').

55 *Kakavas* (n 6) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). The significantly restricting effect of that case on the *Amadio* principle was observed by commentators at the time: see generally Rick Bigwood, 'Still Curbing Unconscionability: *Kakavas* in the High Court of Australia' (2013) 37(2) *Melbourne University Law Review* 463 ('Still Curbing Unconscionability'); Warren Swain, 'The Unconscionable Dealing Doctrine: In Retreat?' (2014) 31(3) *Journal of Contract Law* 255.

56 See also *Bridgewater* (n 4) 492–3 [120]–[123] (Gaudron, Gummow and Kirby JJ).

57 *Amadio* (n 1) 478 (Deane J, Wilson J agreeing at 468). See also at 470 (Deane J, Wilson J agreeing at 468). See below n 234 and accompanying text.

58 See *Gustav* (n 44) 741–2 [7] (Tipping J for the Court).

59 Cf *Nitopi* (n 7) 397–8 [26]–[27] (Bell CJ). In that same case, Ward P (at 430 [181]) attempts to avoid this problem by reading the need for a 'predatory' state of mind

> as simply another way of saying that there needs to be unconscientious exploitation with the requisite knowledge. If that is established, then it can be said that there was a 'predatory'

Interestingly, the imperative terminology of 'predation' seems to have quietly fallen away in decisions of the High Court after *Kakavas*,[60] although the (presumably synonymous) locutions of 'exploitation' and 'victimisation' have remained.[61] In *Australian Securities and Investments Commission v Kobelt*, for example, Gageler J explained that

> [i]n Australia, the central concern of a court administering equity in identifying conduct as unconscionable has long been understood to be to relieve against a stronger party to a transaction exploiting some special disadvantage which has operated to impair the ability of a weaker party to form a judgment as to his or her interests.[62]

On this view, the normative basis of unconscionable dealing is quite narrowly focused and directed at 'exploitation avoidance' in legal transactional settings.[63] In other words, the jurisdiction exists as a corrective response to an abuse of a

state of mind in that there was a deliberate or intentional taking of advantage of the known special disadvantage or disability. That is consistent with the recognition that passive acceptance or retention of moneys may in some circumstances be sufficient to amount to unconscionable dealing.

[60] On a close analysis, only Keane J in *Kobelt* (n 6) seemed to treat 'predation' as an immutable intent requirement of the equitable doctrine: see especially at 48–9 [118]–[120]. Cf 84–5 [257]–[258] (Nettle and Gordon JJ). At least one commentator has suggested that the subsequent silence on the predation requirement 'would appear to be an indirect ratification of what appears to be the current legal position: that one does *not* need to establish that the plaintiff had a predatory state of mind when alleging unconscionability as understood in equity': Giancaspro (n 12) 31 (emphasis in original). However, given the explicit recognition of the predation requirement in *Kakavas* (n 6), we regard it as self-evidently undesirable that the requirement should subsequently be abandoned by the High Court *sub silentio*: see at 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). We suspect that Mark Giancaspro would agree: see Giancaspro (n 12) 31–2. Felicity Maher also notes the uncertainty that the post-*Kakavas* decisions — especially *Thorne* (n 6) — have introduced to the present context: Maher (n 31) 101.

[61] See *Kobelt* (n 6) 17–18 [15] (Kiefel CJ and Bell J), citing *Thorne* (n 6) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ). See also *Kobelt* (n 6) 85 [258] (Nettle and Gordon JJ), 95–6 [282] (Edelman J). Cf *Gunn* (n 7) 124–5 [165] (Mitchell, Beech and Vaughan JJA).

[62] *Kobelt* (n 6) 36 [81], citing *Blomley* (n 3) 392 (McTiernan J), 405 (Fullagar J), *Amadio* (n 1) 462 (Mason J), *Bridgewater* (n 4) 470 [39]–[40] (Gleeson CJ and Callinan J), 478–9 [74]–[76] (Gaudron, Gummow and Kirby JJ), *Thorne* (n 6) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[63] Although Leeming JA in *Wu* (n 54) suggested that, in that context, 'victimisation' and 'exploitation' were not narrow concepts, all his Honour seemed to mean was that the concepts could be 'active' or 'passive': at [14] (Leeming JA, Payne JA agreeing at [21]), quoting *Bridgewater* (n 4) 479 [76] (Gaudron, Gummow and Kirby JJ), quoting *Hart* (n 44) 1024 (Lord Brightman for the Court).

dominant position resulting from serious pre-transactional inequality between the parties — and abuse is seen to inhere specifically in the procedural ill of interpersonal exploitation leading to transaction formation.[64] But the courts have, at least in Australia, always stopped short of analysing, let alone defining, the exploitation concept and concern. More importantly, the courts are yet to articulate exactly why and how interpersonal exploitation offends the conscience of equity in the present context.[65] We suggest that once the High Court narrows the jurisdiction's focus down to a specific, targeted form of opprobrious conduct such as 'exploitation', the risk then arises of lower courts subsequently being straitjacketed by the exploitation concept itself: that is, in a manner that might be counterproductive to equity's ultimate ability to deliver on what ought to be regarded as 'the real justice of' cases of the present kind.[66]

B *Why Does (and Should) Exploitation in Transactions Offend Equity's Conscience?*

Assuming, for now, that a precept of non-exploitation is what normatively underlies the *Amadio* principle as a conscience-based operation of equity, what then, exactly, is the 'construct of values and standards [of personal conduct] against which the … [unconscionable dealer] … is to be judged' in the present connection?[67] An examination into that construct is an important exercise, for it affords a starting point for testing the elasticity of the exploitation concept. Relatedly, an examination also produces a platform for assessing the true weight of that concept's explanatory power in the present context and across different

[64] Note that in *Kobelt* (n 6), Gageler J spoke in terms of D 'exploiting *some special disadvantage*' affecting C: at 36 [81] (emphasis added). In *Amadio* (n 1), Mason J referred to D taking 'unfair or unconscientious advantage … *of the opportunity thereby created*' (ie by C being placed in a position of special disadvantage vis-a-vis D): at 462 (emphasis added).

[65] See *Bridgewater* (n 4) 476–7 [73]–[74] (Gaudron, Gummow and Kirby JJ).

[66] See *The Juliana* (n 18) 1567 (Lord Stowell). The irony here is that while it has been said that '[t]he [*Amadio*] principle is wide, and the danger in further textual definition (as opposed to exemplification or illumination) is that inaccuracy or undue restriction may be brought about', the High Court's continued reliance on concepts like 'exploitation' and 'predation' to define the jurisdiction, at least in certain contexts, results in the *constriction*, rather than the enlargement, of the jurisdiction's constabulary control over the misconduct of the superior party: see *Aboody* (n 7) 32375 [63] (Allsop P, Bathurst CJ agreeing at 32362 [1], Campbell JA agreeing at 32378 [82]). See, eg, *Kakavas* (n 6) 439–40 [160]–[161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[67] *Kakavas* (n 6) 400 [16] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). See also at 400 [15] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

transaction types — that is, as an *exclusive* justificatory reason for interference with legal transactions, whether contract or perfected inter vivos gift, in the name of the unconscionable dealing jurisdiction. Indeed, as we hope to demonstrate, upon an analysis of the mix of competing values and standards at play in unconscionable dealing cases, the exploitation concept proves inapt — too narrow — to plausibly rationalise the outcomes of the spectrum of cases that have been decided in the name of the equitable doctrine. We will also suggest that it may further be unfit for addressing contemporary norms and values that, in our view, *ought* to inform the modern doctrine.[68] For now, however, we will take at face value the courts' own vocabulary in modern unconscionable dealing cases and consider just what an insistence on 'exploitation' may logically require to be shown as the elements of, or considerations relevant to, the claim.

In the absence of a dedicated curial definition of exploitation, we will assume that the concept carries its ordinary juridical meaning: 'taking unjust advantage of another for one's own benefit or selfish ends'.[69] Both ordinary and philosophical meanings are to similar effect.[70] In a sense, then, it is redundant to resort, as courts recurrently do, to the phraseology of '*unfair* exploitation' or '*unconscientious* exploitation' to capture the gravamen of the unconscionable dealing complaint.[71] Strictly speaking, there can be no instances of *interpersonal* exploitation that are other than 'unfair' or 'unconscientious', for '[t]o characterize a relationship as exploitative … presupposes a negative moral verdict on its justice'; the notion of 'unjust' or 'unacceptable' advantage-taking is built into the very definition of exploitation itself.[72] There can, accordingly, be no normatively neutral connotations to the finding that 'A exploited B' given

[68] See below Part IV.

[69] *Black's Law Dictionary* (11th ed, 2019) 'exploitation'.

[70] See, eg, *Webster's Ninth New Collegiate Dictionary* (1983) 'exploitation' (def 1b). That dictionary defines 'exploitation' as, inter alia, 'an unjust or improper use of another person for one's own profit or advantage'. See also *The Concise Oxford Dictionary of Current English* (7th ed, 1982) 'exploit' (vt). That dictionary defines 'exploitation' as 'work[ing], turn[ing] to account … utiliz[ing]' a person etc 'for one's own ends'. For a catalogue of philosophical definitions of exploitation, see Alan Wertheimer, *Exploitation* (Princeton University Press, 1996) 10–12.

[71] See, eg, *Kakavas* (n 6) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *Stubbings* (n 6) 20 [39], 24 [52] (Kiefel CJ, Keane and Gleeson JJ), 59 [169] (Steward J); *Ah Sam v Mortimer* [2021] NSWCA 327, [71] (Brereton JA, Basten JA agreeing at [1], Payne JA agreeing at [2]) ('*Ah Sam*'); *Nitopi* (n 7) 402 [45] (Bell CJ), 407 [79], 412–14 [100]–[105] (Ward P); *Kimberley Developments Pty Ltd v Bale* [2023] NSWCA 25, [68]–[69] (Leeming JA, Kirk JA agreeing at [106], Griffiths AJA agreeing at [107]).

[72] *The Oxford Dictionary of Philosophy* (2nd ed, 2008) 'exploitation'.

that B is a 'person' (and hence is worthy of moral respect) — as opposed to a 'mere thing'.[73]

To our knowledge, the 'values and standards' that inform and explain equity's antipathy towards interpersonal exploitation in transactional settings have never been systematically articulated by Australian courts. They are, however, assumed by them and, if one looks closely enough, implicit in judgments across various pockets of the private law. Thus, it is possible to glean such values and standards from intermittent dicta across various Anglo-Commonwealth legal systems over time, including from cases that do not directly involve the equitable doctrine of unconscionable dealing.

The starting point of the unwritten law, no doubt, is the 'liberal' conception of transfer or exchange: the law in general is not 'paternalistic',[74] but rather it leaves each of us free to enlist others in the pursuit of our own self-interest and, accordingly, to make such bargains or other dispositions as we see fit, '[h]owever improvident, unreasonable, or unjust … [they] may be'.[75] This conception emphasises not only the values of liberty and autonomy but also individual responsibility;[76] for under the liberal ideal, people are generally seen to 'deserve' to have their lives determined by the choices they make, irrespective of whether those choices turn out well or badly for them.[77] Not to respect (ie recognise, enforce or sustain) regretted transactions legally entered into voluntarily inevitably denies the *other* transacting party the equivalent right (ie liberty) to self-determination and hence denies their equal status as a freely choosing jural agent.[78]

But a basal assumption behind the liberal conception, of course, is that the actors concerned are governed by conditions (including political systems) under which it is possible to act 'legally autonomously', hence responsibly, when exercising situation-altering choice.[79] Formal equality of status, capacity or

[73] See Robert E Goodin, 'Exploiting a Situation and Exploiting a Person' in Andrew Reeve (ed), *Modern Theories of Exploitation* (SAGE Publications, 1987) 166, 173; Joel Feinberg, 'Noncoercive Exploitation' in Rolf Sartorius (ed), *Paternalism* (University of Minnesota Press, 1983) 201, 202.

[74] Indeed, the law not being paternalistic is sometimes explicitly recognised in the present connection: see, eg, *Nichols* (n 49) 235 (Somers J); *Louth* (n 6) 638 (Deane J).

[75] *Brusewitz* (n 29) 1109 (Salmond J).

[76] See *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 223–4 [114] (McHugh J) ('*Perre*').

[77] See *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 133 (Kirby P).

[78] Bigwood, *Exploitative Contracts* (n 15) 64–5.

[79] See generally Stephen Gardbaum, 'Liberalism, Autonomy, and Moral Conflict' (1996) 48(2) *Stanford Law Review* 385. See also *Perre* (n 76) 223–4 [114] (McHugh J).

opportunity does not always pertain *inter partes*. For a variety of reasons, sometimes described as 'constitutional' or 'situational' (or both), individuals may find themselves seriously unequalised vis-a-vis others in pre-transactional encounters.[80] This is to the point, at times, where 'the presumption of rational autonomy in self-interested contract-making is displaced'.[81] And while, on the liberal ideal, no objection can be taken to the mere existence of (even very serious) inequality or transactional disadvantage between actors per se,[82] the law, through particularised doctrines such as unconscionable dealing, nevertheless makes it harder for power-holders to use their interpersonal power or relative strategic advantage.[83] The law does this, essentially, by ensuring that such power or advantage, if it is to be exercised at all, must only be used consistently with the injunction against using fellow persons 'merely instrumentally' for gain.[84] Failing to secure someone's relatively informed and freely given consent before taking a contractual commitment or other legal benefit from them is one way of treating that person merely as a means to one's own gratification.[85] Such has been said to be discordant with '[o]ne of the central tenets of the common law' — namely, that individuals should be recognised, respected and protected as autonomous subjects and as independent, responsible agents.[86] Simply put, '[o]ne cannot *use* persons with the same moral impunity with which one may use [mere] things'.[87]

[80] On the distinction between 'constitutional' and 'situational' disadvantage, see *Warren v Lawton [No 3]* [2016] WASC 285, [158] (Le Miere J); *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 318 [48] (Gray, French and Stone JJ) ('*Samton Holdings*').

[81] *Downer* (n 39) 554 [20] (Green CJ, Harrington and Hoegg JJA).

[82] See *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, 183 (Dillon LJ) ('*Alec Lobb*'). See generally Ernest J Weinrib, 'Right and Advantage in Private Law' (1989) 10(5–6) *Cardozo Law Review* 1283. Deeply held convictions about individual rights generally preclude us from denying the ownership of advantages such as negotiation skill and position. Robert Nozick has thus argued that a justification for personal skills need not be given; some qualities are simply possessed: see Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 224–7.

[83] See *Amadio* (n 1) 461 (Mason J), 474–5 (Deane J, Wilson J agreeing at 468); *Kakavas* (n 6) 424–5 [117] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[84] See Bigwood, *Exploitative Contracts* (n 15) 202–3.

[85] See Jeffrie G Murphy and Jules L Coleman, *Philosophy of Law: An Introduction to Jurisprudence* (Westview Press, rev ed, 1990) 173–4.

[86] *Perre* (n 76) 223–4 [114] (McHugh J).

[87] Judith Farr Tormey, 'Exploitation, Oppression and Self-Sacrifice' (1973) 5(1) *Philosophical Forum* 206, 221 n 1 (emphasis in original).

Now, an inability to act as a 'rational autonomous decision-maker' — which is a threshold question administered by the 'special disadvantage' requirement for unconscionable dealing[88] — is precisely what renders a sui juris person vulnerable to merely instrumental utilisation at the hands of another who *is* capable, relative to the other person, of acting as an informed and autonomous decision-maker and who recognises the (strategic) opportunity for personal gain that has been placed before them vis-a-vis the vulnerable party. But being vulnerable to merely instrumental utilisation vis-a-vis another is not the same as being misused in that particular way by that other — and neither is it a reason to deny altogether the stronger party the liberty of transacting with the weaker party. On the liberal conception, serious inequality, if sufficiently known to the stronger party, functions merely as a reason to impose context-specific side constraints (or 'legal disabilities', if you like) upon the superior party's normal transactional liberty vis-a-vis the weaker party.[89] These are reasons to suspend, qualify or modify, rather than prohibit, the pursuit of legitimate self-interest before allowing the superior party to proceed to transact with a party who is known to be specially disadvantaged relative to them.[90] Put slightly differently, tailored corrective responsibilities are cast upon the superior party[91] in order to

[88] Recently, as nicely put by the majority of the Supreme Court of Canada in *Uber Technologies* (n 39), the idea of disadvantage that triggers the unconscionable dealing jurisdiction is that the claimant is shown to have been afflicted, at the moment of transaction formation, by a condition or set of circumstances that 'impair[s] … [their] ability to freely enter [into] or negotiate a contract, compromise[s] … [their] ability to understand or appreciate the meaning and significance of the contractual terms, or both': at 163 [68] (Abella and Rowe JJ for Wagner CJ, Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ).

[89] See Nozick (n 82) 30–3.

[90] See ibid.

[91] These corrective responsibilities are not in the nature of true 'duties', for no right of action to enforce them belongs to the disadvantaged party; rather, the party who fails to so act will be under an equitable 'disability' with respect to the enforcement of the transaction so concluded or will otherwise be vulnerable to having the transaction rescinded at the discretion of the court: cf *Agnew* (n 30) 264–5 (Lord Millett); Bigwood, *Exploitative Contracts* (n 15) 213–15. We disagree with Ying Khai Liew and Debbie Yu's interpretation of Australian law to the effect that the unconscionable dealing doctrine imposes a 'positive duty on D to help C' whereby a failure on D's part amounts to a 'breach of a primary duty': Liew and Yu (n 36) 234–5, citing James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 61–2. While equitable compensation may well be recoverable in unconscionable dealing cases, it does not follow that this is equivalent to the 'damages' that would be available as of right for a breach of a true 'primary duty': cf *Agnew* (n 30) 264–5 (Lord Millett); Edelman (n 91) 62. This is because equitable relief is discretionary and will be moulded to the particular circumstances of the case, albeit in accordance with settled principles: see *Warman*

avoid them 'taking unfair advantage of' the disadvantaged party and, hence, using that disadvantaged party merely instrumentally and preventing them from realising their own operative goals in the transactional encounter in question.[92] Exploiters (ie unconscionable dealers) thus fail, in an agency-responsible manner,[93] to be sufficiently influenced by those relevant side constraints or corrective responsibilities when they actively play upon the known weaknesses of their exploitee or, in more passive cases, deliberately or purposively omit to take the precautionary measures necessary to neutralise the effect of the serious power–vulnerability relationship *inter partes* before taking a legal benefit from the exploitee.[94] In contractual contexts, at least, it might be said that such exploiters avail themselves of strategic opportunities that are (or ought to be) denied to them under the basic ground rules of bargaining: it is wrong, unfair or

International Ltd v Dwyer (1995) 182 CLR 554, 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) ('*Warman*'); *Bridgewater* (n 4) 494 [126]–[127] (Gaudron, Gummow and Kirby JJ).

92 Cf Don E Marietta Jr, 'On Using People' (1972) 82(3) *Ethics* 232, 237. See also Tormey (n 87) 213–15; John RS Wilson, 'In One Another's Power' (1978) 88(4) *Ethics* 299, 315; Allen W Wood, 'Exploitation' (1995) 12(2) *Social Philosophy and Policy* 136, 142–5. Beyond the unconscionable dealing jurisdiction, one can observe conceptual parallels with other exculpatory doctrines where the taking of corrective measures by the dominant party operates to negate a judgment of transaction-vitiating unconscionability. Consider, for example, the role that is served by the ascendant party's ensuring that the subordinate party receive competent independent advice before entry into the impugned transaction in defeating an undue influence claim: see, eg, *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, 576–8 (Gillard J). And consider, too, the transaction-solidifying role that is served by the financier's ensuring that a volunteer 'surety wife' is properly informed as to the nature and effect of a proposed suretyship transaction involving her husband's business debts under the 'special equity' doctrine: *Yerkey v Jones* (1939) 63 CLR 649, 663–4 (Latham CJ), 678, 684–6 (Dixon J) ('*Yerkey*'); *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 405–7 [24]–[25], 411 [41]–[42] (Gaudron, McHugh, Gummow and Hayne JJ) ('*Garcia*').

93 Whenever the phrases 'agency-responsible' and 'agency-responsibility' are used in this article, they are intended to signify that any complained-of conduct on the part of D must be appropriately connected to D as a moral agent and possess features that make it worthy of legal 'blame'. D is only blameable for acts and omissions that are relevantly related to *choices* that D made, or was fairly capable of making, at the relevant time: see Jim Evans, 'Choice and Responsibility' (2002) 27 *Australian Journal of Legal Philosophy* 97, 99–101.

94 Examples of precautionary measures include ensuring that C was fully and competently advised, had time to consider the wisdom of the proposed transaction and was specifically notified of peculiarly unfair terms and the like: see, eg, *Thorne* (n 6) 112 [65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 128 [122] (Gordon J). Hence, in *Amadio* (n 1), Mason J found the bank to be guilty of unconscionable conduct 'by entering into the transaction without disclosing such facts as may have enabled the respondents to form a judgment for themselves and without ensuring that they obtained independent advice': at 468. See also at 469 (Wilson J), 477, 481 (Deane J). See below n 274 and accompanying text.

inappropriate for parties to play by the 'ordinary' rules of free competitive bargaining in situations where, for whatever reason, those rules have been (or ought to be) adjusted or suspended.[95] Quite apart from the question of whether such a flagrant non-observance of transactional side constraints should be seen as necessary in every case to offend equity's conscience through unconscionable dealing — a matter to which we shall return below — it is certainly sufficient for that purpose.[96]

In the end, we believe that equity objects to transactional exploitation because the practice involves an unauthorised interference with the specially protected domains of a fellow person's autonomy and proprietary integrity. Exploiters (ie unconscionable dealers) selfishly violate the other party's general 'right' (ie 'legal immunity') to not have resources or value transferred away from them — here, under the colour of an objectively valid contract or other legally perfected disposition — without their full transactional consent. In such transference, exploiters avail themselves of strategic opportunities that are, or ought to be, denied to them under the rules and ethos of contract bargaining or, as the case may be, of the facilitative social institution of gifting. By failing to observe (or respond to) the side constraints (or 'legal disabilities') that the law engrafts upon transactional liberty when dealing with persons known to be specially disadvantaged relative to them, unconscionable dealers ignore a basic demand articulated in the liberty principle itself — namely, to respect the special status of fellow jural agents as 'freely choosing, rationally valuing, specially efficacious … moral personalit[ies]'.[97] Such a failure ultimately results in an unjust reallocation of resources between the transacting parties inter se, and this reallocation warrants reversal in the name of corrective justice.

A final point relating to the precise manner in which unconscionable dealing — if the doctrine is based strictly upon an anti-exploitation rationale — offends equity's conscience, especially in contractual contexts, is that exploitation is a *purely procedural* concern. In contrast to other Anglo-Commonwealth jurisdictions, such as the United Kingdom and Canada, whose respective doctrines of unconscionable dealing and unconscionable bargain appear to be preconditioned on proof of both procedural unconscionability *and* substantive

[95] Cf Goodin (n 73) 183–4.

[96] See below Part IV.

[97] See Charles Fried, *Right and Wrong* (Harvard University Press, 1978) 29.

unconscionability,[98] the Australian doctrine is purely procedural in its focus.[99] In Australia, substantive unconscionability serves merely a *forensic* role — namely, 'supporting the inference that a position of disadvantage existed' and also 'tending to show that an unfair use was made of the occasion'.[100] This aligns with a liberal conception of contractual justice: 'unconscionable bargains' simply lack the element of 'voluntariness' (ie procedural fairness) that would otherwise allow a court to conclude that the values exchanged by the parties under the impugned contract were 'equivalent' in the relevant (ie normatively 'sufficient', qualitative) sense.[101] On this approach, 'contractual imbalance' (or 'substantive unfairness') is not an *ingredient* of the unconscionable dealing complaint, although it may be relevant — even perhaps crucial in some cases — to inferring procedural unfairness.[102]

The question to which we will return in Part IV is whether 'exploitation', although capable of serving as a compelling justification for the grant of relief, is nevertheless an unduly constricting basis for conceptualising the normative underpinnings of the *Amadio* principle and doctrine. In Part III of this article, though, we enumerate and consider the proof elements of an unconscionable dealing claim on the basis that they match the anti-exploitation thesis expounded by the modern High Court (as discussed in this Part). However, we will propose in Part IV what we consider to be a preferable justificatory foundation for the subject jurisdiction (as compared to strict 'exploitation avoidance'), with a corresponding adjustment to the doctrinal criteria and general methodological approach which we invoke in aid of that alternative foundation.

[98] *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87, 95 (Peter Millett QC), affd *Alec Lobb* (n 82); *Uber Technologies* (n 39) 161–2 [62]–[65] (Abella and Rowe JJ for Wagner CJ, Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ).

[99] Duggan, 'Is Equity Efficient?' (n 36) 612–13; Duggan, 'Unconscientious Dealing' (n 14) 130 [503].

[100] *Blomley* (n 3) 405 (Fullagar J). See also *Downer* (n 39), which states that '[w]hile not a requirement for relief', evidence of substantive unconscionability 'may be relevant to drawing an inference that a special … disadvantage existed' or that an 'unconscionable use was made of the position of disadvantage of the relief-seeker by the [superior] party': at 565–6 [54] (Green CJ, Harrington and Hoegg JJA).

[101] Rick Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part II' (2000) 16(2) *Journal of Contract Law* 191, 202.

[102] See *C G Berbatis* (n 6) 90–1 [96] (Kirby J); *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157, 174 (Richardson J, Gault J agreeing at 175–6).

III Doctrinal Elements

A *The Doctrinal Formulations (and Burden of Proof)*

If the normative purpose of the unconscionable dealing doctrine is the avoidance of interpersonal exploitation in the (active) procurement or (passive) acceptance of legal benefits via voluntary or consensual transactions, it follows that the doctrinal criteria enlisted to implement that purpose ought to match the bilateral structure of a basic 'exploitation claim': (a) an inquiry, first, into the circumstances or situation of C that rendered C vulnerable to merely instrumental use, in the manner of 'exploitation', at the hands of D (namely, peculiar asymmetries in power, opportunity or ability *inter partes*);[103] and (b) a sequent assessment as to whether D *in fact* 'exploited' (ie made unfair strategic use of) those circumstances or the situation to their own advantage, which is the ensuing *act* of interpersonal exploitation itself, so as to justify denying them the fruits of an otherwise perfectly lawful transaction.[104]

This is (more or less) in parallel with contemporary formulations of the unconscionable dealing doctrine in Australia, which, as mentioned above, emphasise the need for C to show equitable fault in the manner of D taking 'unconscientious advantage … of [C's] disabling condition or circumstances',[105] which is, *ex hypothesi*, to exploit (or victimise) C as a jural agent deserving of appropriate respect qua autonomous decision-maker. Although the doctrinal criteria have been multiplied to as many as five since *Amadio* was decided,[106] Mason J in *Amadio* stipulated a simple two-stage inquiry: the party seeking relief for unconscionable dealing must show (a) that the weaker party was 'by reason of some condition [or] circumstance … placed at a special disadvantage vis-à-vis [D]', and (b) that 'unfair or unconscientious advantage [was] then taken [by D] of the opportunity thereby created'.[107] That second criterion can, in turn, be subdivided into two proof elements: (i) sufficient knowledge by D of C's relative special disadvantage, and (ii) a sequent failure

[103] *Uber Technologies* (n 39) 165 [72] (Abella and Rowe JJ for Wagner CJ, Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ).

[104] Bigwood, *Exploitative Contracts* (n 15) 140, 150 n 130, 153.

[105] *Amadio* (n 1) 463 (Mason J).

[106] See, eg, *Turner v O'Bryan-Turner* [2021] NSWSC 5, [399] (Ward CJ in Eq), citing *Turner v Windever* [2003] NSWSC 1147, [105] (Austin J) ('*Turner*'). The case was appealed on *Barnes v Addy* grounds: *Turner v O'Bryan-Turner* (2022) 107 NSWLR 171, 181–2 [42]–[44], 200–1 [151]–[157] (White JA, Meagher JA agreeing at 174 [1], McCallum JA agreeing at 201 [158]).

[107] *Amadio* (n 1) 462.

by D, with that knowledge, to modify their transactional behaviour (ie self-interest) by taking such steps as are appropriate in the circumstances to correct for C's relative position of special disadvantage before transacting with C (ie so as to avoid 'exploiting' C).[108]

However, Deane J formulated the criteria of an unconscionable dealing claim slightly differently in *Amadio* — in a manner resonant with formulations in 19th-century English expectant-heir case law:

> The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: 'the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract' …[109]

Although Deane J effectively repeated this formulation in a later case,[110] and the High Court has subsequently observed that there is 'no real difference' between Mason J's and Deane J's respective formulations in *Amadio*,[111] Mason J's articulation of what must be shown has seemingly proven more influential in shaping the vocabulary and approach of the modern High Court in this field.[112] This is despite the habit of intermediate and lower-tier courts continuing to refer to an 'equitable presumption' or 'shifting onus' approach in unconscionable

108 Rightly, in our view, a recent judgment makes it explicit that 'mere knowledge of a special disadvantage or disability is not enough' to justify relief in the name of the doctrine: *Nitopi* (n 7) 413 [101] (Ward P). '[U]nconscientious exploitation of the known special disability or disadvantage is [additionally] required to be established': at 414 [105] (Ward P). See also at 426–7 [159] (Ward P).

109 *Amadio* (n 1) 474 (Deane J, Wilson J agreeing at 468). See, eg, *O'Rorke v Bolingbroke* (1877) 2 App Cas 814, 822–3 (Lord Hatherley).

110 *Louth* (n 6) 637 (Deane J, Dawson, Gaudron and McHugh JJ agreeing at 643).

111 See, eg, *Kakavas* (n 6) 425 [118] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *C G Berbatis* (n 6) 85 [80] (Kirby J).

112 See, eg, *Thorne* (n 6) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 126 [112] (Gordon J); *C G Berbatis* (n 6) 76–8 [55]–[58] (Gummow and Hayne JJ).

dealing cases.[113] Granted, a distinctive feature of Deane J's formulation in *Amadio* (which is absent from Mason J's judgment in the same case) is that it makes explicit reference to a forensic operation that, upon proof (perhaps at least)[114] of 'special disability' and 'knowledge' of that disability by the superior party, '*an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable*'.[115] This is, however, merely descriptive of a shift in the evidential onus on a question of fact and should never disguise the reality that the *legal burden* on the single issue of D's liability under the doctrine rests upon C throughout.[116] Indeed, Brennan J recognised as much in *Louth v Diprose* ('*Louth*').[117] His Honour distinguished between, on the one hand, the presumption that — at least at the time — was understood to arise by operation of law (for public policy reasons) in Class 2 undue influence cases, which is said to create a persuasive (ie not merely evidential) burden on the influential party, and, on the other hand, the 'presumption' that is sometimes said to operate in unconscionable dealing cases, which is merely an 'inference' that arises 'from

113 See, eg, *Turner v Windever* (2005) Q Conv R ¶54-625, 61370 [2] (Giles JA, Bryson JA agreeing at 61387 [105]), 61386 [99] (Santow JA); *Aboody* (n 7) 32375 [65] (Allsop P, Bathurst CJ agreeing at 32362 [1], Campbell JA agreeing at 32378 [82]); *Hanna* (n 49) [102]–[103] (Beazley P, Macfarlan JA agreeing at [160], White JA agreeing at [163]); *Mentink v Olsen* [2020] NSWCA 182, [2] (Meagher and Payne JJA); *Ah Sam* (n 71) [67] (Brereton JA, Basten JA agreeing at [1], Payne JA agreeing at [2]); *MacDonald v Yakiti Pty Ltd* (2021) 152 ACSR 284, 286 [4] (Macfarlan JA, McCallum JA agreeing at 322 [222]).

114 We mention in passing, but discuss no further, the fact that not all judges have treated the evidential burden as shifting at the same moment, or upon proof of the same basic facts, as Deane J did in *Amadio* (n 1): at 474, 479 (Deane J, Wilson J agreeing at 468). For example, in *Louth* (n 6), Brennan J said of the jurisdiction that '[o]nce it is proved that substantial property has been given by a donor to a donee after the donee has exploited the donor's known position of special disadvantage, an inference may be drawn that the gift is the product of the exploitation': at 632. In other words, his Honour saw the 'presumption' operating with respect to a causal link between D's exploitation and C's entry into the impugned transaction and, unlike Deane J in *Amadio* (n 1), not with respect to the question of whether C's position of special disadvantage had in fact been exploited: see at 474, 479–80 (Deane J, Wilson J agreeing at 468); *Louth* (n 6) 632. In *Nitopi* (n 7), Ward P spoke of 'at least an evidentiary onus on the stronger party' arising upon proof of (a) special disadvantage, (b) knowledge of that special disadvantage and (c) 'improvidence of the transaction' — (c) was absent from Deane J's formulation in *Amadio* (n 1): *Nitopi* (n 7) 424 [147]; *Amadio* (n 1) 474 (Deane J, Wilson J agreeing at 468).

115 *Amadio* (n 1) 474 (Deane J, Wilson J agreeing at 468) (emphasis added).

116 As is well known, the law places the burden of proof on the party who puts forward the proposition: AT Denning, 'Presumptions and Burdens' (1945) 61 (October) *Law Quarterly Review* 379, 379.

117 *Louth* (n 6) 632.

the facts of the case': the persuasive burden remains on C throughout to show that the impugned transaction 'is the product of [D's] exploitative conduct'.[118]

The approach of Brennan J with respect to the onus of proof in unconscionable dealing cases has recently been criticised. Ying Khai Liew and Debbie Yu suggest that it was the product of an 'oversight' on his Honour's part, as his Honour was merely 'purporting to apply the principle as set out in *Amadio* without modification', including in relation to the onus of proof.[119] The authors argue that this suggestion is fortified by the consideration that Brennan J's statements on the onus point were 'strictly obiter', as 'the reversal of burden of proof was not in issue on the facts of that case, where D's clear and overt exploitation of C's position was obviously unconscionable'.[120] Liew and Yu comment that Brennan J's 'approach has not been followed' and argue that it 'ought not to be followed' compared to their own interpretation of the position in Australia:[121] namely, that 'once C has established the first and second requirements', D then 'bears the *burden of establishing* that the transaction was fair, just, and reasonable'.[122] In other words, Liew and Yu regard the answering party to be carrying the legal, or *persuasive*, burden in relation to the proposition that must be established (that 'the transaction was fair, just, and reasonable') and not merely a tactical or evidential burden (ie a *burden of production* only) to bring evidence forward to affect the weight of, or to throw doubt on, the initial inference (or 'prima-facie case') established by C upon proof of the first two elements.[123]

We disagree with Liew and Yu. First, it is inconceivable that a judge of Brennan J's experience and standing would simply fail to comprehend how burdens and presumptions work in civil litigation. His Honour would certainly have appreciated that, once created, the persuasive burden (on a single issue) can never

118 Ibid. As to the existence of these policy reasons, see *Johnson v Buttress* (1936) 56 CLR 113, 135 (Dixon J, Evatt J agreeing at 139). See also at 123 (Latham CJ), 143 (McTiernan J). *Thorne* (n 6), however, has altered how the presumptive cases of undue influence are now understood in Australia: see Bigwood, 'Australian Undue Influence' (n 48) 187–8.

119 Liew and Yu (n 36) 230. See also at 229.

120 Ibid 230.

121 Ibid.

122 Ibid 229 (emphasis added).

123 See ibid. On this approach, C will summarily win unless D is able to furnish evidence upon which, after a balanced consideration of all the evidence before the court at the end of the trial, the court is able to conclude on the normal civil standard that D acted non-exploitatively towards C in procuring or accepting the impugned transaction or benefit.

'shift' during the course of a trial.[124] Far from being an 'oversight' in his Honour's reasoning, Brennan J clearly appreciated the true purport of Deane J's remark in *Amadio* — namely, that the superior party's knowledge of the vulnerable party's special disability 'make[s] it *prima facie* unfair or "unconscientious"' that the former accept the latter's assent to the impugned transaction.[125] As the tag 'prima facie' denotes, Deane J understood that what was being created under the first two steps of his Honour's formulation was merely a provisional burden establishing a '"prima facie" case' — a permissible inference or provisional conclusion of unconscionable dealing only — which is consistent with the creation of an *evidential*, rather than persuasive, burden on the other side.[126] That Brennan J understood this is also confirmed by his Honour's reference to the *contrasting* 'presumption' in Class 2 undue influence cases where, for public policy reasons, a *persuasive* burden was created in favour of the subordinate party upon proof of a specified risk (that of fiduciary disloyalty, essentially).[127] No equivalent public policy reasons exist to justify a similar approach in unconscionable dealing cases where, at least traditionally, the risk to be managed is of a completely different nature than in a situation of relational undue influence.[128]

The further assertion of Liew and Yu that Brennan J's statements regarding the onus of proof were 'strictly obiter' is not convincing either.[129] Where the overall burden of persuasion lies in an unconscionable dealing claim cannot plausibly turn on mere happenstance — whether the transaction-affecting exploitation alleged was 'clear and overt' or not. That, in *Louth*, 'the reversal of burden of proof was not in issue on the facts of that case, where D's clear and overt exploitation of C's position was obviously unconscionable', is merely recognition of the fact that C's persuasive burden could be met by resort to direct evidence alone and that inferences from indirect evidence were not needed

124 See generally Denning (n 116) 379. See also CR Williams, 'Burdens and Standards in Civil Litigation' (2003) 25(2) *Sydney Law Review* 165, 168–9; *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR(R) 855, 885–6 [58]–[60] (VK Rajah JA for the Court).

125 *Amadio* (n 1) 474 (Deane J, Wilson J agreeing at 468) (emphasis added). See also Liew and Yu (n 36) 230; *Louth* (n 6) 632.

126 That is to say, the first two proof elements in Deane J's formulation 'are only guides to the Court in deciding whether to infer the fact in issue or not' (ie equitable fraud in the manner of unconscionable dealing) but do not themselves 'supply the want of necessary evidence': Denning (n 116) 380–1, 383. See also *Amadio* (n 1) 474 (Deane J, Wilson J agreeing at 468).

127 *Louth* (n 6) 628–9, 632.

128 Bigwood, *Exploitative Contracts* (n 15) 238–9.

129 See Liew and Yu (n 36) 230; *Louth* (n 6) 632.

to bridge the sorts of forensic gap that are prone to arise in more passive instances of interpersonal exploitation.[130] Finally, although the authors claim that Brennan J's approach 'has not been followed' in Australia, it has not been contradicted either.[131] In fact, no subsequent unconscionable dealing case heard by the High Court has been decided in a manner that could plausibly cause the reader to assume that the respondent to the claim carries a persuasive burden as to establishing non-exploitation (if that is what really underlies the equitable jurisdiction) as opposed to merely an evidential burden to undermine the claimant's allegations of actual exploitation, whether by inference or direct proof.

B *The Mental Componentry of an Unconscionable Dealing Claim (as Currently Formulated towards 'Exploitation Avoidance')*

Conceptually, at least, the first component of the *Amadio* principle — special disadvantage — seems to generate little in the way of contention nowadays.[132] A finding of special disadvantage seriously affecting C's ability to conserve their own best interests in a transaction vis-a-vis D signifies the point at which, in equitable contemplation, it would be unjust to hold C to the normal level of individual responsibility expected of the generality of transacting parties at law

[130] See Liew and Yu (n 36) 230.

[131] See ibid. Since Liew and Yu's article was published, Ward P, in *Nitopi* (n 7), has addressed the question of the onus of proof in unconscionable dealing cases, treating the 'application of an equitable presumption' here as synonymous merely with 'the availability of inferential reasoning as to the requirement for unconscientious exploitation': at 420 [139]; and concluding that 'the presumption that is here spoken of is nothing more than an aid in making evidentiary determinations where the gravamen of unconscionable conduct has been proven to the requisite standard': at 425 [153].

[132] See generally Bigwood, *Exploitative Contracts* (n 15) 239–46; Carrera (n 36). We do not want to be taken to suggest that the concept of special disadvantage is always easy to apply as a matter of fact and judgement to particular scenarios presented to the courts for adjudication. On the contrary, the case law in the field demonstrates considerable scope for reasonable difference of opinion as between trial judges and appellate judges and among appellate judges in the application of the conceptual test to the particular facts: see, eg, *Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778, 41197 [123]–[124] (French J); *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555, 570 [73], 571 [81]–[82] (Hill, Tamberlin and Emmett JJ); *C G Berbatis* (n 6) 64–5 [15]–[16] (Gleeson CJ), 75 [49], 77–8 [56]–[57] (Gummow and Hayne JJ), 87–8 [84]–[87] (Kirby J), 111–12 [170] (Callinan J). Even in *Amadio* (n 1) itself, Gibbs CJ and Dawson J dissented on the existence of a special disadvantage in the elderly Amadios: at 459–60 (Gibbs CJ), 490 (Dawson J). However, Gibbs CJ was somewhat equivocal on that point: at 460. Cf at 464–6 (Mason J), 477 (Deane J, Wilson J agreeing at 468).

(particularly in contractual contexts).[133] The first component involves a finding that C is 'vulnerable to exploitation' or 'advantage-taking' at the hands of D — that is, if D sufficiently knows of the opportunity for advantage-taking that has been placed in their hands.[134] Recall that such a known vulnerability results in a responsibility (ie a precautionary side constraint) being imposed upon D to modify their pre-transactional behaviour so as to avoid 'taking unfair advantage of' their dominant position relative to C (and hence, *ex hypothesi*, to avoid 'exploiting' C).[135]

Thus, subject to what we will ultimately argue in Part IV, if we are to take seriously modern courts' repeated assertions that '*exploitation avoidance*' is the normative purpose underpinning the *Amadio* principle of unconscionable dealing, it must follow that, while interpersonal exploitation involves an agency-responsible pre-transactional failure on D's part to respond adequately to C's special disadvantage (as a sine qua non of not exploiting the weaker party), such a failure is *accompanied by a particular state of mind*. In its legal, philosophical and ordinary sense, 'exploitation', whether it takes an active (ie overt, positive) form or a passive (ie non-overt, omissive) form, is not an accidental, casual or wholly incidental process of misusing (hence abusing) another; there is a demanding state-of-mind requirement on the part of D, the would-be exploiter.[136] As John Lawrence Hill has explained, a genuine charge of exploitation implies that the exploiter must act (or, as the case may be, omit to act) purposefully or with reckless disregard for the subjectively known special vulnerability of the exploitee; the exploiter must either *intend* to take advantage of the exploitee's known special vulnerability relative to them or else *act in reckless disregard of* that probable condition — that is, 'with the desire to, or with substantial certainty that the act will in fact, bring about some specific consequence' (here, the consequence would be entry into the transaction being

[133] See also *Uber Technologies* (n 39) 165 [71]–[72] (Abella and Rowe JJ for Wagner CJ, Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ).

[134] See above n 4 and accompanying text.

[135] *Downer* (n 39) 559 [37] (Green CJ, Harrington and Hoegg JJA). It also follows that the second criterion for relief — the act of exploitation itself — is itself linked inexorably to the conditions under which D pressed for advantage against C. 'Characterisation of disadvantage as "special" involves the recognition that it would be unconscionable knowingly to deal with the person so affected *without regard to his or her disability*': *Samton Holdings* (n 80) 323 [65] (Gray, French and Stone JJ) (emphasis added).

[136] See above nn 69–70 and accompanying text. See also Bigwood, *Exploitative Contracts* (n 15) 150–4.

subsequently impugned on the ground of unconscionable dealing).[137] This does not imply that exploitation must additionally involve, at least definitionally, something akin to subjective dishonesty or conscious impropriety on the part of the alleged exploiter; in order to 'exploit' another, one need not intend to act wrongly in that particular way. Certainly, as mentioned earlier, that D's advantage-taking in relation to C might have been well intentioned towards C does not necessarily rob D's conduct of its 'exploitative' or 'unconscientious' flavour.[138]

What follows is that, in order to exploit C's exploitable circumstances (ie their special disadvantage vis-a-vis D) and hence exploit C themself, D must: (a) *actually know of* C's relative special disadvantage at the moment of transaction formation (or else be studiously blind as to that possibility), and (b) act in an *agency-responsible manner* in subsequently failing to modify their pre-transactional behaviour before entering into a beneficial transaction with C.[139] That is to say, D's conduct must possess features that make it worthy of legal 'blame', meaning that it must have, at the moment of transaction formation, fairly lain within D's power, through choice, to have made things otherwise than what they became as a result of their transaction-inducing acts (or omissions) with respect to C.[140] The High Court in *Kakavas*, however, took the view that the requisite agency-responsibility (ie fault or blame) is not met by proof of mere neglect: '[h]eedlessness of, or indifference to, the best interests of the other party is not sufficient' for the purposes of the equitable doctrine of unconscionable dealing.[141] The jurisdiction 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.[142]

137 John Lawrence Hill, 'Exploitation' (1994) 79(3) *Cornell Law Review* 631, 684–5.

138 See above n 58 and accompanying text.

139 Again, we do not engage here with the question of whether post-formation knowledge of special disadvantage can influence the court's assessment of 'unconscionability' in unconscionable dealing cases. We do not believe that it can, at least under the *Amadio* principle as presently formulated by the High Court, but there is emerging dicta to the contrary in recent decisions of the NSWCA: see above n 44.

140 Evans (n 93) 99–101.

141 *Kakavas* (n 6) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

142 Ibid 439–40 [161].

D's failure to respond to C's known vulnerability to merely instrumental use at D's hands before taking a legal benefit from C must thus be *deliberate* (or at least reckless) on the part of D. It must follow, then, as was emphasised by the unanimous bench in *Kakavas*, that the conscience-charging 'knowledge' required on the part of D is, for present purposes, *actual* knowledge (or its deemed equivalent — wilful blindness) and not merely constructive knowledge or, a fortiori, constructive notice.[143] D does not *exploit* C merely because D carelessly failed to notice or appreciate facts about C or C's circumstances that a hypothetical 'honest and reasonable person' would have noticed or appreciated but D themselves did not, or because D merely carelessly failed to draw such inferences from known facts that a hypothetical 'honest and reasonable person' would have drawn but D themselves did not. And while the High Court has, post-*Kakavas*, reverted rather casually to language redolent of attenuated knowledge criteria for unconscionable dealing — for example, the plurality in *Thorne v Kennedy* ('*Thorne*') fell back on the familiar pre-*Kakavas* terminology of 'knew *or ought to have known*' in connection with the *scienter* requirements of the jurisdiction — *Kakavas* has not been explicitly overruled on this point.[144] Accordingly, proof that D 'ought to have known' of C's special disadvantage must be understood as the minimal threshold upon which a case of 'wilful blindness' might be built, as seems to have occurred, for example, in *Stubbings*.[145]

[143] Ibid 438 [155]–[156] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[144] *Thorne* (n 6) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) (emphasis added), cited in *Stubbings* (n 6) 54–5 [155] (Steward J), *Kobelt* (n 6) 58 [148] (Nettle and Gordon JJ). See also *Amadio* (n 1) 462 (Mason J). Dilan Thampapillai has argued that *Thorne* (n 6) 'represents a significant departure from recent Australian jurisprudence on unconscionable conduct' and treads 'perilously close to undermining one of the central tenets of the principle set out by Mason J' in *Amadio* (n 1): Dilan Thampapillai, 'Archetypes of Age and Romance: Unconscionable Conduct and the High Court in *Thorne v Kennedy*' (2018) 37(2) *University of Queensland Law Journal* 299, 299. On the other hand, Pranay Jha and Alan Zheng argue that there is no inconsistency between *Kakavas* (n 6) and later High Court cases in relation to the level of knowledge required for proof of unconscionable dealing. They state that '*Thorne* and *Stubbings* should not be read as derogating from the position set out in *Kakavas* regarding the knowledge requirements for an unconscionable conduct claim': Pranay Jha and Alan Zheng, 'Constructive Notice and Passive Retention Scenarios in Unconscionable Conduct Cases' (2023) 37(1) *Commercial Law Quarterly* 4, 10. Still, there can be no denying that the post-*Kakavas* cases are apt to create ambiguity and possible confusion in this area, otherwise the discussion that occurred in *Nitopi* (n 7), for example, would not have occurred: at 393–4 [4]–[9] (Bell CJ).

[145] See *Stubbings* (n 6) 22–4 [43]–[51] (Kiefel CJ, Keane and Gleeson JJ), 54–8 [155]–[168] (Steward J).

Still, despite what was said on this subject in *Kakavas*, some judges and commentators continue to hold that constructive *knowledge* (as opposed to constructive notice) suffices for an unconscionable dealing claim in Australia.[146] In *Nitopi v Nitopi*, Bell CJ recently stated that 'the only way to reconcile *Kakavas*

[146] In other words, category (iv) knowledge on the five-category *Baden* scale of knowledge (ie 'knowledge of circumstances which would indicate the facts to an honest and reasonable' person) would suffice for an unconscionable dealing claim, as opposed to category (v) knowledge on that scale (ie 'knowledge of circumstances which would put an honest and reasonable [person] on inquiry'): see *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*'). For further discussion on the differences between 'constructive knowledge' and 'constructive notice' in the present context, see Bigwood, *Exploitative Contracts* (n 15) 252–60; Jha and Zheng (n 144) 6–7. Giancaspro argues in favour of constructive knowledge sufficing in the present context, based on a purely *literal*, as opposed to legal, view of what constitutes 'actual knowledge': Giancaspro (n 12) 32–3. See also at 33.

> If one turns a blind eye to the possibility that their counterparty is labouring under a special disadvantage, they literally do not know if this is true or not. It is presumed, if the circumstances should have alerted them to the possibility, that they knew of the special disadvantage, but this does not displace the fact that they did not know in the truest sense.

We suggest caution in relation to such an argument. Not only does the argument (too quickly) dismiss what is a well-established equitable technique in the field, it also overlooks the important role that 'legal fictions' play in the administration of justice claims: see generally LL Fuller, 'Legal Fictions' (1930) 25(4) *Illinois Law Review* 363 ('Legal Fictions I'); LL Fuller, 'Legal Fictions' (1931) 25(5) *Illinois Law Review* 513; LL Fuller, 'Legal Fictions' (1931) 25(8) *Illinois Law Review* 877. These articles were republished (in slightly modified form) as a short book: see Lon L Fuller, *Legal Fictions* (Stanford University Press, 1967). For Fuller, the equitable deeming of 'wilful blindness' as the legal equivalent of 'actual knowledge' (ie for the purpose of the administration of an unconscionable dealing claim) would be an 'assumptive' (rather than 'assertive') legal fiction: see Fuller, 'Legal Fictions I' (n 146) 390. Assumptive fictions are 'safe' in the sense that they are facially false (ie the author of the fiction adopts a grammatical construction that 'concedes th[e] falsity' involved). Wilful blindness functions *as if it were* the legal equivalent of actual knowledge, purporting to state nothing contrary to legal fact. Of course, legal fictionalisation in this area is necessary if the courts are to persist with viewing the jurisdiction as strictly requiring 'exploitation' or 'predation' — hence, one of us has in the past argued against the fictionalisation of wilful blindness as the legal equivalent of actual knowledge in favour of equity's adoption of the common law's concept of 'inferred knowledge' in the present context: see Bigwood, *Exploitative Contracts* (n 15) 257–9. However, this previous argument would need to fall away if the arguments we present in Part IV were to be accepted. We also note that some commentators have argued that '[n]otwithstanding the logical constraints of applying constructive notice to active exploitation cases, in our view the doctrine of "constructive knowledge" may have some role to play' in such cases: Jha and Zheng (n 144) 14. Jha and Zheng appear to assign to 'exploitation' a meaning that, in our view, the word cannot naturally bear, and we take a different view of the distinction between 'active' and 'passive' exploitation: see at 10–11. See also *Wakim* (n 11), in which it was observed that the law in *Kakavas* (n 6) on this point is unsettled: *Wakim* (n 11) [59] (Griffiths AJA, White JA agreeing at [1], Basten AJA agreeing at [8]), discussing *Kakavas* (n 6) 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

and *Thorne* in relation to questions of knowledge is that *Kakavas* must be understood as standing as authority only for the *negative* proposition that constructive notice is insufficient but *not* as standing for the additional proposition that constructive knowledge of a special disadvantage … is also insufficient'.[147] With respect, though, this strikes us as inconsistent with what, after considered discussion, appears to be an inescapable consequence of the reasoning in *Kakavas*,[148] and it accords with the understanding of at least one intermediate appellate court in Australia since.[149]

Liew and Yu have suggested that when courts use the language of 'exploitation' in the present context, this 'is best understood not as a positive requirement but [rather as] a loose description of the effects of the doctrine'[150] and that when a court sets aside 'an unfair or unjust transaction' where D in fact possessed knowledge that was less than 'actual' (including where D merely had 'constructive knowledge'), this 'can be described as having the effect of preventing C from being exploited'.[151] We do not think that this is consistent with what

147 *Nitopi* (n 7) 394 [9] (emphasis in original), discussing Liew and Yu (n 36) 223. See also *Nitopi* (n 7) 416–17 [118]–[121] (Ward P).

148 Although the High Court's comments in *Kakavas* (n 6) were directed at dismissing the claimant's argument that 'constructive *notice*' (rather than 'constructive knowledge') sufficed to require the defendant to disgorge what it had taken from the claimant, the Court's ultimate insistence on actual knowledge or wilful blindness, based on its interpretation of what Mason J had meant in *Amadio* (n 1) when he had used the language of 'knows or ought to know', must logically exclude the possibility of 'constructive *knowledge*' sufficing as well: Bigwood, 'Still Curbing Unconscionability' (n 55) 473–5; *Nitopi* (n 7) 393 [6] (Bell CJ); *Kakavas* (n 6) 436–40 [150]–[161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *Amadio* (n 1) 462, 466–8 (Mason J). 'Constructive knowledge' (and not merely 'constructive notice') is typically used in contradistinction to 'shut-eye' knowledge (or wilful blindness) and not typically in comparison with actual knowledge: see Bigwood, *Exploitative Contracts* (n 15) 252–3.

149 See, eg, *Gunn* (n 7) 120–7 [147]–[175] (Mitchell, Beech and Vaughan JJA); *Booth v Zhou [No 2]* [2024] WASCA 128, [55] (Mitchell, Vaughan JJA and Tottle J).

150 Liew and Yu (n 36) 225 (emphasis omitted).

151 Ibid 225–6 (emphasis omitted). See also at 220, 223. Liew and Yu argue that '[t]his was precisely the way in which Nettle and Gordon JJ understood the idea of exploitation in the context of the equitable doctrine of unconscionable bargains' in *Kobelt* (n 6): Liew and Yu (n 36) 226 n 134. See *Kobelt* (n 6) 85 [258] (Nettle and Gordon JJ) (emphasis in original) (citations omitted). Their Honours stated that

> [u]nconscionable conduct in equity can include the passive acceptance of a benefit in unconscionable circumstances. Mr Kobelt's conduct went beyond that — he engaged in an active system of conduct that, even if approached without dishonest motives or with a 'degree of good faith', had the *effect* of being exploitative and unfair. The requirement is still 'victimisation or exploitation' by a stronger party of a more vulnerable party.

was said or implied in *Kakavas*.[152] Ultimately, Liew and Yu's view presents an account of the jurisdiction that depends on resort to a legal fiction or contrivance — and one that could easily be avoided if Australian courts had not become so wedded to such lofty justificatory epithets as 'exploitation', 'victimisation' and 'predation' in the first place.[153] For there can be no 'exploitation' without a human 'exploiter'. Exploitation is an (agency-responsible) *act*; it cannot plausibly be an 'event' or 'effect' of some antecedent act that is itself less than exploitative *stricto sensu*.[154] To suggest otherwise can only be to needlessly and unhelpfully fictionalise what is really occurring[155] and to deny exploitation as a *procedural* concern — that is, present causally at the moment of transaction formation.[156] That would be to alter the current understanding of the unconscionable dealing jurisdiction in Australia, even if, as we will ultimately argue below, that understanding *ought* to be altered — and altered in a way that does not resort to pretence in the explication of the 'exploitation' or any other justificatory concept.[157] As will be seen, we consider the exploitation concept simply to be the wrong basal concept to explain (and justify) curial interference with transactions in the name of the equitable jurisdiction to relieve against an unconscionable dealing. But before turning to that analysis, we must first address

Even if Liew and Yu are correct as to Nettle and Gordon JJ's stance here, it is difficult to see how their Honours' view can be consistent with what was said in *Kakavas* (n 6): at 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). Still, what was said in *Kakavas* (n 6) in terms of the mental requirements of exploitation is not inconsistent with the exploitation concept being limited by a criterion of dishonesty or bad faith, which may be all that Nettle and Gordon JJ were intending to say here: *Kobelt* (n 6) 85 [258]. But if it is not what their Honours were intending to say, we would object to the notion that exploitation can be understood simply as an *effect* of conduct that may in fact be *non*-exploitative.

152 *Kakavas* (n 6) 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

153 See generally Liew and Yu (n 36). See above nn 14, 50–5 and accompanying text.

154 See above n 137 and accompanying text.

155 We do not deny that legal fictions are sometimes helpful and necessary in the law, for, as William Blackstone once famously acknowledged, they may serve to 'prevent a mischief, or remedy an inconvenience, that might result from the general rule of law': William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) vol 3, 43. See above n 146. In the present context, however, a paradigm shift away from law's present reliance on a precept of non-exploitation to a precept that is essentially negligence-based would eliminate the need for fictionalisation altogether: see Bigwood, 'Still Curbing Unconscionability' (n 55) 501. And when there is no need or reason for the use of a legal fiction, the fiction should be vacated in favour of truth: see John Gwilliam, 'Legal Fictions: A Critical Analysis' (1978) 8(4) *Victoria University of Wellington Law Review* 452, 459.

156 See above nn 44, 99 and accompanying text. See Bigwood, *Exploitative Contracts* (n 15) 197.

157 See below Part IV.

the possibility that these matters are not, in any event, doctrinal elements or rigid preconditions for a finding of unconscionable dealing.

C *Are There Doctrinal Elements at All?*

In the latest High Court decision on equitable unconscionable dealing — *Stubbings* — the plurality cited *Amadio* for the proposition that the doctrine involves

> a relationship that places one party at a 'special disadvantage' vis-à-vis the other; knowledge of that special disadvantage by the stronger party; and unconscientious exploitation by the stronger party of the weaker party's disadvantage.[158]

Their Honours in *Stubbings* described these as 'considerations' that 'should not be understood as if they were to be addressed separately as if they were separate elements of a cause of action in tort'.[159] Reliance was placed on a passage from the judgment of Dixon CJ, McTiernan and Kitto JJ in *Jenyns v Public Curator (Qld)* ('*Jenyns*') — namely, that the

> jurisdiction of a court of equity to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances affecting the conscience of the donee is governed by principles the application of which 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 donor. 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

[158] *Stubbings* (n 6) 20 [39] (Kiefel CJ, Keane and Gleeson JJ), citing *Amadio* (n 1) 459–60 (Gibbs CJ), 461 (Mason J), 474 (Deane J, Wilson J agreeing at 468).

[159] *Stubbings* (n 6) 21 [39] (Kiefel CJ, Keane and Gleeson JJ). We note, however, that at least one of the plurality's 'considerations' has been described by a differently formed plurality in a previous High Court case as a *requirement* for a conclusion of unconscionable conduct and so is presumably not merely a 'consideration' to be weighed in some evaluative mix: see *Thorne* (n 6) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), quoted in *Stubbings* (n 6) 54–5 [155] (Steward J).

> to every connected circumstance that ought to influence its determination upon the real justice of the case' …[160]

Invocation of the *Jenyns* statement concerning equitable judicial method in relation to the vitiating doctrines has been a ubiquitous feature of unconscionable dealing decisions of the High Court since *Kakavas* in 2013.[161] The statement is also cited by members of the Court in post-*Kakavas* decisions concerning statutory forms of unconscionable conduct,[162] equitable contribution[163] and accounts of profits for knowing assistance in breach of trust or fiduciary duty.[164] The specific use of that statement in *Stubbings* — to support the view that the 'considerations' relevant to a finding of unconscionable dealing are not to be addressed separately as if they were elements of a tort — has been applauded by respected equity judges.[165] Clearly, the *Jenyns* statement — and its specific use in *Stubbings* — must be regarded as authoritative. But what *precisely* does it mean in the context of equitable unconscionable dealing — a doctrine that, after all, appears to contain three discrete and sequentially ordered

[160] (1953) 90 CLR 113, 118–19 (emphasis omitted) ('*Jenyns*'), quoting *The Juliana* (n 18) 1567. See also *Stubbings* (n 6) 21 [39] (Kiefel CJ, Keane and Gleeson JJ). For a discussion of *The Juliana* (n 18), see *Paciocco* (n 21) 269 [273]–[275] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]).

[161] See, eg, *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ), cited in *Kakavas* (n 6) 426 [122] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ), *Thorne* (n 6) 105 [43] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), *Stubbings* (n 6) 21 [39] (Kiefel CJ, Keane and Gleeson JJ). See also *Tanwar Enterprises* (n 46) 325 [23] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), citing *Jenyns* (n 160) 119 (Dixon CJ, McTiernan and Kitto JJ).

[162] See, eg, *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ), cited in *Kobelt* (n 6) 58–9 [150], 60 [154] (Nettle and Gordon JJ). See also at 49 [120] (Keane J), citing *Jenyns* (n 160) 119 (Dixon CJ, McTiernan and Kitto JJ).

[163] See, eg, *Lavin v Toppi* (2015) 254 CLR 459, 474 [47] (French CJ, Kiefel, Bell, Gageler and Keane JJ), citing *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ).

[164] See, eg, *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ), cited in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 12 [9] (Kiefel CJ, Keane and Edelman JJ), 35 [82] (Gageler J).

[165] See *Stubbings* (n 6) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ), citing *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ). In *Nitopi* (n 7), White JA declared the plurality's 'reminder' regarding the status of the 'elements' to be satisfied in an unconscionable dealing claim to be 'the most important point to arise' from *Stubbings* (n 6): *Nitopi* (n 7) 433 [198]. See also Justice Mark Leeming, 'Unconscionable Transactions: The Roles of Knowledge and "Predatory State of Mind"' (2023) 97(1) *Australian Law Journal* 13, 17–18 ('Unconscionable Transactions'). See also *Wu* (n 54) [7] (Leeming JA, Payne JA agreeing at [21]). See also Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 197–8 ('*Entangled System*').

requirements — to say that these requirements must not be understood or addressed as if they were 'separate elements of a cause of action in tort'?[166] Regrettably, the Court in *Stubbings* did not elaborate on the point and we are left with some questions.[167]

The first question concerns whether the portrayal of the common law's and equity's respective judicial methodologies, as presented in *Jenyns*, remains accurate today.[168] The specific point being made in *Jenyns* was that the application of an equitable vitiating doctrine was never determined by a jury and that to do so now would be 'anomalous and inappropriate' given that the requisite legal inquiry was not confined to deciding discrete questions of fact;[169] it was 'evaluative rather than binary'.[170] That is correct. It is also correct that the natures of common law and equitable proceedings prior to the *Judicature Acts* were very different:

> There were no forms of action in equity. There were no elements that, if proved, were necessary and sufficient to secure relief … [E]quity has a different structure, one that emphasizes grievances (rather than wrongs) and narratives (rather than elements). There is an emphasis on the chancellor's discretion, and the need for the plaintiff to motivate the chancellor to act.[171]

Furthermore, these genetic traits persist in the modern law.[172] As is well known, equitable justice is characteristically more nuanced, fact-dependent and comprehensive than that which is dispensed at common law.[173] For example, the equitable judicial method often involves a holistic consideration of elements of indeterminate weight against a 'basal principle' or standard such as

[166] *Stubbings* (n 6) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ).

[167] See ibid.

[168] *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ), quoting *The Juliana* (n 18) 1567 (Lord Stowell).

[169] *Jenyns* (n 160) 119 (Dixon CJ, McTiernan and Kitto JJ).

[170] *Wu* (n 54) [7] (Leeming JA, Payne JA agreeing at [21]).

[171] See Samuel L Bray and Paul B Miller, 'Getting into Equity' (2022) 97(5) *Notre Dame Law Review* 1763, 1772. See generally *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66; *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77.

[172] See Justice Julie Ward, 'Equity's Path to Justice: The Judicial Method in Equity and the Common Law' (2022) 36(3) *Commercial Law Quarterly* 9; Lord Millett, 'The Common Lawyer and the Equity Practitioner' (2018) 6 *UK Supreme Court Yearbook* 175.

[173] *Paciocco* (n 21) 268 [271] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]).

'conscience'.[174] We will refer to this form of legal reasoning by the shorthand of 'judgment-in-the-round'.[175] Explicit resort to foundational jurisdictional norms to supplement the consideration of relevant doctrinal criteria also occurs more readily in equity (eg through reference to equitable maxims and to the conscience of equity) than when determining a common law cause of action.[176] And, crucially, equitable relief is never available as of right, albeit it is administered according to settled principles; this is the case *even if* the relevant doctrinal criteria are satisfied.[177] To this extent, we agree with Leeming JA of the New South Wales Court of Appeal that the *Jenyns* statement 'reflects a central distinction between common law and equity. This is orthodox, basal and binding.'[178]

Nonetheless, the dichotomous view of common law and equitable method presented in *Jenyns* is potentially misleading in relation to the modern law.[179] As members of the High Court have acknowledged, the jurisdictional boundaries between equity and common law are porous and, in particular, parts of the common law are infused with equitable principles and method.[180] Some

174 Paul Finn, 'Common Law Divergences' (2013) 37(2) *Melbourne University Law Review* 509, 518; Pauline Ridge, 'Modern Equity: Revolution or Renewal from Within?' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 251, 267–70 ('Modern Equity').

175 In the context of mistaken gifts, see *Pitt v Holt* [2013] 2 AC 108, 158 [128] (Lord Walker, Lord Neuberger PSC, Baroness Hale, Lords Mance, Clarke, Sumption and Carnwath JJSC agreeing) ('*Pitt*').

> The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake … its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case.

See also Matthew Harding and Robin Hickey, 'Equity and the Value of Gifts' (2014) 8(1) *Journal of Equity* 1, 23. That article refers to 'an inherently evaluative and fact-specific inquiry rather than the application of formal rules'.

176 See above n 160 and accompanying text.

177 *Re Coomber; Coomber v Coomber* [1911] 1 Ch 723, 728–9 (Fletcher Moulton LJ); *Chan v Zacharia* (1984) 154 CLR 178, 204–5 (Deane J) ('*Chan*'); *Warman* (n 91) 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

178 Leeming, 'Unconscionable Transactions' (n 165) 17. See above n 160 and accompanying text.

179 See above n 160 and accompanying text.

180 See, eg, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 554–5 [99]–[100] (Gummow J). See also *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd*, which highlights how the change of position defence to a common law mistaken

common law doctrines have explicitly drawn on equitable ideas in their modern formulation,[181] and others clearly involve 'matters of fact, degree and value judgment' such as a duty of good faith in contract law (to the extent, if at all, such a duty exists).[182] Indeed, French CJ has acknowledged that the form of judicial reasoning ascribed to courts of equity in *Jenyns* now occurs *across* the law:

> There are many areas of the common law and of statute law which require the case-by-case application of broadly stated legal rules and standards and the judicial development of guiding criteria of liability within them. Such criteria may be inspired, may rise, and may be modified or displaced by the fruitful incremental interaction of advocacy, judicial reasoning, and academic suggestion and critique. Rarely, however, do they yield all-encompassing rules for the application of a foundation standard or norm.[183]

Moreover, and as the above quotation implies, regardless of the form that jural directives initially take — that is, whether they start out as hard 'rules' or as flexible 'standards' — the 'adaptive behaviour' of adjudicators eventually results in many 'rules' being pushed towards becoming more 'standard-like' in their application and vice versa.[184] Doctrines are not static in this respect but may

payment claim is determined according to the equitable concept of conscience and principles of estoppel: (2014) 253 CLR 560, 595–600 [75]–[88] (Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Australian Financial Services*'). Further, in *Paciocco* (n 21), Allsop CJ notes that the equitable principles were not confined to the Court of Chancery but also existed in maritime law: at 268 [272] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]).

181 An obvious example here is the duress doctrine: see WHD Winder, 'Undue Influence and Coercion' (1939) 3(2) *Modern Law Review* 97, 108–19. See also WHD Winder, 'The Equitable Doctrine of Pressure' (1966) 82 (April) *Law Quarterly Review* 165; Nicholas Seddon, 'Compulsion in Commercial Dealings' in PD Finn (ed), *Essays on Restitution* (Law Book, 1990) 138, 144.

182 See AF Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 (January) *Law Quarterly Review* 66, 89. See also at 90.

183 *Australian Financial Services* (n 180) 580–1 [23] (French CJ) (citations omitted). A good example is the High Court's approach to private law claims involving illegality, in which the same judgment-in-the-round method is applied regardless of the jurisdictional source of the claim. See generally *Nelson v Nelson* (1995) 184 CLR 538 (trusts); *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 (contract); *Miller v Miller* (2011) 242 CLR 446 (tort); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 (restitution). See especially at 514 [25] (French CJ, Crennan and Kiefel JJ).

184 See Frederick Schauer, 'The Convergence of Rules and Standards' [2003] (3) *New Zealand Law Review* 303, 319.

become more or less determinate depending on the stability of the social or legal context in which they operate.[185]

A second question concerns the methodological distinction drawn in *Stubbings* between an unconscionable dealing claim and a 'cause of action in tort'.[186] What is meant by the directive that the three matters relevant to the former claim constitute mere 'considerations' for the court to assess (as opposed to 'separate elements' that must be systematically addressed as if a 'tort' were being pleaded)?[187] Is this what distinguishes the determination of relief pursuant to unconscionable dealing from the determination of a cause of action in tort?

It must surely be necessary to *begin* by addressing the three 'considerations' listed by the plurality in *Stubbings* — (a) special disadvantage, (b) knowledge and (c) unconscientious exploitation — separately and systematically, by reason of basic considerations of lexical ordering.[188] In other words, in relation to an interpersonal exploitation claim: (a) and (b) are preconditions of (c) — which involves *both* human conduct and a juridical conclusion as to that conduct — and (a) and (b) are lexically ordered in the sense that the need to show (b) falls away if (a) is not established at all as an initial threshold matter.[189] Exploitation requires at least some level of 'awareness' by D of circumstances or a condition capable of being 'exploited' by D, but no amount of *scienter* on the part of D as to C's circumstances or condition could lead to a judgment of 'unconscientious exploitation' of C if those circumstances, or the relevant condition, do not pass the equitable threshold for vulnerability to interpersonal exploitation in the first place — that is, the threshold of 'special disadvantage'. Thus, each of (a), (b) and (c) could be said to be the scaffolded, properly sequenced integrants of the phenomenon of interpersonal exploitation itself — the avoidance of which, modern courts have declared, lies at the basis of the jurisdiction. For that reason, why should the considerations not be 'addressed separately' and in their correct priority order? Hence, if special disadvantage cannot be established at the first step, that would, theoretically, be the end of the inquiry and the claim

[185] Cf Harding (n 25) 287–8.

[186] *Stubbings* (n 6) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ).

[187] Ibid.

[188] Ibid, citing *Amadio* (n 1) 459–60 (Gibbs CJ), 461 (Mason J), 474 (Deane J, Wilson J agreeing at 468).

[189] See, eg, *Turner* (n 106) [127] (Austin J).

could be dismissed without the need to proceed to the next two steps.[190] Likewise, even if special disadvantage could be shown, a failure to prove knowledge of the superior party thereof would render redundant the need to proceed to the third step.[191] How, then, is the determination of an unconscionable dealing claim different to the determination of a cause of action in tort?

One possible explanation is that the difference is in the relative weighting given to each 'consideration' in an unconscionable dealing claim.[192] Judgment-in-the-round goes beyond a sequential or checklist inquiry of the sort just described, because the weight or significance of each consideration will vary depending on the character of the other considerations.[193] For example, consideration (a) cannot fall out of the picture entirely until considerations (b) and (c) are addressed, because the court must consider the interaction of all three and make an evaluative judgement as to whether, in all of the circumstances, there was a sufficient special disadvantage. Lord Walker's description of judicial method in relation to the doctrine of proprietary estoppel illustrates the point: 'although [the doctrine's] elements (assurance, reliance and detriment) may have to be considered separately they cannot be treated as watertight compartments'.[194] This was because 'the fundamental principle that equity is concerned

[190] We use the term 'theoretically' because even if a court finds an absence of special disadvantage, it will usually proceed to consider the other steps in the alternative: see, eg, *Kakavas* (n 6) 427–40 [126]–[162] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *C G Berbatis* (n 6) 64–5 [16] (Gleeson CJ), 77–8 [56]–[58] (Gummow and Hayne JJ), 111–14 [167]–[177] (Callinan J). But see *Turner* (n 106) [110], [127] (Austin J).

[191] See, eg, *Melverton v Commonwealth Development Bank of Australia* (1989) ASC ¶55-921, 58459–60 (Hodgson J). This is true even if one considers the third step to involve an 'equitable presumption' of unconscionable dealing and a consequent shifting of the evidential burden: see above nn 113–15 and accompanying text.

[192] See, eg, *Nitopi* (n 7) 403 [50] (Bell CJ). His Honour remarked that

> [t]he more acute or severe the disadvantage, and the more extensive the knowledge of that disadvantage, the more difficult it will be to justify any transaction as fair, just and reasonable. This both illustrates and serves to reinforce the fact that questions of unconscionable dealing are notoriously fact intensive and intimately associated with the nature of the special disadvantage and the degree of knowledge of that special disadvantage by the stronger party.

[193] '[E]valuating whether conduct is unconscionable "is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules"': *Kobelt* (n 6) 59 [153] (Nettle and Gordon JJ), quoting *Paciocco* (n 21) 276 [304] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]).

[194] *Pitt* (n 175) 158 [128] (Lord Walker, Lord Neuberger PSC, Baroness Hale, Lords Mance, Clarke, Sumption and Carnwath JJSC agreeing), citing *Gillett v Holt* [2001] Ch 210, 225 (Walker LJ, Waller LJ agreeing at 238, Beldam LJ agreeing at 238) ('*Gillett*').

to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.'[195] The court must step back from the logic of the detail, as it were, in order to ascertain the full picture.[196]

This is especially true of considerations (a) and (b) of the unconscionable dealing doctrine. They are sequential, but not independent of each other, as can be seen in *Stubbings* itself, where the plurality treated consideration (b) — that is, D's knowledge — as not being a major hurdle on the facts despite expressing some uncertainty as to whether it amounted to actual knowledge.[197] This was because the combination of the naivety of the complainant and the palpable imprudence and risk of the transaction made the knowledge element easier to satisfy: '[D's agent] had sufficient appreciation of [C's] vulnerability, and the disaster awaiting him under the mortgages, that his conduct in procuring the execution of the mortgages is justly described as unconscientious'.[198] Although this statement could be rationalised as a finding of wilful blindness, it seems clear that the plurality were not concerned at all with whether there could be 'an unequivocal finding of actual knowledge' on the part of the agent.[199]

But how convincing is this as a basis for distinguishing the judicial method employed in unconscionable dealing from that employed in a cause of action in 'tort' given that instances of judgment-in-the-round occur across common law, equity and statute? It could be argued, for example, that the tort of negligence involves a judgment-in-the-round — a 'calculus' — with respect to 'incommensurables' that necessarily invites the application of expert judgement on the part of a decision-maker to facts that are unknowable in advance of the event upon which the decision-maker is called to adjudicate.[200] Could it be that the adjudication of some torts, at least, is similar to that of unconscionable dealing?

195 *Pitt* (n 175) 158 [128] (Lord Walker, Lord Neuberger PSC, Baroness Hale, Lords Mance, Clarke, Sumption and Carnwath JJSC agreeing), quoting *Gillett* (n 194) 225 (Walker LJ, Waller LJ agreeing at 238, Beldam LJ agreeing at 238).

196 '[T]he power of equity is that it assists judges in finding the appropriate focal length from which to view a given dispute, so that the just (as opposed to the purely logical) outcome may become clear': Ward (n 172) 14.

197 *Stubbings* (n 6) 22–3 [44]–[46] (Kiefel CJ, Keane and Gleeson JJ).

198 Ibid 22–3 [46].

199 Ibid 22 [44].

200 See, eg, *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J, Stephen J agreeing at 44, Aickin J agreeing at 50); *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486, 490 [2] (Gleeson CJ and Kirby J).

Perhaps the plurality in *Stubbings* were suggesting that the legal *content* as well as the weight of the three 'considerations' relevant to unconscionable dealing might vary (compared with the fixed legal content of the elements of a cause of action in tort).[201] For example, might the content of the requisite mental element (which we have argued must be actual knowledge if the prevention of 'exploitation' is accepted as the foundational norm, but which the plurality in *Stubbings* framed more generally as 'knowledge of that special disadvantage'),[202] vary depending on the court's overall assessment of the facts such that constructive knowledge or even constructive notice suffices for a finding of 'unconscientious exploitation' in some scenarios?[203] In other words, was the plurality's conclusion that D had 'sufficient appreciation' of C's special disadvantage, such that 'an unequivocal finding of actual knowledge' was unnecessary, indicative of a different legal test of 'knowledge' due to the severity of the special disadvantage?[204] This seems an unduly complex explanation if the foundational norm is indeed exploitation avoidance, but it is persuasive if (as we suggest below) the foundational norm in *Amadio* should not be restricted to the prevention of exploitation *stricto sensu*.[205] It seems even more troubling to suggest that the legal content of the special disadvantage consideration can vary across different cases and contexts. It seems to us that special disadvantage is necessarily an unwavering *jural threshold* that must be crossed on the facts of each and every case. There must always be proof of a serious inability on the part of the claimant to conserve their own best interests in the impugned transaction relative to the other party. Once that threshold has been met — and, granted, that will be harder to show in some contexts than in others — then it is possible that the other features of an unconscionable dealing inquiry may or may not be easy to make out depending on the *extent* to which the threshold had been crossed

201 See *Stubbings* (n 6) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ).

202 Ibid. See above nn 139–43 and accompanying text.

203 This is not completely implausible in Australia. For example, the plurality in *Thorne* (n 6) said, albeit without explanation or supporting precedent, that it is '*generally* necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage': at 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) (emphasis added). And in Canada, it is clear that proof of superior-party knowledge — even 'constructive knowledge' — is not essential for intervention based on that legal system's unconscionability doctrine: see especially *Uber Technologies* (n 39) 168–9 [84]–[85] (Abella and Rowe JJ for Wagner CJ, Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ). In the same case, though, Brown J was particularly critical of the majority's removal of any *scienter* requirement in this area: see especially at 206–9 [164]–[167].

204 *Stubbings* (n 6) 11 [5], 22 [44] (Kiefel CJ, Keane and Gleeson JJ).

205 See below Part IV.

in the individual case. In other words, there may well be *degrees* of special disadvantage and so in that sense the 'weight' of the criterion may vary in the totality of the overall inquiry. But this is only in a forensic rather than in a substantive sense. In our view, special disadvantage remains a non-negotiable aspect — hence *requirement* — of the doctrine. Unconscionable dealing without initial proof of a special disadvantage strikes us as a conceptual impossibility. Obviously, we would not say the same about the superior party's 'awareness' of a special disadvantage, but the extent to which that must be shown, if it must be shown at all, will turn on what one considers to be the underlying purpose of the jurisdiction. We discuss this further in Part IV.

All of this suggests what seems to us to be the most plausible and simplest explanation of the plurality's statement in *Stubbings* — namely, that it reflects an enduring belief of Australian courts that the potential of equitable doctrines to regulate relational dealings should not be constrained by overly specific and rigid doctrinal criteria or application.[206] On this explanation, the mischief to which the plurality in *Stubbings* were referring was

> the danger that the over-enthusiastic and unnecessary statement of broad general principles of equity in terms of inflexibility may destroy the vigour which it is intended to promote in that it will exclude the ordinary interplay of the doctrines of equity and the adjustment of general principles to particular facts and changing circumstances and convert equity into an instrument of hardship and injustice in individual cases …[207]

Hence, formulating the mental element in broad terms such as 'knowledge' or 'know or ought to know', rather than 'actual knowledge' for example, allows for the exercise of judgment-in-the-round as to what knowledge suffices on the particular facts under consideration to constitute an unconscionable dealing.[208] Taking this further, the crux of the *Jenyns* statement is that the court's deliberation is *not* confined to the three considerations listed in *Stubbings* but may take into account *any* matter that the court considers both relevant to the exercise of its discretion to grant relief and supportive of equity's underlying principles and the foundational norm(s) of unconscionable dealing (whatever the courts

[206] See *Stubbings* (n 6) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ).

[207] *Chan* (n 177) 205 (Deane J). See also ibid.

[208] See, eg, *Kakavas* (n 6) 398 [6] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ), quoting *Amadio* (n 1) 462 (Mason J); *Thorne* (n 6) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

express those to be).[209] This explanation comes closest to articulating the difference between the modes of legal reasoning in relation to unconscionable dealing and 'a cause of action in tort': accepting that a tort inquiry might involve judgment-in-the-round reasoning, the court is still confined to determining, in binary fashion, the elements of the tort in question.[210] Conversely, in unconscionable dealing, the court may go beyond the three 'considerations' listed in *Stubbings* and consider 'every connected circumstance that ought to influence its determination upon the real justice of the case'.[211]

But why has this emphasis on equity's distinctive judicial method, along with the *Jenyns* statement, resurfaced in the current century?[212] And why is this emphasis being raised in relation to equitable unconscionable dealing, a doctrine that seems relatively determinate compared to other conscience-based doctrines? We can only speculate. Perhaps it reflects a latent uneasiness with the narrow scope of the anti-exploitation rationale and consequent unsatisfactory formulation of the doctrinal considerations. Perhaps it is part of a corrective response to the perceived dominance in the latter part of the 20th century of Birksian taxonomic thinking, which threatened to eliminate the distinction between equity and the common law altogether.[213] Perhaps it reflects a judicial concern that legal practitioners (particularly counsel) are not as well versed in the fundamentals of equity pleadings as they used to be. Or perhaps there is a concern that the widening of statutory forms of unconscionable conduct may create the false perception that equity is unable to respond to the 'real justice' of a case.[214]

If it is indeed the case that the plurality in *Stubbings* were advocating for a judicial method according to which the legal content and relative weighting of the three considerations relevant to unconscionable dealing might vary (although that seems most implausible for 'special disadvantage' in particular) or a method according to which the overall assessment of unconscionability is not

209 See *Stubbings* (n 6) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ); *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ).

210 See *Stubbings* (n 6) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ).

211 *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ), quoting *The Juliana* (n 18) 1567 (Lord Stowell). See also *Stubbings* (n 6) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ).

212 For recent examples of extrajudicial commentary, see generally Ward (n 172); Leeming, 'Unconscionable Transactions' (n 165); Leeming, *Entangled System* (n 165).

213 See Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1; Michael Bryan, 'Peter Birks and Unjust Enrichment in Australia' (2004) 28(3) *Melbourne University Law Review* 724, 725.

214 See *The Juliana* (n 18) 1567 (Lord Stowell).

confined to the interaction of those considerations, does this raise concern? Clearly, some will worry that such doctrinal indeterminacy undermines the rule of law.[215] However, there are compelling arguments that this is not the case, not least because equitable indeterminacy involves a constrained discretion and is subject to institutional processes, checks and balances.[216] Judgment-in-the-round is a legitimate form of legal reasoning with strong historical and principled credentials.[217] It plays an important expressive function when a doctrine has clear and stable normative foundations and where judicial reasoning is transparent and explicit.

And therein lies the rub. Can it be said that, presently, the *Amadio* principle is circumscribed by clear and stable normative foundations? We are concerned by the very real possibility that some, at least, of unconscionable dealing's present indeterminacy is due to conceptual confusion and even error in the development and articulation — such as it is — of the doctrine's foundational norm(s) post-*Amadio*. Could it be, for example, that an unacknowledged and unintended narrowing of the doctrine's normative foundations, expressed broadly in *Amadio* as the prevention of 'unfair or unconscientious advantage'[218] being taken of C, but which in later cases became 'victimisation', 'exploitation' or 'predation', has confounded the permissible legal content of, in particular, the 'consideration' of knowledge?[219] In other words, is it time to revisit *Amadio* and the doctrine's true normative foundations? We think so.

IV What Went Wrong and a Proposed Resolution

Four decades on from *Amadio*, are we any nearer to knowing the true nature and potential of the equitable principle that animated the majority's decision to set aside a mortgage guarantee that was perfectly valid at law? We sense that a transaction that has been unfairly acquired because one party has abused a position of dominance over the other party should not, all other things being equal, be enforced or be allowed to stand. Our membership of a common

215 See, eg, Birks (n 213) 97.

216 Cf Harding (n 25) 286. The related assumption that a rules-based judicial method creates greater certainty is also questionable: see Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes: Meeting the Needs of Any Sophisticated and Successful Legal System' (2019) 47(2) *Australian Bar Review* 137, 151–7.

217 See Ridge, 'Modern Equity' (n 174) 268.

218 *Amadio* (n 1) 462 (Mason J).

219 See above nn 26, 50–5 and accompanying text.

humanity qualifies us to intuit that it is unfair, wrong or inappropriate to profit from those who are seriously unable to protect themselves against our agency-responsible decisions to exercise relative interpersonal power for selfish gain. We victimise a fellow person whenever we treat them merely instrumentally for our own gratification, which we certainly do whenever we choose to exercise, actively or passively, interpersonal power over another who is known to be especially vulnerable to us — that is, this vulnerability militates against the realisation, by that other, of their own operative goals in the exchange relationship or other form of voluntary disposition inter se.[220] Moreover, by exercising such interpersonal power in that particular way and to that particular effect, we subject the other party, through our own agency-responsible acts or omissions, to an improper reason (or motive) for intentional action — that is, a reason or motive that does not adequately respect the weaker party's own right to fully autonomous participation in the transaction.[221] The consequence of such subjection (and consequent victimisation) is that any expression of transactional consent that resulted from the abuse of the power cannot be regarded as genuinely voluntary or legally responsible such that any resulting transaction cannot, at least in equitable contemplation, be regarded as 'just' *inter partes*.[222]

As acknowledged in Part II(B), while these observations are far from overt in *Amadio* itself, they can nevertheless be gleaned from, and are certainly consistent with, curial dicta within and beyond that case, including from areas of the private law that do not directly engage equity's jurisdiction to relieve against an 'unconscionable dealing'. Ideally, though, the majority in *Amadio* (and courts in significant unconscionable dealing cases since) should have made more explicit (than it has been in our experience of the case law) the 'construct of values and standards [of personal conduct] against which the [defendant's own] conduct … is to be judged'[223] for the purpose of giving content to the concept of 'a juridical conscience', which is said to lie at the foundation of equity's authority to interfere with a transaction validly concluded at law.[224] Since *Amadio*, Australian courts have struggled to explicate what they consider to be 'the real justice of' those cases that are capable of falling within the ambit of the

220 See above Part II(B).

221 See above nn 88–95 and accompanying text.

222 See above Part II(B).

223 *Kakavas* (n 6) 400 [15]–[16] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

224 See *Amadio* (n 1) 461 (Mason J).

principle.[225] Instead, the courts have tended to resort to language that, on an escalating scale over time, has arguably inhibited the original intent and ameliorative potential of the doctrine. What began in *Blomley* and *Amadio* as an expression of the jurisdiction's gravamen in terms of 'something like fraud, for an undue advantage was taken of [the plaintiff's] situation'[226] later became 'victimisation', which, whether active or passive, signifies 'an unconscientious use of the power arising out of [the] circumstances and conditions' of the parties.[227] This understanding was, in turn, taken to be synonymous with 'unfair exploitation' (of the opportunity arising from the claimant's special disadvantage), which required proof 'of a predatory state of mind' no less, at least in so-called 'arm's-length commercial transactions'.[228] This rhetoric is imbued with such variable and essentially contestable meaning that modern courts — especially those bound to follow the High Court's lead in the field — are required either to assume or else to dissect the meaning and boundaries of the core principle that the labels purport to express. This has inevitably led to a rather ambiguous doctrine of unconscionable dealing in Australia today — and one that is potentially highly constraining of the jurisdiction. The risk is that cases that ought to fall within the doctrine's ambit are excluded or, as we suspect is more likely, certain scenarios are only included by virtue of clever interpretative manoeuvres by judges to circumvent the perceived ambiguities and fetters in the case law.[229]

In our respectful view, the relatively modern escalation of the rhetoric associated with the unconscionable dealing jurisdiction is inexplicable from the standpoint of originating precedent, as well as from the abstract justice values and standards that remain under-articulated in the case law. Nothing in *Amadio*, or its antecedents, compels resort to such deeply pejorative signifiers as 'exploitation' or 'predation' (in particular).[230] The connotations of 'victimisation' are, perhaps, more malleable: it is possible to make a victim of someone — here, in the manner of using them merely instrumentally for gain — in ways that do

[225] *The Juliana* (n 18) 1567 (Lord Stowell).

[226] *Blomley* (n 3) 429 (Kitto J), quoting *Evans* (n 41) 1194 (Kenyon MR). See also *Amadio* (n 1) 461 (Mason J).

[227] *Hart* (n 44) 1024 (Lord Brightman for the Court), quoting *Earl of Aylesford* (n 54) 491 (Lord Selborne LC).

[228] *Kakavas* (n 6) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[229] See above nn 146–7 and accompanying text.

[230] See *Kakavas* (n 6) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). See above nn 14–15 and accompanying text.

not necessarily involve naked exploitation.[231] Still, the modern case law seems to treat 'victimisation' and 'exploitation' as synonymous in this field.[232] Moreover, the requirement of a 'predatory state of mind' is neither explicit nor implicit in *Amadio*, which involved, as between the enforcing bank and the relief-seeking sureties in that case, an 'arm's-length commercial transaction'.[233] At worst, the bank might be said to have acted opportunistically towards the specially disadvantaged Amadios for its own commercial advantage and this might be described as 'unfair advantage-taking'. But to say that the elderly couple were 'preyed upon' by the bank's officers strikes us as inconsistent with the evidence as it appears in the authorised report of the case.[234]

Moreover, the recent apparent acceptance by judges and commentators of attenuated knowledge criteria in connection with the doctrine's proof elements (especially 'constructive knowledge' in the sense of 'knowledge of circumstances [that] would indicate the facts to an honest and reasonable' person),[235]

231 See above n 54 and accompanying text.

232 See, eg, *Kobelt* (n 6) 17–18 [15] (Kiefel CJ and Bell J), 48 [118] (Keane J), 85 [258] (Nettle and Gordon JJ), 95–6 [282] (Edelman J).

233 *Kakavas* (n 6) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). See below n 234 and accompanying text.

234 While it is true that the bank had, in active participation with the Amadios' son, been selectively dishonouring cheques drawn on the already seriously overdrawn accounts of the son's company and presented, at times repeatedly, for payment, this was primarily to ensure the capacity of the company to continue its building activities in the hope that it would be able to trade out of its 'liquidity crisis': *Amadio* (n 1) 457–8 (Gibbs CJ), 464–5 (Mason J), 473 (Deane J), 482–3 (Dawson J). Further, Wilson J suggested that the purpose of the bank's conduct was to facilitate the interests of its wholly owned subsidiary whose interests were closely related to the Amadios' son, thereby 'embroil[ing] the bank in a conflict of interest which, in the special circumstances of this case, inhibited the proper conduct of its banking business': at 468. Although the bank's conduct undoubtedly contributed to the elderly Amadios' special disadvantage — for the Amadios were consequently misled as to the prosperity of their son's business and hence misled as to the risks that they would be assuming by signing the proposed mortgage guarantee — none of the judges suggested that the bank's practice was part of a self-conscious (ie predatory) scheme designed to create a special disadvantage in the parents that the bank could then actively exploit. Even Gibbs CJ, who described the bank's conduct as constituting 'not merely dishonour[ing] … cheques' but rather making 'itself a party to their selective dishonour, in an endeavour to maintain the facade of prosperity that the company, although insolvent, had erected — a facade which, the bank should have expected, may well have deceived the [Amadios]', ultimately concluded that the bank's failure to make disclosure of such 'unusual features' of the banker–customer relationship amounted to a transaction-vitiating misrepresentation, 'albeit unintended': at 457–8. That the misrepresentation was of the innocent variety is inconsistent with any possible implication that the bank was ever acting in a 'predatory' way towards the Amadios.

235 This is so-called 'category (iv) knowledge': *Baden* (n 146) 575–6 [250] (Peter Gibson J).

if not inconsistent with the inevitable consequence of what was held in *Kakavas*, is nevertheless incongruous with a jurisdiction that now purports to respond to proof of *actual exploitation* in the (active) procurement or (passive) acceptance of voluntary or consensual transactions.[236] The apparent acceptance gestures instead to a doctrine that correctively responds to not only deliberate but also 'morally obtuse' failures on the part of the stronger party to respond to the sufficiently known possibility (or risk) that the weaker party was unable to act fully autonomously relative to the stronger party in the proposed transaction inter se.[237] While such a conception of unconscionable dealing would of course include transaction-inducing acts of deliberate exploitation, the 'exploitation' concept seems to be inapt — at least as the *exclusive* normative justification for the equitable doctrine. Courts should acknowledge instead that the true gravamen of the *Amadio* principle, especially in those more 'passive' instances of unconscionable dealing, is what two of us have previously referred to as 'transactional neglect'.[238]

This concept, which we think is implicit in *Amadio*, allows for the possibility of a corrective liability on the part of D for the failure to take reasonable precautions against the foreseeable risk of transactional harm to C in a scenario where D and C were, sufficiently knowingly to D at the time, dealing with each other under conditions that would make 'exploitation' a possibility but not an actuality, because a genuinely exploitative state of mind had not accompanied D's failure to be sufficiently influenced by the relevant corrective responsibilities (ie side constraints) that were engrafted upon D's ordinary transactional liberty by virtue of their sufficient awareness of C's relative special disadvantage at the moment of transaction formation or (as the case may be) perfection. 'Sufficient awareness' here will, of course, extend below the currently required standards of actual knowledge or wilful blindness and include situations where D 'ought to have known' (or had 'reason to know') of C's special disadvantage relative to

[236] See above Part III(B). See also *Kakavas* (n 6) 438 [155]–[156] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[237] The High Court used the term 'morally obtuse' to describe category (iv) — 'constructive' — knowledge on the *Baden* scale in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 164 [177] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *Baden* (n 146) 575–6 [250] (Peter Gibson J).

[238] See, eg, Rick Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25(1) *Oxford Journal of Legal Studies* 65; 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(1) *Journal of Banking and Finance Law and Practice* 18, 33–6.

them. The point has particular application to those cases of passive unconscionable dealing, which can only in some very tenuous sense be said to involve a 'predatory state of mind' or even 'exploitation'. Again, *Amadio* itself is an illustration. We consider that the worst that can objectively be said of the bank's behaviour in that case is that the bank, through its officers or employees, simply failed to take reasonable precautions against the realistic possibility that the elderly Amadios were specially disadvantaged relative to the bank in the proposed security transaction: that is, a reasonable person in the bank's position would have predicated their actions upon the assumption of the possible existence of a serious, autonomy-debilitating power–vulnerability relationship *inter partes* and would have taken such steps as were reasonable in the circumstances to reduce the prospect of that relationship existing to an acceptable level before taking, to the ultimate detriment of the Amadios, a contractual benefit from them.[239] The bank's failure to take reasonable precautions constitutes 'transactional neglect' — not predation or exploitation.[240]

Such a paradigm of liability is not unknown to Australian equity (and its 'public normative role in the protection of the weak from the strong in appropriate circumstances'),[241] even in the context of so-called 'arm's-length commercial transactions'.[242] Recognition of the 'transactional neglect' concept that, we argue, underlies the result in *Amadio* is not possible while *Kakavas* remains a governing authority on unconscionable dealing in Australia, or unless and until the High Court is prepared to reconsider the 'construct of values and standards' that informs equity's conscience-based assessment in cases that fit

239 See above nn 94–5 and accompanying text. See below n 274 and accompanying text.

240 See above n 238 and accompanying text.

241 See *Aboody* (n 7) 32377 [77] (Allsop P, Bathurst CJ agreeing at 32362 [1], Campbell JA agreeing at 32378 [82]), citing Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* (Hilliard, Gray & Company, 1836) vol 1, 261.

242 *Kakavas* (n 6) 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). See, eg, *Garcia* (n 92) 408–9 [31] (Gaudron, McHugh, Gummow and Hayne JJ). Of course, the majority in *Garcia* (n 92) attempt to distance the 'wives' special equity' cases from *Amadio*-style liability so as to avoid any suggestion of an implied overruling of *Yerkey* (n 92) by the Court in *Amadio* (n 1): *Garcia* (n 92) 407–10 [27]–[34] (Gaudron, McHugh, Gummow and Hayne JJ). The majority in *Garcia* (n 92) ultimately acknowledged 'that the statement that enforcement … would be "unconscionable" is [in the 'wives' special equity' cases] to characterise the result rather than to identify the reasoning that leads to the application of that description': at 409 [34]. And so we do not want to be taken to be suggesting that a theory of 'transactional neglect' was expressly endorsed in that case. It was not. But the reasoning in the case certainly fits a negligence-style level of agency-responsibility that would trigger the lender's conscience in such cases.

the *Amadio* pattern of dispute.[243] Such a reconsideration, while unlikely, is not beyond the realm of possibility.[244]

It may be that the requirement of proof of 'a predatory state of mind' in *Kakavas* was confined to 'arm's-length commercial transactions' — the classificatory boundaries of which were not elaborated in the Court's judgment.[245] Assuming that this denotes at least a division between 'contracts' and 'inter vivos gifts' (and, within the category of 'contracts', between 'commercial' contracts and 'consumer' ones),[246] it is worth noting that it has long been acknowledged that gratuitous transfers are more readily rescinded for unconscionable dealing than genuine contracts.[247] For obvious reasons, the law's

243 See *Kakavas* (n 6) 400 [16], 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

244 We have recently witnessed, for example, a judicial retreat from the erstwhile use of such lofty epithets as 'moral obloquy' in the context of statutory unconscionability. Previously, Gageler J had endorsed the 'high level of moral obloquy' threshold: *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 587 [188], quoting *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ). However, his Honour expressly recanted his endorsement of that standard in *Kobelt* (n 6), asserting it to be 'arcane terminology' that 'does nothing to elucidate the normative standard' embedded in s 12CB of the *ASIC Act* (n 8) and instead 'has the potential to be misleading to the extent that it might be taken to suggest a requirement for conscious wrongdoing': *Kobelt* (n 6) 39–40 [91]. Contrast this with Keane J noting that the impugned conduct must exhibit 'the level of moral obloquy associated with predatory conduct': at 49 [120]. For a tracing of the progressive demise of the language or requirement of (a high level of) 'moral obloquy' in the statutory unconscionability context, see NC Seddon and RA Bigwood, *Cheshire and Fifoot Law of Contract* (LexisNexis, 12th ed, 2023) 888–93. See also Giancaspro (n 12) 29–31. Most recently, in *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 419 ALR 30, however, Steward J (at 102–8 [283]–[304]) provided reasons why, in his Honour's view, 'the concept of moral obloquy, or a form of moral turpitude, endures as an essential attribute of unconscionable conduct', 'both as an equitable doctrine and as a statutory concept': at 102 [283]. His Honour concluded that there was 'a need for a grave level of moral obloquy to exist if a finding of unconscionable conduct is to be made': at 108 [304]. With respect, at least for the equitable doctrine, this seems inconsistent with the actual demands of *Amadio* (n 1).

245 *Kakavas* (n 6) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

246 Generally, though, we are left to speculate as to what falls within and what lies outside the boundaries of the 'predatory state of mind' requirement from *Kakavas*: see ibid. Private sales between individuals? Domestic transactions or exchanges between friends or family members? See, eg, *Paroz v Paroz* [2010] QCA 362, [1]–[2] (Fraser JA). Ordinary conveyances of residential land? 'Emotional dependency' cases (although these tend to involve impugned gifts rather than exchanges)? See, eg, *Louth* (n 6) 626 (Mason CJ), 626–7 (Brennan J), 636–8 (Deane J), 642 (Dawson, Gaudron and McHugh JJ).

247 See, eg, *Wilton* (n 3) 649 (Latham CJ), 655 (Rich J, Dixon J agreeing at 656); *Scott v Wise* [1986] 2 NZLR 484, 492–3 (Somers J for the Court), quoted in *Dark v Boock* [1991] 1 NZLR 496,

concern for certainty and protecting the sanctity of concluded transactions is not engaged to the same extent in connection with gifts as with bargains, but it is not removed altogether in that context either.[248] Certainly, since the discrediting of Romilly MR's (in)famous 'heresy' in *Cooke v Lamotte*,[249] equity has required the donor to show a 'substantial reason' before interfering with inter vivos gifts perfected at law.[250] This reason must be a normatively persuasive explanation, beyond mere proof of 'special disadvantage', that links D to C's plight and which justifies D 'suffer[ing] the consequences' of C's vulnerability.[251]

Of course, the linking reason that taints D's conscience in connection with an unconscionable dealing claim need not be viewed as identical as between contractual and non-contractual transactions, especially on a judgment-in-the-round style of approach. One would naturally expect the reason to be stronger for contracts than for gifts. Proof of naked exploitation is a very high threshold that significantly favours D's interest in contractual liberty over C's countervailing interest in security from harm or loss. It certainly insures against excessive interference with contractual transactions in the name of the doctrine. On the other hand, 'transactional neglect' — or '[h]eedlessness of, or indifference to, the best interests of [C]' — might well be an appropriate minimal standard of agency-responsible misconduct sufficient for setting aside non-contractual transactions in the name of the unconscionable dealing doctrine.[252] But it is not

502 (Heron J); *Williams* (n 17) 346 [192] (Hargrave J); *Uber Technologies* (n 39) 208 [166] (Brown J). See also Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 3rd ed, 2023) 613–14 [29.17]–[29.21].

248 O'Sullivan, Elliott and Zakrzewski (n 247) 614–15 [29.22]–[29.23]. Tang Hang Wu has argued that there are moral and social factors that speak in favour of the sanctity of gifts: see generally Tang Hang Wu, 'Restitution for Mistaken Gifts' (2004) 20(1) *Journal of Contract Law* 1. See also Pauline Ridge, 'Third Party Volunteers and Undue Influence' (2014) 130 (January) *Law Quarterly Review* 112, 118, which notes that, in the 'hierarchy of transactions' that the law will unravel, gift transactions sit somewhere between contracts and mistaken payments. See also at 117–19.

249 (1851) 15 Beav 234; 51 ER 527, 530. The principle was that certain voluntary dispositions of property, if large or improvident, would be set aside unless the donee could satisfy the court that the donor understood the transaction and freely consented to it: see also *Hoghton v Hoghton* (1852) 15 Beav 278; 51 ER 545, 553 (Romilly MR). For the discrediting of that approach, see *Yerkey* (n 92) 678–9 (Dixon J), discussed in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 193 (Lord Browne-Wilkinson, Lord Templeman agreeing at 185, Lord Lowry agreeing at 185, Lord Slynn agreeing at 199, Lord Woolf agreeing at 199).

250 *Wilton* (n 3) 655 (Rich J, Dixon J agreeing at 656).

251 See *Uber Technologies* (n 39) 208 [166] (Brown J). In that case, his Honour's remarks were in connection with contracts rather than 'gratuitous' transactions.

252 See *Kakavas* (n 6) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

clear, at least to us, why it is not also the most appropriate *minimally sufficient* standard for all transaction types.

One can appreciate the strong signalling function that elevated rhetoric such as 'exploitation' and 'predation' plays in the present connection: bargain transactions validly concluded at law should not be seen as vulnerable to casual destruction in equity.[253] However, it is to be borne in mind that the *effect* of both exploitative and neglectful uses of interpersonal power causing transactions is identical; each results in a reallocation of resources or wealth *inter partes* without C's fully autonomous consent. All that differs is how much weight the law should be seen to assign to D's specific (and society's general) interest in transactional liberty and security at the expense of C's personal and proprietary integrity when what is sought to be upset is a bargain transaction rather than a gratuitous one — noting that, in unconscionable dealing cases, it almost always lies within D's power (and typically at minimal cost or effort to D) to ensure that C's transactional autonomy was properly protected (hence respected) before entry into the impugned transaction.[254] The notion that nothing less than a full-blown charge of exploitation suffices after a threshold finding of special disadvantage is initially made in favour of C, and that 'heedlessness of, or indifference to, the best interests of [C]' does not tip the scales of justice in favour of C, seems unnecessarily ruthless towards C given the *juridical significance* of the finding of special disadvantage in C's favour: that the normal rules of self-reliance and individual responsibility in bargaining are suspended and that C can then reasonably expect D to exercise appropriate restraint in the pursuit of D's own self-interest. That is, the exercise of appropriate restraint renders D's legal transaction with C consistent with the 'ordinary minimum standards of fair dealing'.[255]

That, in our respectful view, exposes 'the real justice of the case' that equity should be seen to be pursuing and enforcing under the *Amadio* principle:[256] a proscription against the weaker party being used merely instrumentally by the stronger party where the latter could easily have taken, through choice, the precautionary steps needed to avoid the defect in autonomy (or consent) that now

[253] See *Uber Technologies* (n 39) 208 [166] (Brown J).

[254] Indeed, in *Amadio* (n 1), it was suggested that all that the bank would have needed to do was to have properly explained the proposed transaction to the Amadios or else to have ensured that a competent stranger to the transaction had done so: see at 469 (Wilson J). See below n 274 and accompanying text.

[255] *Commonwealth v Verwayen* (1990) 170 CLR 394, 441 (Deane J).

[256] See *The Juliana* (n 18) 1567 (Lord Stowell).

underlies the weaker party's petition for relief from what would otherwise be the consequence of them having signified their transactional assent at law. It should not matter, on this approach, whether the stronger party failed deliberately or merely carelessly to respond to the anticipatable risk of the weaker party being used merely instrumentally: the *effect* of the transaction on C is identical regardless and, in either event, D's conduct is still 'blamable' in an agency-responsible sense (ie liability remains fault-based and is not strict). There is nothing in *Amadio* that would preclude the jurisdiction being conceived of in this particular way[257] — indeed, it is possible to read the judgments of Mason J and Deane J in that case as entirely consistent with it[258] — although the subsequent curial interposition of such rhetorical labelling as 'exploitation' and 'predation' potentially blocks it.[259]

If the rhetoric is not recanted, there is a danger that some meritorious unconscionable dealing claims might fail, thereby robbing the transactionally vulnerable in Australia of 'the real justice of' their cases.[260] Or, if success is to arrive, it might only come at the price of courts having to circumvent the rhetoric by clever means or artful (but ultimately unpersuasive) interpretations of the precedents that bind them.[261] As mentioned earlier, one may sense that this is occurring already in Australia and that modern courts may appreciate the corner into which they have been painted — by *Kakavas*, in particular.[262] Of course, unconscionable dealing might be more readily inferred in the case of gratuitous transactions than with genuine contracts,[263] but this is not, in our view, because some differential behavioural standard should be seen to apply

[257] As argued in Part II(A), it is implausible to explain *Amadio* (n 1) as a case involving 'naked exploitation' or 'predation'.

[258] Paul Finn once utilised the 'neighbourhood principle' to 'provide a bridge between negligence and one major species of unconscionable conduct': Paul Finn, 'Unconscionable Conduct' (1994) 8(1) *Journal of Contract Law* 37, 42, discussing *Donoghue v Stevenson* [1932] AC 562, 580 (Lord Atkin). In citing *Amadio* (n 1) as an illustration of the analogy he was trying to convey, Finn said of the result in that case that '[t]he bank's awareness of the couple's inability to conserve their own interests in their dealing with it authored a duty in the bank to care for them': Finn, 'Unconscionable Conduct' (n 258) 43.

[259] See above n 14 and accompanying text.

[260] See *The Juliana* (n 18) 1567 (Lord Stowell).

[261] See above n 229 and accompanying text.

[262] See *Kakavas* (n 6) 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). See, eg, *Nitopi* (n 7) 394 [9] (Bell CJ), 416–17 [118]–[120] (Ward P). See also *Wakim* (n 11) [45] (Griffiths AJA, White JA agreeing at [1], Basten AJA agreeing at [8]). See above Part III(B).

[263] See above n 247 and accompanying text.

when one party deals with another who is sufficiently known, by the stronger party, to be operating under a special disadvantage — rather, 'transactional neglect' ought to be the minimal standard of conduct or norm of interpersonal treatment that is applied across both contractual and non-contractual dealings. The courts would do well to repose greater faith in the power of the 'special disadvantage' requirement as the most appropriate gateway for sifting out unmeritorious unconscionable dealing claims. Given the 'game' element inherent in free competitive bargaining,[264] it is only natural that 'risk analysis' will attend and inform the threshold question of whether a contracting party should be found to be acting under a 'special disadvantage' in a contractual setting, as opposed to a pure gift scenario (where no such game element applies).[265] Bargain transactions are thus less likely than gratuitous ones to be unravelled for unconscionable dealing because the courts have made it clear that equitable principles are not available to redeem someone 'from the coming home of risks inherent in … business [activity]';[266] risk-taking does not equate with special disadvantage.[267] In non-contractual contexts, special disadvantage is more likely to be found, at least partly, in considerations of familial or emotional control or dependency.[268]

V Conclusion

Is the *Amadio* principle still fit for its apparent purpose over four decades after its enunciation by a majority of the High Court in 1983?[269] That is a difficult question for any legal scholar to answer definitively, not least because it was never made clear in *Amadio* itself what, *precisely*, was the basal object of the equitable jurisdiction to relieve against an 'unconscionable dealing'. Granted, based on what a majority of the judges said, the principle's *apparent* purpose has something to do with preventing improper (ie unjust, unfair or

[264] See generally Bigwood, *Exploitative Contracts* (n 15) ch 2.

[265] Ibid 232 n 28, 244.

[266] *Kakavas* (n 6) 401–2 [20] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[267] See, eg, *Wu* (n 54) [101] (Bergin CJ in Eq, Leeming JA agreeing at [1], Payne JA agreeing at [21]), citing ibid.

[268] See, eg, *Thorne* (n 6) 112 [65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 115–16 [74] (Nettle J), 126 [113], 127 [116] (Gordon J); *Louth* (n 6) 626 (Mason CJ), 626–7, 629–30 (Brennan J), 636–8 (Deane J), 642 (Dawson, Gaudron and McHugh JJ). Cf *C G Berbatis* (n 6) 65 [16]–[17] (Gleeson CJ), 77–8 [56]–[57] (Gummow and Hayne JJ).

[269] *Amadio* (n 1) 447.

unconscientious) advantage being taken of parties who enter into legal transactions under the autonomy-debilitating influence of a known 'special disadvantage'.[270] And it can be assumed that a court not intervening to prevent that sort of conduct and outcome would offend equity's 'conscience' because *not* to intervene in such circumstances would be tantamount to the state countenancing the practice of the transactionally strong using the transactionally weak merely instrumentally as a means or expendable resource to their own self-interest under the colour of a legally binding transaction (whether of contract or of inter vivos gift). And who could credibly quarrel with that being a legitimate function of equity in the regulation of significant unofficial power–vulnerability relationships in our society?

However, despite four decades of judicial learning (much at the hands of differently constituted benches of the High Court), many uncertainties remain in relation to crucial aspects of the equitable doctrine in its modern contexts and application: (a) its normative rationale or foundation, (b) the formulation of doctrinal proof criteria intended to implement that rationale or foundation and the method of adjudication of specific claims of unconscionable dealing, (c) the doctrine's relationship to other exculpatory categories of the unwritten law and the statutory 'unconscionable conduct' jurisdiction, and (d) the (in)consistency of curial approach in applying the doctrine to different transaction types that are subject to its scrutiny (especially contracts versus gratuitous transactions). Such uncertainties are not helpful to courts and legal advisers who must follow the High Court's (at times seemingly discordant) pronouncements in this field. Hence, we propose that it is time for a big-picture 'reset', primarily through the leadership of the modern High Court.

We have speculated as to the reasons for the ongoing uncertainties described in this article and attributed many of them to a failure on the part of senior courts, including the Court in *Amadio* itself, to robustly engage with the theoretical core of the unconscionable dealing complaint and hence to then articulate, in sufficient detail and with clarity, a normative basis for intervention. Even allowing for equity's distinctive adjudicative approach compared to that of the common law (à la *Jenyns*),[271] we have argued that the High Court's increased reliance, post-*Amadio*, on elevated rhetoric such as 'exploitation', 'victimisation' and 'predation' to signify the gravamen of the jurisdiction has caused the doctrine's focus to become excessively narrow and the associated proof elements

[270] See above nn 42–4 and accompanying text.

[271] *Jenyns* (n 160) 118–19 (Dixon CJ, McTiernan and Kitto JJ).

accordingly to become too strict to deliver on what we consider ought to be seen as 'the real justice of' the cases of the type to which the *Amadio* principle originally appeared directed: instances of 'unfair advantage-taking' by the strong against the especially vulnerable in transactions. Indeed, the current, very narrowly formulated conception of unconscionable dealing appears antithetic to the judicial method described in *Jenyns* itself.[272] Obviously, 'exploitation' constitutes 'unfair advantage-taking' par excellence — its very definition integrates the notion and practice — but we do not regard *Amadio* as being confined to the avoidance of unfair advantage-taking by *exploitation* alone (let alone 'predation'). Despite Deane J's somewhat perplexing statement that the bank manager in that case had 'simply closed his eyes to the vulnerability of Mr and Mrs Amadio and the disability which adversely affected them', while also acquitting the manager of 'dishonesty or moral obliquity',[273] the worst that the bank seemed to have done towards the elderly couple was simply neglect their basic autonomy interests when it was apparent that they were in need of transactional assistance, advice or explanation which the bank could easily have, if it had so chosen, ensured that they received before entry into the impugned mortgage guarantee.[274] Why should it matter, at least when justifying the minimal rectificatory response of transaction avoidance (or imposition of an enforcement disability) as against a dominant party, that advantage was taken *merely carelessly* as opposed to deliberately, exploitatively or predatively?

To our knowledge, the courts have never explicitly answered that deeply 'values-and-standards'-laden question, although an answer seems to have been assumed by the High Court (particularly in *Kakavas*) for so-called 'arm's length commercial transaction[s]' (at least).[275] Granted, the law must safeguard the general security of lawful transactions — contracts perhaps more so than gratuitous dispositions — but, in our view, a more 'neglect-oriented' approach

[272] See ibid.

[273] *Amadio* (n 1) 478.

[274] See ibid 469 (Wilson J). There, it was nicely put that

> [t]he circumstances required that the [Amadios] be acquainted with the true financial position of [their son's] company and thereby enabled to make an informed decision. Having regard to the special circumstances surrounding the bank's relationship to [the Amadios' son], [the bank's manager] was obliged either to ensure that [the Amadios] understood what they were doing or to advise them to seek independent advice and allow them the opportunity to do so. He was not entitled to assume that [the son] would already have informed them adequately.

[275] *Kakavas* (n 6) 400 [16], 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). See also Bigwood, 'Still Curbing Unconscionability' (n 55) 477–8.

towards patrolling transactions involving unfair advantage would not overly threaten the finality of concluded transactions. Even *Kakavas* illustrates that the special disadvantage requirement of unconscionable dealing, if robustly applied, suffices to filter unmeritorious claims regardless of the quality of the defendant's subsequent benefiting from or through the claimant.[276] In our view, to go further and insist on actual exploitation or predation in relation to a subjectively known special disadvantage not only over-insures against excessive interference with transactions in the name of equity's conscience but also licences those who benefit from transactions with the seriously vulnerable to evade the consequences of their own moral obtuseness. Indeed, we consider that a return to a 'transactional neglect' style of approach would resolve many of the current problematics and uncertainties regarding the jurisdiction that we have identified in this article. It would, inter alia: (a) better explain the result in *Amadio* itself; (b) better align between the publicly announced purpose of the doctrine (ie the avoidance of causative unfair advantage-taking in voluntary or consensual transactions) and the doctrinal criteria designed to implement that purpose at the coalface (and, in particular, eliminate confusion over the role of the jurisdiction and modern courts' seeming preference for attenuated knowledge criteria despite what was said in *Kakavas*); (c) produce a doctrine that does not require significant modification in its application as between contracts and non-contractual transactions (provided that the 'special disadvantage' criterion remains sufficiently sensitive to the differences between 'commercial' and 'non-commercial' relational situations despite this distinction's occasional formalism); and (d) lend itself to more of a 'judgment-in-the-round' approach by involving, as it would, a negligence-type calculus in the circumstances of the individual case (noting that Australian courts continue to emphasise the equitable method in contrast to the more rigid and binary approach engendered by a strict, and hence potentially overly constrictive, exploitation-based account of the jurisdiction and its animating purpose). In short, it would render the equitable doctrine of unconscionable dealing fit for its apparent, original purpose which, it seems to us, is simply to ensure the maintenance of a basic norm of 'fair dealing' between those who hold significant interpersonal power in pre-transactional settings and encounters and those who are vulnerable not only to its deliberate, but also careless, exercise.

[276] *Kakavas* (n 6) 427–40 [126]–[162] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).