

Research Report

Research Problem

This research focussed on how different perspectives on autonomy can help our understanding of undue influence cases involving surety wives and help to highlight how coercive relationships can negate their consent and consequently what the law's response might look like.

In particular, how the supposed impartiality of contract law plays out in practice for these women. Contracts are about human relationships, yet contract law finds itself relatively ill-equipped and reluctant to address the inequalities of bargaining power arising within the family context, disproportionately disadvantaging women. Doctrines like undue influence, which seek to protect vulnerable contracting parties from exploitation, should take a more contextualized approach. Even where consent appears voluntary, there remains the risk that we have failed to fully appreciate sociocultural factors and different types of vulnerability.

Context

Undue influence is broadly defined as 'the exploitation of a relationship of influence to obtain an undue advantage'. As part of the court's equitable jurisdiction, the doctrine seeks to protect parties from the abuse of relational influence. It arises where contracts are entered into under pressure, falling short of the threshold for duress, which fails to account for subtler exploitations of pressure.

Surety wife cases describe a husband who takes a second charge out for the matrimonial home to secure his debts, procuring his wife's signature by undue influence. The cases arise when the banks seek to repossess the homes and the wives seek to set aside the charge.

Methodology and Process

I began with a broad reading of the conventional academic literature describing the doctrine of undue influence in order to solidify a basis from which I could begin unpicking problematic areas. Simultaneously, I read feminist perspectives on contract law to identify the general schools of thought being challenged and decide on a theoretical basis and lens from which I could analyse the doctrine, settling on autonomy.

Generally, contract law follows a very narrow and liberal view of autonomy. Autonomy is typically seen as the epitome of self-reliance and independence. We presuppose that individuals contract for their own gain and can choose which obligations they impose upon themselves. Defining autonomy in this way ignores how individuals are shaped by the relationships they engage in. Independence is typically understood as both the antithesis and rival of community. A false dichotomy between individuals and their constitutive communities is reinforced by not adequately recognising how fundamental care and dependence are to our relationships. The

issue with reinforcing such a dichotomy is that it applies this narrow conception of autonomy to the actors of undue influence cases. It is overly commercialistic in ways that fail to capture the different motivations and pressures within intimate personal relationships.

I chose to contrast this conception with Jennifer Nedelsky's relational view of autonomy, as propagated in her book "The Law's Relations." A relational approach to autonomy allows a narrower focus on how power relations operate within the law and how the law, in turn, encourages certain relationships over others. Certain relationships encourage specific values. Nedelsky argues that seeing autonomy as relational allows us to structure our relations in a way that promotes rather than undermines autonomy. As such, ensuring surety wives make autonomous decisions and protecting their consent does not threaten the existence of surety transactions as a social good but protects their continued validity and longevity. Autonomous individuals depend on each other, so encouraging interdependence promotes individual autonomy.

This aligned with recent research since the enactment of the Domestic Abuse Act 2021, testament to society's own changing perceptions of violence and control that can be experienced by women.

Recent research between Refuge, a domestic abuse charity and Co-op bank revealed that perpetrators often use joint financial products to inflict economic abuse. Under s.1 of the Domestic Abuse Act 2021, economic abuse has been defined as any behaviour that substantially affects the victim's ability to acquire, use or maintain money and property or other goods or services. Surety wives are often deprived of their main asset, the matrimonial home.

There is the risk that financial misconduct within a relationship is an indicator of other severe abuses of relational power, which would limit a wife's ability to engage effectively with the doctrine of undue influence. An example would be how she might respond to independent legal advice. An awareness of how abuse operates helps to highlight why a relational basis for analysis allows for a better appreciation of a surety wife's context.

From here, I began building a bank of case law specific to surety transactions and listing the arising issues with a view to how they align to Nedelsky's theories.

All current undue influence tests reflect an inherently male standard of commercial self-interest and an assumption of equal bargaining power within couples. They ignore subtle relational pressures that lead prima facie invulnerable actors to fall victim to subtler and more insidious forms of power play. All women today can still be vulnerable to the phenomenon described as sexually or emotionally coerced debt, which describes situations where one partner becomes responsible for the other partner's financial debts after being misled into taking more debt than they anticipate or know about under their name. A woman is less likely to view her decision in economic and business terms but rather with a view to the impact on her marital relationship. Social reality is perceived differently by a wife compared to her husband. Most cases do not suggest the equal joint financial decision-making assumed by the perfect marriage stereotype

applied to them. Wives are simultaneously encouraged to support this and faulted for relying on these statements. The same dicta runs through most cases: "Marriage is considered to be a partnership constituting the ultimate union of affections and interests," in which a wife is assumed to share in her husband's success. "If the marriage is secure and the indebtedness has been incurred by the business which provides the husband's livelihood and on which the prosperity of his wife and family depends, there may be no real conflict between the interests of the husband and the wife."

Conclusions

Societal norms heavily affect undue influence because obligations or behavioural expectations mirror what the respective jurisdiction considers acceptable and desirable. Our assumptions about wives' and their husbands' roles diverge. A relational approach allows us to consider how societal relationship norms play out in surety decisions. Particularly, given the broad and undefined definitions at play within undue influence, there is scope for various societal stereotypes to shape the application of the doctrine.

The line between what is undue and coercive influence and naturally occurring is hard to define. A 'relationship of influence' is very broad and so there is a need to distinguish between what is considered ordinary and extraordinary.

Leaving definitions of "undue" and the interpretation of relationships to be made contextually relies too heavily on societal norms. Whether society changes the law or is changed by society, it remains that the law cannot be truly neutral. As such, any claims of objectivity, either through broad definitions or objective assessments of 'transactions calling for explanation,' ignore that they implicitly reinforce inequalities. If we are to be more than objects socially and legally - we need to shift from people as discrete units to beings defined by their relations. Where the law fails women, it fails everyone by reinforcing existing stereotypes that hinder relations of equality.

However, theoretical concerns need to be translated into practical and actionable points in order to be able to hope to effect any change. To simply criticise is not enough.

Next Steps for the Law

Undue influence raises an evidential presumption, which can be rebutted if the defendant shows the transaction is the consequence of the complainant's full, free and informed consent. This is typically demonstrated by proving that the complainant received adequate independent advice concerning the transaction. It seems to be the turning point upon which cases either succeed or fail.

Assistance in a vacuum has little value and affirms rather than relieves the wife's isolation. Allowing creditors to escape private meeting requirements by insisting on independent advice isolates surety wives from negotiations surrounding loan transactions. Given that we expect women to be active agents in surety transactions and require commercial knowledge from them,

more has to be done to integrate them into the process. The message is that contracting parties should look after themselves. Still, the law does little to assist surety wives in doing so while both acknowledging and condemning a surety wife's probable lack of commercial experience and knowledge.

It is necessary to ask whether advice aims only to inform or emancipate from vitiating factors. In some cases, a surety wife should be advised against signing. Focus is on the mere presence of advice rather than its adequacy. As such, the requirement is easy to satisfy by creditors. It would be a step in the right direction if the advice considered the woman's context, whether that is commercial ignorance or a coercive husband with control over finances.

Reflections

This was an incredibly enriching process. I learnt how to go beyond merely reading the facts and justifications given in a case but how to track case history and situate it within the wider context it exists in. By looking at preceding cases mentioned in a judgement and the successive citations I was able to grasp the development of the case law and identify the broader motivating factors and link them to historical and social ideologies. Seeing the link between societal perspectives and how they implicitly impact judgements led to both disillusionment and hope. It was difficult to believe that impact could be made when standing against decades of entrenched stereotypes and presumptions about our relationships and human interactions within the home. However, the more recent cases and push by the criminal law to acknowledge and identify coercive and controlling behaviour within domestic abuse and seeing this translated into the bank's codes of practice gives hope that the law can change incrementally.

Given that law changes society and society changes the law, doctrines are applied to accommodate social values. Human rights can only be fully understood with recourse to their socio-cultural context, which changes over time. Consequently, so does our prioritisation and definition of rights meaning that our definition of autonomy is fluid and amenable to change.

Engaging with overarching theories which shape the direction contractual cases take and suggesting how we might shift our near unquestioning application of these, with little recourse to the definition of, for example, autonomy and how it might change have highlighted a need to continually question what we mean when we use the same language to justify conclusions which felt right in a different time in society.

I was particularly struck by how many of the neoliberal arguments we make now can be seen as part of a new "social conservatism" as coined by Melinda Cooper. This is in the sense that by critiquing existing structures, there is an implicit approval that, at some point, they functioned well or that there are elements we should protect. Fitting into existing frameworks, such as those of the world of commerce, becomes partly an exercise of garnering concessions where they are granted by parties that already exist and dominate those spheres.

As such, we expect wives to integrate into a field where they previously lacked legal personality. Historically, common law always considered contracts between husband and wife void and unenforceable because married women were entirely under their husband's power and so could not consent freely. They were expected to endure abuse from their husbands due to the social and financial security their marriage granted them. Without recognising the role of norms, we risk repeating the same damaging patterns. To classify an issue as purely private is to grant it some legal impunity, which allows problematic relations to continue.

Ultimately, it has become clear that our constitution of self is only made possible by the societal structures in place, but ultimately, we should get a say in how we place ourselves within them. This is where the law will maintain an ever pertinent role in allowing us to act and react as social conscience grows and that there is hope for change for the better even if the first steps toward this take the form of criticism and identification of issues and the way forwards is unclear. Ultimately, this project has reinforced that the examination of how undue influence both reflects and informs social values can help explain and begin to bridge the disconnect between legal theory and practice by identifying the factors that fuel this divide.