

A comparison of duress in contract and unjust enrichment law

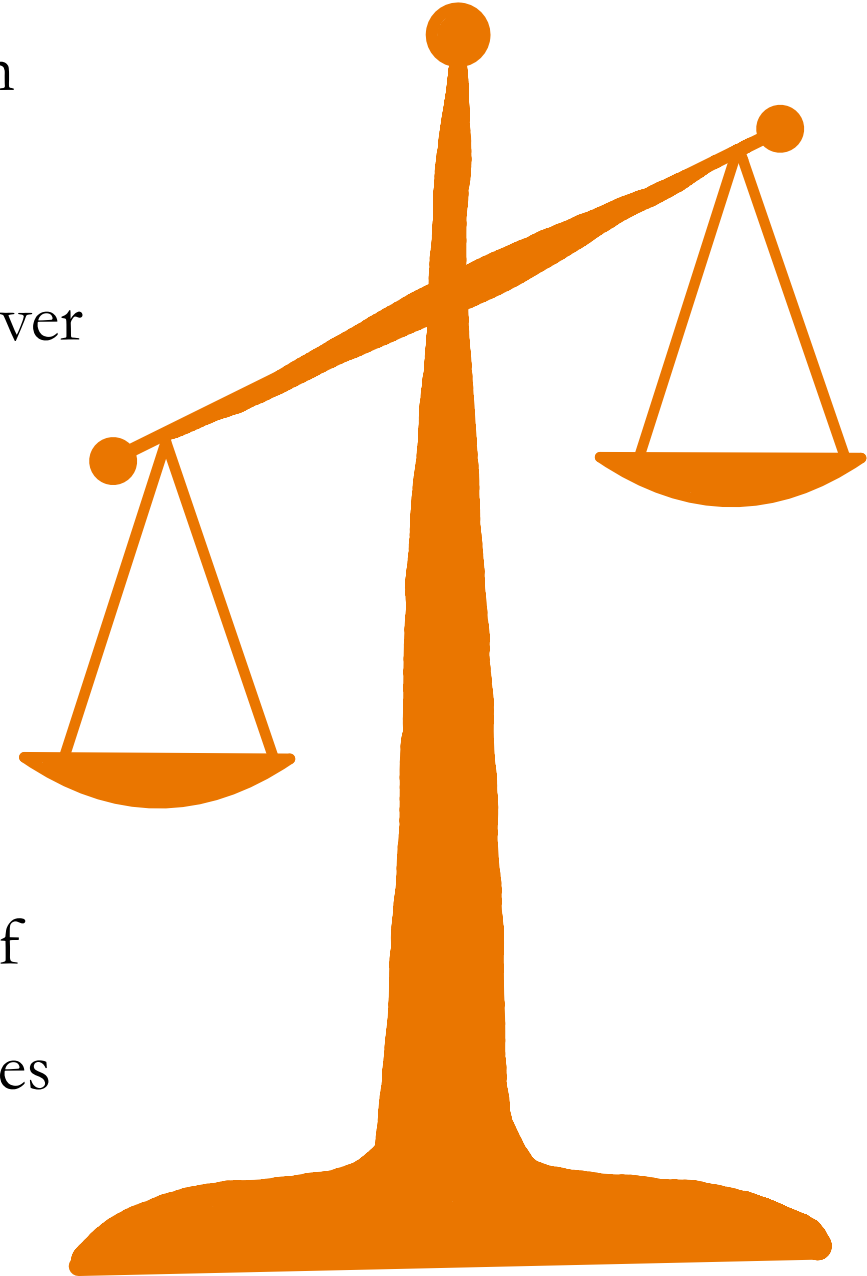
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Introduction

Unjust enrichment law deals with situations where it is unfair for someone to receive a benefit without paying for it. That is when one person is unjustly enriched at the expense of another. Successful claims in unjust enrichment would allow him to recover his payment, which is called restitution. A claim in unjust enrichment law will contradict a claim in contract law, since contractual performance will still be possible if the contract is valid. Claiming recovery of payment under unjust enrichment undermines parties' own allocation of risk and determination of value in the contract. Hence, the law of unjust enrichment comes into play only when the contract is invalid.



Abstract

To form a contract, each party must manifest their consent freely. Duress is a form of coercion where one party uses an impermissible threat to pressure another party to enter into the contract. Under such condition, the contract is voidable as it is not freely entered into. In recent cases like *CTN Cash and Carry*, the court has assumed the same threshold for establishing duress in contract and in unjust enrichment. However, contract law tends to be stricter about letting people to recover their payment as it aims to prevent people escape from their contractual obligations and maintain security of transactions. Hence, where people pay without a contract, why should parties under duress not be allowed to recover their money straightaway?

The answer goes to the very nature of duress in contract and unjust enrichment and the conceptual distinctions in the to the areas of law. **My aim is to establish a less stringent threshold for granting restitutionary remedies for duress in unjust enrichment than in contract where there are no contracts in play.**

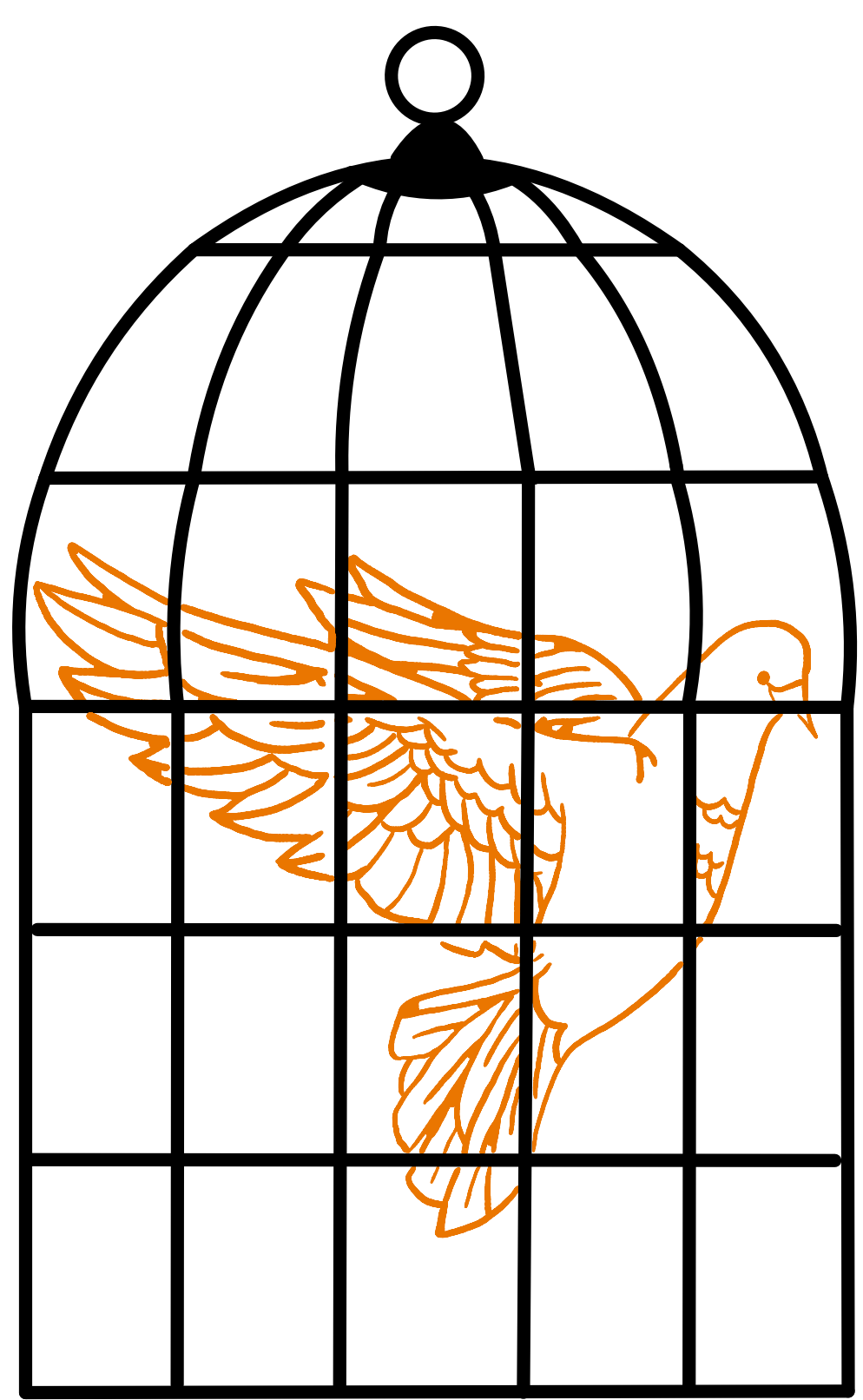
Background

Skeate v Beale is a puzzling case that first shows that claims for recovery of money under duress might be treated differently if there is not a contract. After *Skeate*, the distinction between contracts and money payments has not been followed. A more recent case *CTN Cash and Carry* assumed that the same rules would govern duress in contract and unjust enrichment. In *CTN Cash and Carry*, the supplier delivered cigarettes to the wrong warehouse by mistake, which were then stolen. When the buyer refused to pay for the undelivered cigarettes, the supplier threatened to withdraw future credit facilities. Duress was not found since the seller genuinely believed the buyer owed him money. In the judgment, Lord Justice Steyn explicitly stated that there was no difference between contractual and non-contractual payments.

The Case For A Lower Threshold

1. Different normative foundations

Contract law aims to protect the reasonable expectations of contracting parties and transactional security. Unjust enrichment aims to restore parties to their original position to achieve fairness. Given the differing aims, there is no reason to maintain the same degree of stringency when finding duress.



2. Comparison with mistake

The test for mistake is substantially more liberal in unjust enrichment law than in contract law. In contract law, to find a common mistake, the mistake must be so fundamental that contractual performance is impossible. This is held in *Smith v Hughes* – a contract law case – where the parties intended to transact new oats, but it turned out to be old oats. Hence, the contract was invalidated by mistake. Yet, in unjust enrichment, the contract can be invalidated provided that there was a one-sided mistake in making a payment. I consider that there is no reason duress should be treated similarly to fit better in the overall approach to unjust enrichment law.

3. The Nature of Duress in Unjust Enrichment

To establish duress in contract law, it must be proved that there is a lack of free consent given in entering the contract and that there is the exertion of illegitimate pressure. The dual requirement reflects contract law's concern to protect people's autonomy in entering a contract and prevent morally reprehensible conducts. However, in unjust enrichment, lack of free consent alone can be sufficient. The pressure does not necessarily have to be illegitimate. Compared with other unjust factors, an element of 'wrongdoing' is not necessary. For *duress colore officii*, a public official who acts beyond his legal authority to demand a payment would be duress. Similarly, where people are forced to contract under **necessitous circumstances**, the contract can be invalidated simply because there is a lack of free will. It appears that defective consent alone might be a sufficient normative reason for restitution in unjust enrichment – a lower standard than contract law.

New Directions

1. Assimilating the categories of duress in unjust enrichment

The arbitrary distinction between the different categories of duress, such as duress to the person and duress to the property, should be dissolved in unjust enrichment. Most would consider violence against a person is clearly wrongful, whereas non-physical threats may not be. Nevertheless, non-physical coercion can be of similar gravity as physical coercion is. A wrongful seizure of property can be as imminent as blackmailing a person. The ultimate question should be whether the pressure is sufficient to induce the claimant to enter the transaction, but not what type of pressure it is.

2. A new general principle

Given that duress in unjust enrichment is primarily based on the person's lack of free consent, the primary focus of the test for duress should be whether the illegitimate pressure induces the claimant to enter into the contract **from the claimant's perspective**. In unjust enrichment, it is not concerned with the ability of parties being able to fend for themselves and how society expects people to behave in commercial transactions. Hence, the objective aspect – whether a reasonable person in society would consider it to be an unacceptable pressure – would be less of a concern. Such a broad, general principle would clarify the doctrinal relationship between the unjust factors and benefit the practical application of this aspect of private law.

