

THE LIABILITY OF THIRD PARTY VOLUNTEERS FOR UNDUE INFLUENCE

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I INTRODUCTION

If a claimant, C, gives property to the defendant, D, as a result of actual or presumed undue influence over C by another person, X, why is D liable to rescind the gift? A common misconception, given Equity's ubiquitous concern with conscience, is that D's liability must be based upon fault and that this will be established if D was aware of the relationship of influence between C and X.¹ Professor Burrows has challenged this assumption by reference to eighteenth and nineteenth century authorities involving third party volunteers to relationships of influence.² At issue in these early undue influence cases tended to be whether liability to return a gift to C by way of rescission could be avoided if C had made the gift to X's innocent spouse or children, rather than directly to X. The courts were adamant that it could not. Professor Burrows concludes that a volunteer, D, who receives property directly from C as a result of a relationship of influence between C and X is subject to strict liability, meaning a liability not dependent upon fault.³ He uses this finding to support his argument that other forms of equitable third party liability, such as recipient liability for breach of trust, should also be strict, subject to defences, in relation to volunteers.

The objective of this paper is to explore why D, the recipient of a gift tainted by the actual or presumed undue influence of X over C, must rescind the gift irrespective of whether he or she was aware of the relationship of influence between X and C, whereas a third party purchaser for value without notice of the relationship of influence is not liable. Are there explanations for the cases that would support the orthodox understanding of equitable third party liability as being grounded in the third party's equitable wrongdoing? Or is this truly an example of strict liability in equity that could, or should, be applied more widely as Professor Burrows suggests?

The discussion is organized in three parts: first, the relevant case law is briefly reviewed; secondly, possible rationales for D's liability are considered and; finally, the implications for our understanding of equitable recipient liability for breach of

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¹ The choice of a neutral term, 'awareness', rather than knowledge or notice is deliberate. The question of what level of awareness (actual knowledge or some level of notice according to the general law priorities rules or otherwise) is required for third party liability in relation to equitable doctrines such as undue influence is contentious. The debate is not directly relevant because, as we shall see, if D is a volunteer, liability does not depend on D's awareness of the relationship of influence at all. 'Awareness' is taken from Dennis R Klinck, "'The Nebulous Equitable Duty of Conscience'" (2005) 31 *Queen's Law Journal* 206.

² Andrew Burrows, 'The Australian law of restitution: has the High Court lost its way?' in Elise Bant and Matthew Harding, *Exploring Private Law* (Cambridge University Press, 2010) 67, 81. See also, Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 426.

³ The liability is subject to defences and is conceptualised in unjust enrichment terms. This paper does not evaluate the unjust enrichment aspect of Burrows argument.

trust are discussed. Three points should be noted before beginning the discussion. The doctrines of actual undue influence and presumed undue influence are not distinguished for the purposes of this paper, although in the modern law they are conceptually distinct.⁴ Historically, the courts did not distinguish between actual and presumed undue influence and most of the case law relevant to third party volunteer liability arose in the nineteenth century. Nor will this paper dwell on the related modern debate concerning whether presumed undue influence liability is grounded in the vitiation of C's consent or X's wrongdoing or both.⁵ The second preliminary point is that undue influence is one of several vitiating factors in equity that allow for rescission of a gift or contract; from time to time reference will be made to the other grounds for rescission in equity and at common law, but this paper does not purport to explain third party volunteer liability for all such doctrines. The final preliminary point is that although in the example posited above, D is a 'direct recipient' from C, it may be helpful sometimes to consider the related position of a 'remote recipient' from C, that is, where D receives the gift from X who received it as a gift from C.⁶

II THE CASE LAW

It is clear from as early as the eighteenth century that an innocent volunteer, D, who receives an inter vivos⁷ gift through the actual or presumed undue influence of X over the donor, C, cannot retain the gift. It does not matter whether or not the gift is made by way of deed nor whether it is made directly or by way of a trust.⁸ The leading case is *Bridgeman v Green* decided at first instance in 1755 and, on a rehearing, in 1757.⁹ At issue was the validity of various gifts totaling £5,000 made by Henry Bridgeman due to the undue influence of his 'artful servant', George Green.¹⁰ The gifts were made to George himself (£2,600), George's wife (£400), George's brother, Thomas, (£1,000) and to a lawyer, William Lock, in trust for William's son

⁴ Actual undue influence is the equitable counterpart of, and virtually no different to, the common law doctrine of duress. See, eg, *Williams v Bayley* (1866) LR 1 HL 200 (equitable undue influence) and *Kaufman v Gerson* [1904] 1 KB 591 (common law duress); N Seddon, 'Compulsion in Commercial Dealings' in P D Finn, *Essays on Restitution* (Law Book Co, Sydney, 1990) 138, 144. The operation and elements of the doctrine of presumed undue influence are stated differently in England and Australia. See, eg, *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773; *Johnson v Buttress* (1936) 56 CLR 113.

⁵ See, eg, Peter Birks and Chin Nyuk Yin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (1998, Clarendon Press, Oxford) 57; Rick Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"?' (1996) 16 *Oxford Journal of Legal Studies* 503; Rick Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 *Oxford Journal of Legal Studies* 65. This author prefers Bigwood's views.

⁶ The chain of remote D's can continue so long as no bona fides purchaser for value without notice intervenes. The term 'remote recipient' is taken from Dominic O'Sullivan, Steven Elliot and Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, Oxford, 2008) Chapter 21, 483.

⁷ The equitable doctrine of undue influence does not apply to testamentary gifts. See Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617.

⁸ In *Bridgeman v Green* (1755) 2 Ves Sen 627; 28 ER 399; (1757) Wilm 56; 97 ER 22, direct payments, deeds and trusts are all mentioned. For a twentieth century example of a deed of trust being set aside against third party volunteers, see *Giarrantano v Smith* (1985) NSW ConvR 55-267.

⁹ (1755) 2 Ves Sen 627; 28 ER 399; (1757) Wilm 56; 97 ER 22.

¹⁰ George Green is variously described in the litigation as footman, valet and butler which may indicate the rise in his master's esteem. For an interesting discussion of the meaning of 'artful' in the eighteenth and nineteenth centuries and the social norms implicit in its usage in the court of Chancery and in Dickens' writing, see Carla Spivack, 'Why the Testamentary Doctrine of Undue Influence Should Be Abolished' (2010) 58 *Kansas Law Review* 245, 257-258.

(£1,000). At first instance, Lord Hardwicke LC treated the brother and the lawyer as clearly implicated in a fraud.¹¹ As to the fact that William Lock received the gift on trust for his son, Lord Hardwicke considered the trust a sham and treated the gift as made to Lock himself.¹² Relief was given for the full £5,000 with no separate mention of Green's wife.

On the rehearing before the Lord Commissioners, Lord Wilmot, with whom the other Lord Commissioners agreed, affirmed Lord Hardwicke's decree.¹³ But in doing so, Lord Wilmot considered whether it was necessary to show that Green's wife and brother were implicated in the undue influence. His colourful conclusion was that it was not necessary:

There is no pretence that Green's brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it...¹⁴

This statement provides strong support for Professor Burrows' suggestion that D's liability should be conceptualized as a non-fault liability.

Lord Wilmot shared Lord Hardwicke's view that the trust for the benefit of Lock's son was a sham, but even if it were a genuine trust, the court should not enforce it:

But if it was given to the son, we cannot execute the trust reposed in us for his benefit more faithfully, than by throwing such a poisonous weed out of his fortune...¹⁵

Thus, even where D is the volunteer beneficiary of a trust tainted by actual or presumed undue influence exercised over the settlor, the trust will be set aside by the court.

The robust attitude in *Bridgeman v Green* was endorsed by Lord Eldon in the early nineteenth century case of *Huguenin v Baseley* concerning deeds of settlement made by C that benefitted not only C's spiritual adviser, a clergyman, but also the clergyman's wife and children.¹⁶ It was argued before Lord Eldon that the public policy that precluded the clergyman, X, from receiving a gift from the person with whom he stood in a relation of confidence, should not extend to 'the disappointment of the children'.¹⁷ Lord Eldon disagreed:

¹¹ (1755) 2 Ves Sen 627, 628; 28 ER 399, 400: '[T]hey did what they thought fit, and divided his property, as they pleased.'

¹² Ibid 2 Ves Sen 629; 28 ER 401.

¹³ (1757) Wilm 56; 97 ER 22.

¹⁴ Ibid Wilm 64-65; 97 ER 25.

¹⁵ Ibid Wilm 73; 97 ER 28.

¹⁶ (1807) 14 Ves Jun 273; 33 ER 526.

¹⁷ Ibid 14 Ves Jun 281; 33 ER 529.

[A]nd I should regret, that any doubt could be entertained, whether it is not competent to a Court of Equity to take away from third persons the benefits, which they have derived from the fraud, imposition, or undue influence, of others.¹⁸

Bridgeman v Green and *Hugenin v Baseley* have always been considered correct when cited in subsequent cases involving undue influence and third parties.¹⁹

The treatment of third party volunteers in *Bridgeman v Green* is also consistent with Chancery's treatment of remote recipients of the benefit of a transaction able to be rescinded on some equitable ground.²⁰ Thus, D, who is given property by X that was the subject of a transaction tainted by undue influence between C and X, is also liable to rescission. In the older cases D tended to be X's heir. An example is *Charter v Trevelyan* which concerned the fraud of a steward who secretly purchased property from his employer at an undervalue.²¹ The fraud was discovered many years later and a successful action to rescind the purchase was then brought against the steward's son who had inherited the property. Both before the Master of the Rolls and on appeal, the courts were adamant that subsequent heirs to the tainted property would be liable to restore it. Lord Campbell quoted with approval from the judgment of the Master of the Rolls, Sir Charles Pepys:

[T]hose who may be disposed fraudulently to appropriate to themselves the property of others, may be assured that no time will secure them in the enjoyment of their plunder, but that their children's children will be compelled by this Court to restore it to those from whom it had been fraudulently abstracted.²²

¹⁸ Ibid 14 Ves Jun 289; 33 ER 532.

¹⁹ *Cooke v Lamotte* (1851) 15 Beav 234, 250; 51 ER 527, 533 (Sir John Romilly MR); *Bainbrigge v Browne* (1881) 18 Ch D 188, 196-197 (Fry J); *Morley v Loughnan* (1893) 1 Ch 736, 757 (Wright J); *Barron v Willis* [1899] Ch D 578, 585 (Cozens-Hardy J); *Barron v Willis* [1900] 2 Ch 121, 133 (Lindley LJ); *Wright v Carter* [1903] 1 Ch 27; *Bullock v Lloyds Bank Ltd* [1955] 1 Ch 317; *O'Sullivan v Management Agency & Music Ltd* [1985] 1 QB 428, 464 (Fox LJ); *Tahir v Hassan* (Unreported, Chancery Division, Edward Nugee QC, 11 March 1983). An Australian case that affirms the rule, but did not have to apply it is *Berk v Permanent Trustee Co* (1947) 47 SR (NSW) 459, 463 (Nicholas CJ in Eq). See also, *Giorgi v European Asian Bank AG* (Unreported, Supreme Court of New South Wales, Young J, 21 February 1981).

²⁰ See, eg, *Gould v Okeden* (1731) 4 Brown 198; 2 ER 135; *Small v Attwood* (1832) You 407, 535-537; 159 ER 1051, 1103-1104 (rev'd on other grounds). Both cases are cited in O'Sullivan et al, above n 6 [21.04].

²¹ *Trevelyan v Charter* (1835) LJ 4 (NS) Ch 209; *Charter v Trevelyan* (1842, 1844) 11 Cl & Fin 714; 8 ER 1273. The case is also reported at (1846) 9 Beav 140; 50 ER 297.

²² (1842, 1844) 11 Cl & Fin 714, 740-741; 8 ER 1273, 1283-1284 (Lord Campbell). The passage as recorded in the report cited by Lord Campbell is slightly different: 'It is fitting that those who thus appropriate the property of others, should be assured, that in this Court no time will secure to them the fruits of their dishonesty, but that their children's children will be compelled to restore the property of which their ancestors have fraudulently possessed themselves.' *Trevelyan v Charter* (1835) LJ 4 (NS) Ch 209, 214 (Sir Charles Pepys MR). O'Sullivan et al, above n 6, 484 say the rule is 'an old one'. They cite *Joy v Bannister (No 2)* (1617), *Wyatt v Wyatt* (1618-1620) in J Ritchie, *Reports of Cases Decided by Francis Bacon in the High Court of Chancery* (1617-1621) (1932) 36, 126. See also *Vane v Vane* (1873) 8 Ch App 383, 397 (James LJ) quoted below in text to n 34.

Thus, the recipient of a gift tainted by undue influence (or another equitable wrong allowing rescission, such as misrepresentation or fraud), was liable to restore the property to C, whether the property had been received directly from C or indirectly from the wrongdoer, X.

Interestingly, the principle in *Bridgeman v Green* has been affirmed in the twentieth and twenty-first centuries, but rarely applied. Instead, the strict liability of third party volunteers appears to have been glossed over by courts more accustomed to dealing with third party purchasers in transactions tainted by the undue influence of another. This may be due to the explosion in the twentieth century of litigation concerning the enforceability by financial institutions (D) of loans tainted by the misrepresentation or undue influence of the debtor (X) where the guarantor (C) and X are intimately related. The sheer number and significance of such cases has meant that the law concerning third parties to undue influence in modern cases is often stated in terms applicable *only* to third parties who give value. A striking example is Lord Browne-Wilkinson's well-known judgment in *Barclays Bank plc v O'Brien*.²³ Lord Browne-Wilkinson gave the misleading impression that the liability of third parties to undue influence or misrepresentation depended entirely on notice:²⁴

The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice).²⁵

The reasoning employed in twentieth century Australian undue influence cases also suggests that the differences between a third party volunteer and a third party purchaser are sometimes overlooked or glossed over by the courts.²⁶ In cases involving volunteer spouses, either the fact that D is a volunteer has been noted, but the court goes on to consider D's notice,²⁷ or D's liability has been couched only in terms of whether D had notice.²⁸ These cases perhaps suggest some ambivalence

²³ [1994] 1 AC 180.

²⁴ The inaccuracy of Lord Browne-Wilkinson's statement of principle in this respect is noted in John R F Lehane, 'Undue influence, misrepresentation and third parties' (1994) *Law Quarterly Review* 167, 171.

²⁵ [1994] 1 AC 180, 195.

²⁶ See, eg, *Khan v Khan* [2004] NSWSC 1189, (2004) 62 NSWLR 229, 235 where Barrett J focused upon the knowledge of the third party purchaser in his discussion of the liability of third parties generally to undue influence. With respect, although his Honour's statement of the law is correct with respect to the facts of the case, like Lord Browne-Wilkinson's judgment in *Barclays Bank PLC v O'Brien*, it is stated too widely and does not take account of the more onerous liability of volunteers.

²⁷ See, eg, *Quek v Beggs* (1990) 5 BPR [97405]. In relation to gifts of real property to X and his wife, D, jointly, McLelland J correctly recognized that D was liable to the same extent as X. But D's notice of the relationship of influence between X and C was treated as of equal importance to her being a volunteer, whereas her status as a volunteer should have sufficed: 'The fact that [X's wife] was a joint recipient of the gifts of the properties is of no consequence, she being both a volunteer and on notice of the relationship between her husband and [C].'

²⁸ See, eg, *McCulloch v Fern* [2001] NSWSC 406 (Unreported, Palmer J, 28 May 2001). The case concerned a gift by C jointly to X and X's husband, D, of money to discharge a mortgage over land owned by X and D. Palmer J held at [77] that it was 'inconceivable' that D did not know that [C] was subject to the undue influence of his wife, X. See also [80]. See also Pauline Ridge, 'McCulloch v Fern' (2002) 18 *Journal of Contract Law* 138.

towards the concept of D's strict liability.²⁹ In other Australian cases, involving gifts to members of X's family, judges have effectively treated the facts as involving only C and X. An example is *Giarrantano v Smith* in which a widow declared herself trustee of her land for herself and her four children in equal shares because of the actual undue influence of her father in law.³⁰ Powell J set aside the deed of trust without any separate mention of the position of the volunteer children.

Notwithstanding its lack of prominence in modern cases, the principle in *Bridgeman v Green* has not been explicitly challenged and indisputably remains good law. The next Part of this paper considers possible rationales for the principle.

III POSSIBLE RATIONALES FOR D'S LIABILITY

There are a number of cumulative rationales for why D's liability is strict. None is conclusive on its own, but in combination they help to justify the liability. The objective in this Part of the paper is to identify these rationales and evaluate their relative strength.

A *Pragmatism: X and D Are Treated As One Entity*

The rationale for D's liability that is most evident in the early case law is purely pragmatic: it would be too easy for X to perpetrate a fraud if a gift tainted by undue influence were beyond recall once placed in the hands of an innocent D. Bolstering this concern was the fact that the only available remedy was to set aside the gift against D: X is not personally liable for C's loss of the subject matter of the gift. In this vein, Lord Eldon in *Hugenin v Baseley* approved of Lord Hardwicke's reasoning at first instance in *Bridgeman v Green*:³¹

Lord Hardwicke observes justly, that, if a person could get out of the reach of the doctrine and principle of this Court by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud.³²

This is especially so when D and X are closely related. Thus, in the early cases the courts treated gifts to X's wife and children as having been made to X himself, and ignored the tripartite nature of the transaction.³³ Underpinning this rationale is the notion of a family being one interdependent and homogenous entity. On this

²⁹ An exception is Bryson J's judgment in the NSW Supreme Court's decision of *Hartigan v International Society for Krishna Consciousness Inc.* [2002] NSWSC 810. Bryson J correctly noted the effect of D being a volunteer: [26]. But his Honour still went on to give additional reasons why D was liable (D was directly involved in the transaction and D's agents had notice of the influence).

³⁰ *Giarrantano v Smith* (1985) NSW ConvR 55267. See also, *Smith v Smith* (Unreported, New South Wales Supreme Court, Bryson J, 12 July 1996) at 23 and 26 where parents and a son were treated as one entity for the purposes of liability.

³¹ (1755) 2 Ves Sen 627, 629; 28 ER 399, 401 (Lord Hardwicke LC): 'here he is a trustee for a considerable sum given to his son, which I must consider as given to himself: otherwise all frauds would be easily covered...'

³² (1807) 14 Ves Jun 273, 289; 33 ER 526, 532.

³³ See, eg, *Bridgeman v Green* (1757) Wilm 56, 64-65; 97 ER 22, 25 (Lord Wilmot): 'his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon'.

reasoning, so long as D and X are closely related, X will benefit from a gift to D just as much as if the gift were made to X.

A similar idea of wealth being owned by a family as a whole rather than by individual members of the family can be seen in the remote recipient cases of the nineteenth century, that is, where the gift was made by C to X and X then gave (by deed or will) the subject matter of the gift to D:

[T]his Court will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language, from his children and his children's children, or, as was said in *Huguenin v Baseley* and *Bridgeman v Green*, from any persons amongst whom he may have parceled out the fruits of his fraud.³⁴

A further, perhaps more speculative, factor underpinning the pragmatic rationale is that it often will be more likely than not that a D who is a close (adult) relative of X will actually know, or have reason to suspect, that the gift was tainted by the relationship of influence between X and C. Thus, on the facts of *Bridgeman v Green*, it seems highly unlikely that George Green's wife and brother did not suspect anything was amiss. Strict liability removes the need to prove notice in situations where notice is, more likely than not, present.

The pragmatic rationale is less compelling in scenarios where C and D are not so closely related. And the reasoning breaks down entirely when there is no intimate connection at all between X and D. For instance, if in the well-known case of *Allcard v Skinner*, the religious postulant, C, had given her assets directly to a charitable group instead of, in the first instance, to her mother superior, X, it would be impossible to say that the gift to the charity equated to a direct gift to the mother superior or that the charity would be likely to have notice of the relationship of influence between C and X.³⁵

On the other hand, the rationale does not depend upon undue influence being conceptualized in terms of X's 'equitable fraud' as is done in the early cases. Even if the doctrine of undue influence is explained in terms of the vitiation of C's consent to the transaction, rather than being dependent upon wrongdoing by X, the pragmatic rationale can be reformulated as being that otherwise C's rights would be too easily divested.³⁶

It is questionable how far the pragmatic rationale is justifiable today: a modern court is most unlikely to treat a family as one entity for equitable liability purposes,³⁷ although it still may be the case that an adult D in a close relationship with X is more likely to have notice of the relationship of influence between X and C. It also remains the case that the only available remedy is to set aside the transaction with D. The weakening in strength of the pragmatic rationale may explain why the modern Australian undue influence judgments noted in Part II appear uneasy in attributing

³⁴ *Vane v Vane* (1873) 8 Ch App 383, 397 (James LJ).

³⁵ (1887) 36 Ch D 145.

³⁶ See above n 5.

³⁷ See eg, *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89, 148 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

strict liability to D and have tended to emphasise additional grounds, such as notice, for D's liability.³⁸

B *The Nature of Rescission*

The remedy for a successful undue influence claim is rescission of the gift, that is, the reversal of the process by which the gift was made and the re-vesting in C, with any necessary adjustments and allowances, of the subject matter of the gift. C is 'to be put back into his old position.'³⁹ C's entitlement to an order of rescission arises immediately the gift is made.⁴⁰ Equity is exercising its auxiliary jurisdiction in relation to rescission for undue influence. This means that, unlike common law rescission and rescission in equity's concurrent jurisdiction, the court's order is necessary to effectuate the rescission as well as to make any consequential orders.⁴¹ In other words, rescission is not a self-help remedy in this context. The gift is voidable until the court order of rescission. The effect of rescission is to avoid the transaction from the outset.⁴²

It is not necessary to demonstrate that the parties can be restored exactly to their previous positions for rescission to be available so long as 'the court can achieve practical justice between' them.⁴³ This is accomplished, where necessary, through the power to 'take account of profits and...direct inquiries as to allowances proper to be made for deterioration...'.⁴⁴ The court will consider what is practically just for both parties, not just C, and will apply the maxim 'he who seeks equity must do equity'.⁴⁵ Particularly where D is innocent, which is the case in our scenario, the court will be alert to avoid a harsh outcome to D.⁴⁶ A court has considerable discretion in moulding the remedy:

³⁸ See above, text to nn 27-30.

³⁹ *Newbigging v Adam* (1886) 34 CH D 582, 588 (Cotton LJ). The jurisdictional sources of the equitable remedy do not affect the mechanics of the rescission exercise, so it is possible to draw on all equitable rescission cases to understand how rescission operates. See *Vadasz v Pioneer Concrete (SA) Pty Limited* (1995)184 CLR 102, 111 and n 27 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁴⁰ *Maguire v Makaronis* (1997) 188 CLR 449, 467 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

⁴¹ See R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (LexisNexis Butterworths, 4th ed, 2002) [24-085] where it is noted that the distinction between the concurrent jurisdiction in equity and the auxiliary and exclusive jurisdictions in equity is not always made in the cases. See, eg, *Alati v Kruger* (1955) 94 CLR 216, 224 (Dixon CJ, Webb, Kitto and Taylor JJ). See also, David Wright, *Remedies* (Federation Press, Sydney, 2010) 148-149. There has been confusion as to when rescission can be a self-help remedy effected by the innocent party, rather than by the court. The better view is that a court order was always necessary for rescission in equity's exclusive jurisdiction. See Janet O'Sullivan, 'Rescission as a Self-Help Remedy: A Critical Analysis' (2000) 59 *Cambridge Law Journal* 509. O'Sullivan argues convincingly that this should be extended to all instances of rescission; that is, rescission should never be a self-help remedy. Contra Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 90.

⁴² *Alati v Kruger* (1955) 94 CLR 216, 224 (Dixon CJ, Webb, Kitto and Taylor JJ).

⁴³ *O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428, 458 (Dunn LJ), 466 (Fox LJ). *Vadasz v Pioneer Concrete (SA) Pty Limited* (1995)184 CLR 102, 111 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁴⁴ *Alati v Kruger* (1955) 94 CLR 216, 223 (Dixon CJ, Webb, Kitto and Taylor JJ).

⁴⁵ *Cheese v Thomas* [1994] 1 WLR 129, 136 (Sir Donald Nicholls VC); *Vadasz v Pioneer Concrete (SA) Pty Limited* (1995)184 CLR 102, 115 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁴⁶ *Cheese v Thomas* [1994] 1 WLR 129, 138 (Sir Donald Nicholls VC). See also, *Maguire v Makaronis* (1997) 188 CLR 449, 472 (Brennan CJ, Gaudron, McHugh and Gummow JJ): 'the scope of the equity for rescission may be determined by the nature and extent of the conduct giving rise to the equity for rescission.'

As with the jurisdiction to grant relief, so with the precise form of the relief to be granted, equity as a court of conscience will look at all the circumstances and do what fairness requires.⁴⁷

If the gift to D was a direct payment of money, then rescission should be straightforward: D must pay C an equivalent sum, plus interest.⁴⁸ The authors of *The Law of Rescission* suggest that, in principle, rescission as such is not necessary at all here for there is no inconsistent legal instrument needing to be set aside.⁴⁹ Nonetheless, they acknowledge that the courts have not taken this approach and tend to 'set aside' gifts of money in the same sense as setting aside an instrument of gift.⁵⁰ If the subject matter of the gift is an enduring asset, rather than money, then the process of rescission becomes more involved. The remedy of rescission has received a great deal of attention in recent years,⁵¹ particularly in relation to its proprietary consequences.⁵²

Rescission is possibly one of the mildest of equitable remedies in terms of its impact upon a defendant and rescission of a gift made to an innocent D should be a relatively straightforward instance of the remedy. C has nothing to return so the only question is whether it is practicable for D to return the gift. The subject matter of the gift is restored to its rightful owner where that is still possible without undue hardship to D. Unlike other equitable remedies, such as equitable compensation and account of profits for instance, the impact of rescission is limited in its scope by the terms of the original transaction between C and D. That is, D is not subjected to an unbounded and potentially onerous liability. Although the mildness of rescission is not always viewed as a strength,⁵³ it is in this context and it does mean that D's liability can be more easily explained. If the primary remedy for undue influence is bounded in its impact, restitutionary in focus and sensitive to changes in D's position since the gift was made, one can understand why even an innocent D would be liable. The property (or payment) is restored to C and D is returned to his or her original position. The status quo resumes. Of course, this rationale for D's liability is weakened to the extent that remedies other than rescission (and with a more onerous impact upon D) are countenanced.⁵⁴

⁴⁷ *Cheese v Thomas* [1994] 1 WLR 129, 137 (Sir Donald Nicholls VC). The passage goes on to list examples of how this principle has been applied.

⁴⁸ *Maguire v Makaronis* (1997) 188 CLR 449, 475-7.

⁴⁹ O'Sullivan et al, above n 6 [29.35]: 'In the eyes of the law the transaction is ineffective as from the outset, and the donor's right is to enforce a claim to repayment that vested at the moment the moneys were paid.'

⁵⁰ *Ibid* [29.34]. The example cited is *Hammond v Osborn* [2002] EWCA Civ 885 [16], [33] (Nourse LJ).

⁵¹ See, eg, O'Sullivan et al, above n 6.

⁵² See, eg, Sarah Worthington, 'The Proprietary Consequences of Rescission' [2002] *Restitution Law Review* 28; Ben McFarlane, *The Structure of Property Law* (Hart Publishing, Oxford, 2008); Birke Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 *Cambridge Law Journal* 324; Elise Bant, 'Trusts, powers and liens: An exercise in ground-clearing' (2009) 3 *Journal of Equity* 286.

⁵³ Sarah Worthington, for example, bemoans the ease with which C can lose her right to rescind and then be left with no remedial alternative: 'The Proprietary Consequences of Rescission' [2002] *Restitution Law Review* 28.

⁵⁴ See the discussion of *Treadwell v Martin* (1976) 13 NBR (2d) 137; 67 DLR (3d) 493 and *Dusik v Newton* (1985) 62 BCLR in Meagher et al, above n 41, [15-155]. See also, *Mahoney v Purnell* [1996] 3 All ER 61.

C *The Fragility of Gifts*

The voluntary nature of the transaction between C and D has been used to explain D's liability in three ways, not all of which are convincing.

First, it is argued that gifts are more easily overturned than contracts because they lack the normative backing of the principle of *pacta sunt servanda*.⁵⁵ To this can be added the need to respect the contracting parties' allocation of risk under the contract and the importance in commercial dealings of certainty and security of receipt.⁵⁶ That is, there are strong public policy arguments against undoing a bargain which do not apply to a gift. When a gift is tainted by undue influence, there are no such countervailing policy factors to prevent rescission so long as the parties can be restored in substance to their original positions. Thus, if C contracted with D, it must be shown that D was aware of the relationship of influence; that is, that D was at fault. Whereas, if C made a gift to D, no personal fault on the part of D is required.

The suggestion that gifts are more vulnerable to legal intervention than contracts must be treated with caution.⁵⁷ Tang Hang Wu has argued convincingly that gifts have an important role in the 'moral economy' similar in significance to that of contracts in the market economy and therefore should not be too readily overturned.⁵⁸ His arguments find support in the law of mistake. Stricter tests apply to rescind a mistaken deed of gift or trust in equity than to recover a mistaken (non-contractual, non-gift) payment at common law.⁵⁹ What emerges from Tang Hang Wu's thesis in relation to mistake is a hierarchy of transactions: contracts being the most difficult to overturn and direct payments made under a mistaken belief as to legal liability being the easiest to overturn. Gifts fall somewhere in the middle, depending upon whether equitable intervention is necessary to effect recovery.⁶⁰

Accepting Tang Hang Wu's argument that there are public policy reasons why courts should not be too ready to overturn gifts, these may not be as compelling in the undue influence context and, as Tang Hang Wu points out, they have not been generally recognized by the courts. Thus, the stronger policy reasons in favour of upholding contracts may still be a relevant factor in explaining D's strict liability as the donee of a gift. Security of receipt aside (which is accommodated by the requirements for rescission) there would seem to be fewer policy constraints on overturning gifts than for contracts.

A second version of the fragility of gifts rationale is that it is sometimes assumed that large gifts naturally cry out for explanation and must be defended. An extreme version

⁵⁵ O'Sullivan et al, above n 6, [29.22].

⁵⁶ See George E Parker III, 'Gifts: Mistake: Rights of the Donor, Donee and Their Successors in Interest to Relief' (1959) 58 *Michigan Law Review* 90, 92.

⁵⁷ Tang Hang Wu, 'Restitution for Mistaken Gifts' (2004) 20 *Journal of Contract Law* 1.

⁵⁸ *Ibid* 24: 'The gift is an important social practice meant to generate trust so as to form the basis of future action.'

⁵⁹ See, eg, *Pitt v Holt* [2012] Ch 132 (equity); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (common law).

⁶⁰ There is some uncertainty as to the appropriate test for recovery at common law of a mistaken direct gift of money. See *Deutsche Morgan Grenfell Goup plc v Inland Revenue Commissioners* [2007] 1 AC 558 [87] (Lord Schott of Foscote); *Pitt v Holt* [2012] Ch 132 [166] (Lloyd LJ).

of this notion was propounded by Sir John Romilly during his long office as Master of the Rolls in the mid-nineteenth century. In Romilly MR's view, the donee of a large gift was obliged to justify the propriety of the gift. It was 'a principle of high morality' that:⁶¹

in every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary that he should be able to establish, that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing; and if this be not done, the transaction cannot stand.⁶²

Thus, even if a relation of influence was not shown on the facts, the donee of 'a large pecuniary benefit' must show that the transaction was 'righteous'.⁶³ But even at the time this was doubted by other judges and legal commentators and it has been subsequently discredited altogether as a legal principle.⁶⁴

A third explanation of D's liability in terms of the fragility of gifts is given by the authors of *On Equity*.⁶⁵ They explain *Bridgeman v Green* on the basis of the equitable maxim that 'Equity will not assist a volunteer'.⁶⁶ But the maxim describes equity's strong reluctance to bind a donor in relation to an *incomplete* voluntary transaction⁶⁷ whereas, in our scenario, all necessary legal or equitable formalities have been complied with. In any event, recent courts have sometimes been more generous in validating even incomplete gifts.⁶⁸ Further undermining the argument of the *On Equity* authors is the presence of other instances where equity indubitably assists volunteers to enforce their equitable rights, most strikingly in the case of the beneficiaries of a trust who have not given consideration for their interests.

D *A Loose Conception of Agency: D 'Left Everything To' X*

The next possible rationale involves a loose conception of agency. On this explanation, X is considered to be the agent of D and hence D becomes liable for the equitable wrongdoing of X. The agency explanation for third party liability in undue influence cases emerged in the twentieth century in relation to surety cases in which C gave a security to D in relation to the debts of X (typically, C's husband). It was said that if D had left it to X to obtain the security, D would be bound by any equitable

⁶¹ *Cooke v Lamotte* (1851) 15 Beav 234, 241; 51 ER 527, 530.

⁶² *Ibid* 15 Beav 240-241; 51 ER 530. See also *Hoghton v Hoghton* (1852) 16 Beav 278, 298-299; 51 ER 545, 553 (Sir John Romilly); *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 193 (Lord Browne-Wilkinson); Lehane, above n 24, 169.

⁶³ *Hoghton v Hoghton* (1852) 16 Beav 278, 299; 51 ER 545, 553 (Sir John Romilly MR).

⁶⁴ *Yerkey v Jones* (1939) 63 CLR 649, 678-680 (Dixon J); *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 195 (Lord Browne-Wilkinson).

⁶⁵ Hon Peter W Young, Clyde Croft, Megan Louise Smith, *On Equity* (Lawbook Co, Sydney, 2009).

⁶⁶ *Ibid* [5.470].

⁶⁷ *Ellison v Ellison* (1802) 6 Ves Jun 656, 662; 31 ER 1243, 1246 (Lord Eldon): 'if the act is completed, though voluntary, the Court will act upon it.' See also, *Re McArdle* [1951] Ch 669, 677 (Jenkins LJ); *Corin v Patton* (1989) 169 CLR 540, 557 (Mason CJ, McHugh J): 'this and the related maxim that equity will not perfect an imperfect gift are primarily associated with the rule that a voluntary covenant is not enforceable in equity...'. See further, M McNair 'Equity and Volunteers' (1988) 8 Legal Studies 172, 187: 'No question of conscience enters into the matter, for there is no consideration, and there is nothing dishonest on the part of the intending donor if he chooses to change his mind at any time before the gift is complete.'

⁶⁸ See, eg, *T Choithram International SA v Pagarani* [2001] 1 WLR 1, 11 (Lord Browne-Wilkinson).

wrongdoing of X in performing that task.⁶⁹ Although D has given consideration to X in the form of a loan, ‘in substance’ and in relation to C, D is exactly like a volunteer.⁷⁰ Hence, these surety cases may have some relevance to the liability of a volunteer D in our scenario.

The agency basis for D’s liability was explicitly linked to *Bridgeman v Green* in the 1902 Privy Council case of *Turnbull v Duvall*.⁷¹ In this case, D and X agreed that X would procure his wife’s signature to a security in favour of D and in relation to X’s debts and prepared by D.⁷² X persuaded her to sign. C did not read the security document and had no advice or information about it. Lord Lindley, in delivering the Privy Council judgment, considered that:

It is impossible to hold that [the Ds] are unaffected by such pressure [by X] and ignorance [of C]. They left everything to [X], and must abide by the consequences...The well-known case of *Bridgman v Green* (sic) is conclusive to shew that [D] can obtain no benefit from it.⁷³

A true agency relationship does not arise in such scenarios because X does not have actual or ostensible authority to bind D.⁷⁴ Furthermore, in surety cases it is more likely that X is acting on his or her own behalf in procuring the assistance of D and therefore is not acting as agent for the creditor, D.⁷⁵ It is now accepted in England in relation to surety cases that, true agency arrangements apart, the statements in *Turnbull v Duvall* must be explained on some other basis.⁷⁶ Thus, in *Barclays Bank Plc v O’Brien* Lord Browne-Wilkinson held that D would only be liable if X was truly the agent of D (which would be rare) or where D had notice of C’s right to rescind the surety transaction because of X’s undue influence or misrepresentation.⁷⁷ The endorsement of *Turnbull v Duvall* by earlier High Courts of Australia has not been considered in recent Australian surety cases which have taken a different path to liability to that in England.⁷⁸ Hence, in Australia, the argument that D left everything

⁶⁹ See, eg, *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 55 (Starke J): the bank ‘prepared and left it to [X] to procure the [securities], and must therefore abide the consequences of his undue influence.’

⁷⁰ *Yerkey v Jones* (1939) 63 CLR 649, 685 (Dixon J). See also *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 54 (Starke J): ‘The bank gave what is called ‘valuable consideration’ in the law...But from a practical point of view the respondent got nothing.’

⁷¹ [1902] AC 429. Discussed in *Yerkey v Jones* (1939) 63 CLR 649, 681 (Dixon J).

⁷² A separate ground for the decision was that D’s agent was also the trustee of a testamentary trust in favour of C.

⁷³ [1902] AC 429, 435. See also, Dixon J’s summary of *Turnbull v Duvall* in *Yerkey v Jones* (1939) 63 CLR 649, 681: ‘they left everything to the husband and must abide by the consequences.’ See also, *Chaplin & Co Ltd v Brammall* (1908) 1 KB 233.

⁷⁴ G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed 2011, Sydney) 241.

⁷⁵ *Barclays Bank Plc v O’Brien* [1994] 1 AC 180, 194 (Lord Browne-Wilkinson).

⁷⁶ In *Barclays Bank Plc v O’Brien* *ibid* 191-195 Lehane, above n 24, 168 agrees that *Turnbull v Duvall* can only be explained on the basis that D’s representative was in a fiduciary relationship with C (as her trustee) and there was conflict of duty and interest, not ‘on the footing of some extended concept of agency’.

⁷⁷ *Ibid* 195.

⁷⁸ The High Court of Australia in its most recent case in this area, *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, dealt only with Dixon J’s second category of equitable liability in relation to sureties and not with a surety transaction tainted by X’s undue influence or misrepresentation.

to X may still be open in an undue influence case where C has given a security to D in relation to X's debts and D's consideration does not benefit C.⁷⁹

It is questionable whether the analogy between the surety cases and scenario with which this paper is concerned – the innocent D in receipt of a gift tainted by undue influence – is convincing. If there is an actual agent/principal relationship between X and D, then that suffices to explain D's liability (whether D is volunteer or not), but this is not likely to arise in scenarios involving volunteers. Apart from that possibility, it is likely there has been no *active* leaving of the arrangements to X; rather, D is the passive recipient of benefits arising from, or presumed to arise from, X's relationship to C. Even a loose conception of agency (that D left everything to X) does not provide a convincing explanation for D's liability.

The last two rationales to be discussed involve the twin themes of conscience and property. These themes permeate equity jurisprudence and are the most challenging to make sense of. How do they relate and is one or the other predominant in explaining D's liability?

E *D's Conscience is Affected*

The fact that D is a volunteer activates Equity's jurisdiction which is based upon conscience. Historically, D's liability was explained in the language of conscience. An innocent volunteer's conscience was affected when he or she sought to retain a gift now found to be tainted by undue influence. It was 'against conscience, that one person should hold a benefit, which he derived through the fraud of another...'.⁸⁰ The principle applied to all equitable triggers for rescission of a gift and reflected a 'broad principle that no one can avail himself of fraud.'⁸¹ That is, D need not be a participant in the equitable fraud of X in order for his conscience to be affected. As Sir William Page Wood VC in *Scholefield v Templer* explained:

The truth is that, in all cases of this kind, where a fraud has been committed, and a third person is concerned, who was ignorant of the fraud, and from whom no consideration moves, such third person is innocent of the fraud only so long as he does not insist on deriving any benefit from it; but when once he seeks to derive any benefit from it he becomes a party to the fraud.⁸²

The facts of *Lloyd v Passingham* provide a good illustration.⁸³ The case itself concerned a procedural point, but what was alleged was that the first defendant, Robert Passingham, had fraudulently altered a parish register in order to demonstrate his legitimacy and ensure that title to certain property passed to him and his brother,

⁷⁹ *Bank of New South Wales v Rogers* (1941) 65 CLR 42.

⁸⁰ *Hugenin v Baseley* (1807) 14 Ves Jun 273; 33 ER 526. Lord Eldon quoted from Lord Wilmot's judgment in *Bridgeman v Green* and also relied upon the judgment of Lord Thurlow in litigation concerning the will of Lord Waltham. Lord Thurlow held that an innocent heir at law could not take advantage of her husband's fraud in order to benefit under a will that the testator had been wrongly prevented from changing. See, *Dixon v Olmius* (1787) 1 Cox 414; 29 ER 1227; *Luttrell v Olmius* referred to in *Mestaer v Gillespie* (1805) 11 Ves Jun 622, 638; 32 ER 1230, 1236 (Lord Eldon).

⁸¹ *Scholefield v Templer* (1859) Johns 154, 162; 70 ER 377, 381 (Sir William Page Wood VC).

⁸² *Ibid* Johns 165; 70 ER 381-382.

⁸³ (1809) 16 Ves Jun 59; 33 ER 906.

Jonathan Passingham, the second defendant. In relation to Jonathan, against whom no fraud was found, Lord Eldon said:

The principle of equity, affecting him, is, that a mere volunteer, obtaining a title, gained by fraud, shall not have the advantage of it against those, who have the better right; and that it is against conscience, that he, who has given nothing for the property, which he has obtained by the fraud of another, shall hold it.⁸⁴

Given that Equity had no problem in fastening liability onto the post-gift conscience of D, why was the conscience of a bona fides purchaser for value of the legal estate from C who subsequently received notice of X's presumed or actual undue influence over C not similarly affected? The reason is jurisdictional. The presence of consideration plus the absence of notice at the time of the transaction meant that there was nothing to attract the Court of Chancery's jurisdiction.⁸⁵ Nor did an innocent bona fides purchaser require Chancery's assistance to enforce his or her rights if they held a legal estate in the subject matter of the transaction.⁸⁶ The plea of bona fides purchaser for value without notice of the legal estate was regarded as:

an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court...this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.⁸⁷

Thus, Chancery could only interfere with transactions on the basis of conscience or where equitable rights needed to be enforced. The bona fides purchaser of the legal estate without notice of X's influence over C did not require the Court's assistance to enforce his legal right and the presence of consideration combined with absence of notice meant that it was not unconscionable to retain the benefit of the contract even knowing now of the influence. D's bona fides and the provision of consideration in combination meant that there was nothing for Equity's conscience to fasten onto.

The conscience rationale for D's liability survived the fusion of the common law courts and Chancery and has received strong affirmation in the modern case law. The High Court of Australia, for example, has made clear its understanding of conscience as being sufficiently unlimited in time to attach to a D who is innocent at the time of a tainted transaction and as not limited to conduct:

⁸⁴ *Ibid* 16 Ves Jun 69; 33 ER 909-910.

⁸⁵ *Re Nisbet and Potts' Contract* [1905] 1 Ch 391, 398 (Farwell J): the significance of notice is 'it enabled the Court of Equity to bind the conscience of the defendant [a purchaser for value of the legal estate] and forbid him to set up the legal estate.' In support, Farwell J cited *Buckland v Gibbins* (1863) 32 LJ (Ch) 391, 395 (Lord Westbury LC).

⁸⁶ The bona fides purchaser rule traditionally only applied to purchasers of the legal estate (or in a narrow, now obsolete category, of purchasers of equitable estates seeking to rely on attached legal privileges). See Dominic O'Sullivan, 'The rule in *Phillips v Phillips*' (2002) *Law Quarterly Review* 296.

⁸⁷ *Pilcher v Rawlins* (1872) 7 Ch App 259, 269 (James LJ).

to speak of “unconscionable *conduct*” as if it were all that *need* be shown may suggest that it is all that *can* be shown and so covers the field of equitable interest and concern. Yet legal rights may be acquired by conduct which pricks no conscience at the time...However, at the time of attempted enforcement, it then may be unconscientious to rely upon the legal rights so acquired.⁸⁸

What the modern cases also show is that the conscience rationale does not depend on understanding undue influence as based upon a strong notion of ‘equitable fraud’. Even if one considers that the jurisdiction to set aside transactions for undue influence is based solely upon the vitiation of C’s intention rather than any wrongdoing by X, the conscience rationale still holds good.⁸⁹ This has been made clear in recent English decisions concerning the equitable jurisdiction to rescind trusts and deeds of gift on the ground of a spontaneous mistake by C. The cases usually involve deeds of gift under which the disponent (C) has mistakenly conferred benefits on third party volunteers (D).

Here, the basis of recovery can only relate to C’s vitiated intention because D is not responsible in any way for C’s mistake. Furthermore, D has given no consideration to C and thus can be equated with, or is a more extreme version of, the innocent D receiving a gift tainted by undue influence.⁹⁰ But D’s liability is still explained in the language of conscience. For example, in *Gibbon v Mitchell* the plaintiff, acting on incorrect legal advice, mistakenly executed a deed which had a contrary effect to that which he had intended.⁹¹ In so doing, he created a new class of beneficiaries under a discretionary trust. In Millett J’s view, the new beneficiaries’ consciences would be bound:

Equity acts on the conscience. The parties whose interest it would be to oppose the setting aside of the deed are the unborn future children of Mr Gibbon and the objects of the discretionary trust to arise on forfeiture, that is to say his grandchildren, nephews and nieces. They are all volunteers. In my judgment they could not conscionably insist on their legal rights under the deed once they had become aware of the circumstances in which they had acquired them.⁹²

With respect, this statement of principle requires some qualification. It suggests that rescission of the deed still depends upon D’s eventual ‘awareness’ of P’s mistake, albeit that this will not necessarily have occurred at the date the matter comes to court (given that D is an unborn, potential beneficiary only). The older cases quoted from above do not imply that D’s awareness is necessary at all and this seems the preferable view. Awareness that the gift is tainted, if shown, clearly satisfies the

⁸⁸ *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 325 citing *Redgrave v Hurd* (1881) 20 Ch D 1, 12-15 (Sir George Jessel MR). See also, *Black v Freedman* (1910) 12 CLR 105, 109 (Griffith CJ); *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 409 (Gaudron, McHugh, Gummow and Hayne JJ).

⁸⁹ See above n 5.

⁹⁰ *Pitt v Holt* [2012] Ch 132 [165] (Lloyd LJ): the ‘equitable jurisdiction to set aside a voluntary transaction for mistake’ is ‘of the same kind’ as ‘[t]he jurisdiction of equity to protect parties against fraud, undue influence, unconscionable bargains and related conduct including abuse of confidence...’.

⁹¹ [1990] 1 WLR 1304.

⁹² *Ibid* 1309; cited with approval by Lloyd LJ in *Pitt v Holt* [2012] Ch 132 [203].

conscience requirement, but is not a pre-requisite for liability. This is supported by the Court of Appeal's reasoning in the infamous case of *Re Diplock* which involved a personal claim against the innocent recipients of an invalid testamentary bequest.⁹³ Recovery was sought of the invalid distributions to the extent that the loss to the estate could not be made good by the executors. On the question of whether the recipients' conscience could be affected without knowledge, the court concluded after reviewing the case law that:

It is no doubt true that an equitable claim predicates that the conscience of the defendant must be affected. But we have failed to observe any justification, in the judgments cited, for the suggestion that the state of the defendant's conscience depends upon his knowledge or assumed knowledge that his title to the money paid to him may or may not be defeasible in favour of other interested persons. The test as regards conscience seems rather to be whether at the time when the payment was made the legatee received anything more than, at the time, he was properly entitled to receive.⁹⁴

Similarly, in the scenario with which this paper is concerned, it is against conscience for the innocent third party D to a relationship of undue influence to retain a benefit to which he or she was not 'properly entitled'. D's knowledge does not enter into the analysis at all because conscience need not connote personal culpability (wrongdoing) on the part of D. As Lionel Smith explains:

'unconscionable' does not mean 'culpable' but only liable: the heir or the good faith donee is caught by this principle, and his 'conscience is affected', even though he may have no knowledge or notice and so not be guilty of any kind of wrongdoing.⁹⁵

This analysis is also supported by Dennis Klinck's identification of five 'lower level concepts' inherent in the equitable concept of conscience.⁹⁶ Of most interest here are the first and fifth of the concepts identified by Klinck, namely, 'mutuality' and 'awareness'. Mutuality concerns whether there was reciprocity between the parties involved. Klinck notes:

the importance that equity – specifically as a matter of conscience – attributes to one party's having or not having received something for what is claimed.⁹⁷

The significance of mutuality is illustrated by the bona fides purchaser for value without notice doctrine. Because the purchaser has reciprocated C's actions by giving consideration, something more is required in order for the purchaser's conscience to be affected. Thus, D's awareness (of the relationship of influence, in our scenario) must be shown. Conversely, the innocent D to a relationship of undue influence has given nothing to C in return for the gift, so it is against good conscience to retain that to which he was not properly entitled.

⁹³ [1948] 1 Ch 465.

⁹⁴ Ibid 488 (Lord Greene MR, Wrottesley and Evershed LJJ). See also, at 492 and 503.

⁹⁵ Lionel Smith, 'Fusion and Tradition' in Simone Degeling and James Edelman, *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) 19, 33.

⁹⁶ Klinck, above n 1.

⁹⁷ Ibid 217.

In relation to the lower level concept of ‘awareness’ Klinck explains that it is pervasive in equity jurisprudence and often interacts with the other lower-level concepts to justify an outcome being against conscience. But it is not an absolute pre-requisite and, exceptionally, mutuality alone can suffice for equity’s conscience to be attracted. Crucially, however, where mutuality is the only lower-level meaning of conscience in play, the cases suggest that ‘conscience is engaged differently and less intensely than in cases where other factors are present.’⁹⁸ Klinck’s thesis supports the argument in this paper that an essential contributing rationale for D’s liability is the mild nature of the remedy of rescission. Where the only reason for liability is that D did not give value for a gift tainted by the equitable vitiating factor of undue influence, the remedy should not go beyond restoring both parties to their pre-gift positions where that is still possible.

Similarly to Klinck, Lionel Smith has argued that the concept of conscience in equity is a shorthand representation for distinctive judge-made legal norms underlying equitable doctrine.⁹⁹ Combining Smith’s approach with Klinck’s findings, it can be argued that the legal norm in relation to a direct innocent recipient from C is that of mutuality (the lack thereof) and the ability to substantially return the parties to the pre-gift situation. Thus, D cannot keep a gift to which he or she was not entitled *if* C and D can be restored to their original positions.¹⁰⁰ D’s liability in *Bridgeman v Green* exemplifies this norm.

Some commentators strongly dispute the utility of a conscience explanation for D’s liability in relation to any equitable doctrine. Conscience is seen as a conclusory, and therefore redundant, statement.¹⁰¹ Unjust enrichment is the preferred explanation for liability on this view. For example, Professor Burrows states the liability of the third parties in *Bridgeman v Green* solely in unjust enrichment terms, rather than conscience, as follows:

As they were not bona fides purchasers for value without notice, there was no justification for their being enriched at the expense of the claimant who did not truly mean them to have the money.¹⁰²

On this approach, to say that D is acting unconscionably adds nothing to an already sufficient analysis, as ‘it will always be unconscientious to retain an unjust enrichment received, subject to recognized defences such as change of position.’¹⁰³

To some extent, the criticism is semantic: both the unconscionability and unjust enrichment descriptive labels rely upon the same factors in this context, namely, that D was a volunteer and the transaction was tainted by actual or presumed undue

⁹⁸ Ibid 224. Klinck is here discussing *Re Diplock* [1948] 1 Ch 465. He does not consider the principle liability of an innocent volunteer receiving a gift tainted by another’s undue influence.

⁹⁹ Smith, above n 95, 32-37.

¹⁰⁰ See *Lloyd v Passingham* (1809) 16 Ves Jun 59, 69; 33 ER 906, 909-910 quoted above in the text to n 84.

¹⁰¹ See, eg, Birks and Chin, above n 5, 60; Birks, ‘Receipt’ in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing, Oxford 2002) 213, 226; Peter Birks, *Unjust Enrichment* (2nd ed, 2005, OUP, Oxford) 6.

¹⁰² Burrows, ‘The Australian Law of Restitution’ above n 2, 81.

¹⁰³ Ibid 75-76.

influence. For D to retain the gift when it could be returned to C without undue hardship to D is both an ‘unjust enrichment’ and ‘unconscionable’: both are equally valid (and conclusory) descriptions. This is not to suggest that there are not important differences in emphasis in the detail of either explanation. For example, the enrichment is considered unjust because of the vitiation of C’s consent alone; the fact that D is a volunteer goes to whether there is a defence; whereas, D being a volunteer is not a defence, but a crucial element in establishing C’s claim on the unconscionability approach. Nonetheless, both unjust enrichment and unconscionability require some unpacking before they can be viewed as more than conclusory statements. But, even accepting that conscience is a conclusory statement in this context, this still does not rob it of explanatory power.

A final criticism of the conscience explanation that is sometimes made is that it does not explain why C’s right to rescind arises immediately the gift is made.¹⁰⁴ This is easily refuted once one understands how conscience operates in this context: the conscience rationale is not personal to D, that is, it is not necessary to wait until D becomes aware of the undue influence. The conscience rationale operates immediately the gift is made; indeed, it is strongest at that point when it will be most feasible to restore the subject matter of the gift to C.

Thus, there is strong support both historically and in contemporary jurisprudence for a conscience-based rationale for D’s liability. It has a long, continuing and distinguished case law pedigree. The concept of conscience in equity is not limited in application to conduct at the time of the disputed transaction, nor does it depend upon any level of awareness by D of the actual or presumed undue influence by X. The fact that D gave nothing in return to C, plus the finding that the gift is tainted by undue influence, means that D cannot, in good conscience, retain the benefit of the gift, unless the conditions for rescission are not made out. Conscience in this sense cannot refer to D’s actual, subjective, conscience as is graphically illustrated by the mistaken gift cases in which the concept of conscience is applied to the unborn beneficiaries of a gift. Rather, conscience here reflects the court’s objective view of what is right and proper in the circumstances. The reason why the same rationale did not apply to a bona fides purchaser for value without notice from C is that the presence of consideration and absence of notice (the concepts of mutuality and awareness in Klinck’s terminology) together counter what would otherwise be unconscionable.

F *C’s Property Rights Trump D’s Property Rights*

The final possible rationale for D’s liability draws upon the legal rules that determine whose rights prevail in a competition between inconsistent claims to the same property: specifically the priority rules and the defence of bona fides purchaser for value without notice of the legal estate. Could D’s liability be explained simply on the basis that C’s property rights to the subject-matter of the gift trump D’s property rights? If so, the role of conscience in explaining D’s liability is minimal.¹⁰⁵

In order to test this rationale it is necessary to create some additional parameters for the scenario considered in this paper. First, the subject matter of the gift must be an enduring asset so that rescission will involve the re-transfer of the asset to C and

¹⁰⁴ Burrows, ‘The Australian Law of Restitution’ above n 2, 76.

¹⁰⁵ Klinck, above n 1, 256.

hence generate property rights. Although more complex scenarios may be envisaged, for the sake of simplicity the following discussion will assume that the C's gift to D transferred either equitable or legal title to the property that was the subject matter of the gift and that the property is still identifiable in D's hands.¹⁰⁶ Also for the sake of simplicity, the impact of statutory registration schemes and statutory modifications of the general law rules will not be considered because our question concerns a possible historical rationale for D's liability, rather than necessarily depending upon the current law.¹⁰⁷

1 *The Nature of D's Property Rights in the Subject Matter of the Gift*

Because a transaction tainted by undue influence is voidable, rather than void, it will pass title in its subject matter to D. Depending on what interest C had and the form of the gift (outright or by way of trust), D obtains a legal or equitable interest in the subject matter of the gift. Because D is a volunteer, he or she will not be able to rely on the doctrine of bona fides purchaser for value without notice either in relation to legal ownership of the property if that is what has been transferred, or in relation to equitable ownership (to the extent that the doctrine can be applied to it).¹⁰⁸

2 *The Nature of C's Property Rights in the Subject Matter of the Gift*

The gift to D divests C of his or her existing proprietary interest in the subject matter of the gift. But because of the undue influence, C has a right to rescind the transaction and recover that proprietary interest.¹⁰⁹ In that sense, C can be said to have an inchoate interest in the subject matter of the gift which is itself a proprietary interest, albeit a much more fragile one than C's original interest in the property.¹¹⁰ This inchoate proprietary interest is generally described as a 'mere equity', to distinguish it from full equitable proprietary interests, but the term does not have a fixed meaning or fixed consequences for all purposes and all equitable doctrines.¹¹¹ Although there is uncertainty about when a mere equity arises, how it ranks in competition with other property interests,¹¹² and as to the attributes of mere equities arising in relation to different equitable causes of action, there is sufficient clarity in the law for our

¹⁰⁶ An example of a more complex scenario is the facts of *McCulloch v Fern* [2001] NSWSC 406 (Unreported, Palmer J, 28 May 2001). C's gift of money to X and D jointly was given for the purpose of discharging a mortgage on property owned by X and D. Could C be subrogated to the rights of the mortgagee? The court ordered a constructive trust over the property.

¹⁰⁷ Cf John Mee, 'An Alternative Approach to Third-Party Undue Influence and Misrepresentation' (1995) 46 *Northern Ireland Legal Quarterly* 147, 152-153

¹⁰⁸ See O'Sullivan, 'The rule in *Phillips v Phillips*', above n 86.

¹⁰⁹ See Sarah Worthington, 'The Proprietary Consequences of Rescission' [2002] *Restitution Law Review* 28; Ben McFarlane, *The Structure of Property Law* (Hart Publishing, Oxford, 2008); Birke Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 *Cambridge Law Journal* 324; Elise Bant, 'Trusts, powers and liens: An exercise in ground-clearing' (2009) 3 *Journal of Equity* 286.

¹¹⁰ C's right to challenge the gift in these circumstances is viewed as a right having 'some of the attributes of assignability and transferability which are indicia of property interests.' Meagher et al, above n 41, [4-135].

¹¹¹ *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265. Recent commentators have preferred the more neutral label of 'proprietary power' over 'mere equity'. Elise Bant, 'Trusts, powers and liens: An exercise in ground-clearing' (2009) 3 *Journal of Equity* 286, 297.

¹¹² D Skapinker, 'Equitable Interests: Mere Equities, "Personal" Equities and "Personal Equities" – Distinctions with a Difference' (1994) 68 *Australian Law Journal* 593; S Hepburn, 'Reconsidering the Benefits of Equitable Classification' (2005) 2 *Australian Property Law Journal* 258.

purposes. If C has the right to challenge a transaction on the basis of actual or presumed undue influence by X, C has a 'mere equity' for the purpose of determining priority claims.¹¹³ That being so, can the scenario be conceptualised as a 'contest' between C and D's property rights to the subject matter of the gift?

3 *Do the Priorities Rules Apply At All to a Contest Between C and D?*

The priorities rules cannot be applied directly to the contest between C and D because C's mere equity and D's legal or equitable right in relation to the subject-matter of the gift arise out of the *same* transaction (the gift tainted by undue influence), rather than from subsequent transactions.¹¹⁴ The priorities rules are strongly dependent upon the point in time at which interests were gained and on whether the holder of a later acquired interest had notice of an earlier interest in the property.¹¹⁵

4 *The Application of Priorities Rules if D is a Remote Recipient*

For this reason, it is simplest to explain first how the priorities rules would apply if D is a remote recipient, rather than a direct recipient from C, that is, where D gains the property interest via X at a later point in time. The priority rules clearly apply in this context. Assume that C gives an asset to X by way of a gift tainted by the undue influence of X; X then gives the same asset to D. The primary priorities rule is that the first interest to be created will prevail.¹¹⁶ C's mere equity is first in time and will prevail over D's later legal or equitable interest in the subject matter of the gift unless D is a bona fides purchaser for value without notice. As between C and D, this means that C's interest should prevail. Although C's interest, being less than a full proprietary interest, is extremely vulnerable, D suffers from an equal disability in being a volunteer (and hence unable to take advantage of the bona fides purchaser rule) and in being later in time.¹¹⁷ In other words, C's property rights will generally trump D's property rights where D is a remote recipient and a volunteer. This has been explained by analogy with the *nemo dat* rule. Because of C's mere equity, a remote D receives only imperfect title to the property in dispute:¹¹⁸

It is a rule *sui generis*, however, in that the *nemo dat* principle is not being applied in respect of a vested proprietary interest, as is usual, but in respect of a power to alter ownership when a right is exercised.¹¹⁹

5 *The Application of Priorities Rules if D is a Direct Recipient*

Having seen how a contest between C and a remote D would be resolved, can these rules apply directly or by analogy even though C and D's rights arise out of the same transaction? The case law at first glance suggests that they can. The 1881 case of *Bainbridge v Browne* involved an assignment by C (the wife and children of X) of

¹¹³ *Bainbridge v Browne* (1881) 18 Ch D 188.

¹¹⁴ See Mee, 'An Alternative Approach', above n 107, 151; see also, John Mee, 'Undue Influence, Misrepresentation and the Doctrine of Notice' (1995) 54 Cambridge Law Journal 536.

¹¹⁵ See generally, Meagher et al, above n 41, Ch 8.

¹¹⁶ *Phillips v Phillips* (1861) 4 De GF& J 208, 215; 45 ER 1164, 1166.

¹¹⁷ *Re Nisbet and Potts' Contract* [1905] 1 Ch 391.

¹¹⁸ O'Sullivan et al, above n 6, [21.27].

¹¹⁹ *Ibid* [21.28].

property to D (the creditors of X) to secure the payment of mortgage debts owed by X to D. That is, D was the direct recipient of a benefit from C in a transaction tainted by the undue influence of X. Fry J described D's liability in terms of notice:

[the inference of undue influence] operates against the person who is able to exercise the influence... and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the Court infers the equity.¹²⁰

Although the wording here suggests that D is a remote recipient, Fry J applied the principle to the facts of the case before him which involved a direct transaction between C and D, rather than between C and X and then X and D. Fry J's statement of principle in *Bainbrigge v Browne* was relied upon by the High Court of Australia in *Bank of NSW v Rogers* in relation to a similar fact situation also involving a surety who received no benefit from the transaction with D.¹²¹ It was controversially extended by Lord Browne-Wilkinson in *Barclays Bank PLC v O'Brien* with respect to the circumstances in which a financial institution in the position of D would be put on notice.¹²² All these cases involved a direct D, rather than a remote D.

Leaving aside Lord Browne-Wilkinson's extended application of the notice principles which it is not necessary to discuss here, at first glance there appears nothing controversial in Fry J's approach in *Bainbrigge v Browne*.¹²³ But John Mee has challenged the application of the priority rules by analogy in this way.¹²⁴ His arguments are made in the context of a D who is the purchaser, rather than a donee, from C in a transaction tainted by the actual or presumed undue influence of X. Having explained that the application of priority rules by analogy relies on the one transaction between C and D being recast as two transactions (a gift or contract between C and D and then a gift or contract between X and D), Mee argues that the rationale of the notice rules in relation to remote purchasers from X does not apply to a direct purchaser from C.¹²⁵ In his view, the rationale for requiring notice is to rein in an otherwise ongoing potential for C's mere equity to deprive a remote recipient of title.¹²⁶ The first bona fides purchaser for value without notice will 'clean up the title', so to speak, and this is desirable as a matter of policy. But, in Mee's view, this policy concern does not apply when the contest is between C and the direct recipient, D. In that scenario, according to Mee, there is therefore a strong case for the liability of a direct purchaser from C to be made strict subject to defences.¹²⁷ This reasoning does not apply to at all to the situation of volunteers who are already subject to strict

¹²⁰ *Bainbrigge v Browne* (1881) 18 Ch D 188, 197. Fry J cited *Maitland v Irving* 15 Sim 437; *Archer v Hudson* 7 Beav 551; *Berdoe v Dawson* 34 Beav 603; and *Kempson v Ashbee* Law Rep 10 Ch 15, 21.

¹²¹ (1941) 65 CLR 42. Similarly to Fry J in *Bainbrigge v Browne* *ibid*, the Court drew no distinction between the situation of a direct D and remote D. This is clearest in McTiernan J's judgment at 67.

¹²² [1994] 1 AC 180, 195-197.

¹²³ See, eg, Lehane, above n 24, 171 who commented in relation to *Barclays Bank Plc v O'Brien* *ibid*: The effect of what the House of Lords has held is, no doubt, that the priority rules applicable to competing interests in property apply by analogy here, and one cannot reasonably quarrel with that.'

¹²⁴ Mee, 'An Alternative Approach', above n 107; Mee, 'Undue Influence', above n 114.

¹²⁵ Mee, 'An Alternative Approach', above n 107, 151-152. Mee cites two further case law illustrations of the approach: *Cobbett v Brock* (1855) 20 Beav 524 and *Bank of NSW v Rogers* (1941) 65 CLR 42, 60-61 and 67 (McTiernan J).

¹²⁶ Mee, 'An Alternative Approach', above n 107, 152.

¹²⁷ *Ibid*. Such defences would incorporate D's lack of notice and bona fides provision of consideration.

liability whether direct or remote recipients. This is not the place to critique Mee's reform proposal in relation to the liability of purchasers. For now, it is sufficient to note that it does not necessarily preclude the application of the priorities rules by analogy to a voluntary transaction between C and D.

Overall, however, the property-based rationale for D's liability, although initially appealing, does not add much to our understanding of D's liability. It depends upon C's claim for rescission having the proprietary consequence of generating a mere equity, which means that it cannot be a comprehensive rationale for D's liability. Furthermore, because C and D's competing rights arise out of the same transaction, the priority rules can only apply by analogy. It seems rather implausible to say that C's right is first in time when created simultaneously with D's property right. Rather, given that the weakness of D's competing claim to the property derives from D's status as a volunteer, this brings us in a full circle back to the more comprehensive explanation of conscience discussed in the previous section of this paper.

To summarise the discussion so far, an analysis of the case law suggests that the most plausible, comprehensive and enduring rationales for D's strict liability concern the nature and effect of rescission, the absence of any sufficiently strong countervailing policy reasons for upholding a gift (such as those that apply to contract) and the notion of conscience in equity. These three rationales are co-dependent and they are underpinned by a historically strong judicial pragmatism that sought to protect C from too easily losing the only available remedy. The severity of strict liability is mitigated by the mildness of the remedy of rescission because the remedy will be lost once D has irretrievably changed his or her position. The final part of this paper considers the implications of this analysis for the argument of Professor Burrows concerning equitable recipient liability.

IV EQUITABLE RECIPIENT LIABILITY FOR BREACH OF TRUST

Professor Burrows argues that the liability of an innocent recipient of a gift tainted by X's presumed or actual undue influence proves that equity is not averse to strict liability.¹²⁸ As we have seen, this is correct. The liability in *Bridgeman v Green* is not fault-based. Burrows then suggests that a strict liability analysis should also be applied to the innocent volunteer recipient of trust property received in breach of the trust. The implication is that there is some incoherence within equity itself (let alone when comparing recipient liability with analogous common law liabilities) if recipient liability is fault-based and the liability in *Bridgeman v Green* is not. The suggestion is made as part of a wider campaign by judges and scholars for equitable recipient liability either to be recast as a strict liability unjust enrichment claim or for a strict liability unjust enrichment claim to be developed alongside the existing fault-based equitable claim.¹²⁹

¹²⁸ Burrows, 'The Australian law of restitution', above n 2, 81. See also, Burrows, *The Law of Restitution*, above n 2, 426.

¹²⁹ See, eg, Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 231; Birks, 'Receipt', above n 101, Birks, *Unjust Enrichment*, above n 101, 156-158; Michael Bryan, 'The Liability of the Recipient: Restitution at Common law or Wrongdoing in Equity?' in Simone Degeling and James Edelman, *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) 327. For a fuller discussion of this scholarship, see Joachim Dietrich and Pauline Ridge, "'The Receipt of What?':

There are at least three elements in Burrows' argument. The first element is that recipient liability and *Bridgeman v Green* liability are inherently similar claims such that the latter strict liability claim can be used as a template for the former (currently fault-based) claim. The second element in the argument is that both the *Bridgeman v Green* liability and the reformulated strict recipient liability are unjust enrichment claims. The classic Birksian unjust enrichment framework is applied:

- 1 Was D enriched?
- 2 Was the enrichment at the expense of C?
- 3 Was the enrichment unjust?
- 4 Are there any defences?¹³⁰

Burrows' proposal means radically changing the current law on recipient liability in order to accommodate the unjust enrichment framework as either a substitute for, or addition to, fault-based liability.¹³¹ Specifically, this means abolishing the requirement of knowledge (or notice) on the part of D, limiting the remedy to restitution of the enrichment received by D, and inserting a change of position defence. The third element of Burrows' argument is normative: recipient liability *should* be recast in this way.

It is beyond the scope of this article to consider all three elements of Burrows' argument,¹³² but some thoughts are now offered on the first element in light of the findings in this paper. Do the rationales that support strict liability in the *Bridgeman v Green* scenario support strict liability for the receipt of trust property? First, it is necessary to briefly describe equitable recipient liability.¹³³

Recipient liability for breach of trust involves an equitable personal claim against a third party to a trust or other fiduciary relationship who received trust property¹³⁴ in breach of the trust or fiduciary duty and where the receipt was not pursuant to a valid contract. Liability turns on the recipient's awareness of the breach of trust or fiduciary duty, as is indicated by the doctrine being sometimes referred to as 'knowing receipt'. It is not necessary here to explore the complexities of the debate over what awareness suffices for liability, but the lack of clarity on this issue has undoubtedly contributed to dissatisfaction with the doctrine and consequent calls for its reformulation. If the defendant is found liable, it is no defence that he or she has no remaining trust

Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) *Melbourne University Law Review* 47.

¹³⁰ Birks, *Unjust Enrichment*, above n 101, 39.

¹³¹ Professor Burrows does not necessarily advocate the abolition of the wrong-based receipt claim so long as an unjust enrichment strict liability claim is added. Burrows, *The Law of Restitution*, above n 2, 431.

¹³² For a critique of the second and third elements, see Dietrich and Ridge, above n 129.

¹³³ See further, Dietrich and Ridge, above n 129.

¹³⁴ Company assets are regarded as trust property in the hands of the company directors for the purposes of this doctrine: *Belmont Finance Corporation v Williams Furniture Ltd [No 2]* [1980] 1 All ER 393, 405 (Buckley LJ), citing *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474, 479 (Jessel MR). The High Court of Australia has questioned whether this extends the doctrine's scope too far: *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89, [113] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). The doctrine also applies to any fiduciary in control of property belonging to his or her principal. See *Foley v Hill* (1848) 2 HL Cas 28, 35-36 (Lord Cottenham LC).

property in their hands. The remedy is generally regarded as being loss-based (equitable compensation), but encompasses gain-based personal remedies where appropriate.¹³⁵ In principle, compensation is not limited to the value of the benefit received, although normally this will equate to the loss suffered by the trust beneficiaries.¹³⁶ The personal liability exists alongside possible property-based claims using the priorities or tracing rules and asserting the claimant's right to any trust property or its traceable substitute remaining in the recipient's hands.¹³⁷ Recipient liability also exists alongside a personal 'knowing assistance' or 'accessory liability' claim.¹³⁸ Clearly, the claimant also has a claim against the trustee or fiduciary for breach of the trust or fiduciary duty. There may also be common law claims available.¹³⁹ With this background in mind, do any or all of the rationales for the liability of an innocent volunteer recipient of a gift tainted by undue influence apply to the innocent volunteer recipient of misappropriated trust property?

(a) *Pragmatism*

There are two reasons why the pragmatic rationale is not convincing in relation to the innocent recipient of misappropriated trust property. First, it does not sit comfortably with modern sensibilities to treat related individuals as one entity for liability purposes. Indeed, the High Court of Australia in *Farah Constructions Pty Limited v Say-Dee Pty Limited*, in relation to the recipient liability of the wife and daughters of an alleged fiduciary, was not prepared to treat them as fixed with his knowledge, instead emphasising that they were 'separate individuals'.¹⁴⁰ For this reason, the pragmatic rationale is not as convincing nowadays even in relation to *Bridgeman v Green* liability.

Secondly, and more importantly, recipient liability is not C's sole remedial avenue in relation to the breach of trust or fiduciary duty. C has a claim against X, the defaulting fiduciary, to which more than one remedy is potentially available. Furthermore, C may have other personal or property-based claims against D and against other third parties. A motivation for the pragmatic attitude in *Bridgeman v Green* and cases following it was that C had no alternative remedy at all to rescission of the gift. Strict liability ensured that C was not too easily deprived of his or her sole remedy. But this cannot be such a concern when C has a plethora of potential remedies and potential defendants.

(b) *The Nature of Rescission*

The nature of the equitable remedy of rescission in its auxiliary jurisdiction is crucial in justifying D's strict liability under *Bridgeman v Green*, but at present, rescission is

¹³⁵ This has been affirmed most recently by the Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 [253] (Finn, Stone and Perram JJ).

¹³⁶ See Dietrich and Ridge, above n 129, 66.

¹³⁷ Ibid. See also, *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 [253] (Finn, Stone and Perram JJ). There seems no reason in principle why rescission would not be available in appropriate circumstances.

¹³⁸ This fault-based liability is formulated differently in England and Australia: *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC); *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 (HCA).

¹³⁹ See further, Bryan, above n 129.

¹⁴⁰ *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89, 148.

an unlikely remedy for recipient liability in practice. Reformulating recipient liability as a strict liability claim along the lines envisaged by Professor Burrows involves making restitution the only remedy and including a change of position defence. The analysis in this paper suggests that such a defence would need to be as accommodating as the operation of rescission in the *Bridgeman v Green* scenario in order for strict liability to be justified. In particular, this would involve considering the conduct of both parties and requiring C to ‘do equity’. The operation of equitable rescission and the operation of the change of position defence as currently formulated in the common law (and recognizing that the latter is an evolving defence) are different.¹⁴¹ Joachim Dietrich and I have argued elsewhere that if recipient liability were to be recast as an unjust enrichment strict liability, it would need to become ‘more equitable in its operation’.¹⁴² Specifically, the change of position defence would need to reflect more closely than is presently the case the operation of the equitable remedy of rescission.¹⁴³ If this were achieved, then the rescission rationale would apply equally to a strict recipient liability for breach of trust.

(c) *The Fragility of Gifts*

The argument that there are fewer policy constraints on overturning gifts rather than contracts applies equally to recipients of misappropriated trust property where, by definition, there is no valid contract governing the transfer. Security of receipt concerns can be dealt with by the change of position defence (subject to the comments above).

(d) *D’s Conscience*

There is a clear resonance between the conscience rationale for D’s *Bridgeman v Green* liability and the situation of an innocent recipient of misappropriated trust property. This is the strongest aspect of Burrows’ argument, although ironically it is probably the least palatable to unjust enrichment scholars. Under the former liability, the lack of mutuality (because D is a volunteer) means that it is against good conscience for D to retain a gift to which he or she is not ‘properly entitled’ (because of the taint of undue influence) to the extent that it can be returned without hardship to D. This reasoning is equally applicable to the innocent recipient of misappropriated trust property: there is a lack of mutuality because D is a volunteer and the breach of trust is an equitable wrong which taints the transaction. But, as noted by Klinck, if mutuality is the only factor at play, ‘conscience is engaged differently and less intensely than in cases where other factors are present.’¹⁴⁴ That is, what Burrows’ thesis must engage with is whether the conscience rationale is sufficiently bolstered by the other rationales in this context (including rationales that apply only to recipient liability and that have not been considered here). The analysis in this paper suggests

¹⁴¹ See further, Bant, above n 41, 234-236.

¹⁴² Dietrich and Ridge, above n 129, 86.

¹⁴³ Cases on the question whether C or D bears the onus of proof in showing that rescission is possible in the *Bridgeman v Green* scenario has been difficult to find. Mason, Carter and Tolhurst treat the requirement of *restitutio in integrum* in rescission as a defence, which suggests that the onus of proof is on D to prove that rescission is not possible, but they acknowledge that ‘the usual perspective is as a limitation on the court’s ability to set aside the contract.’ This suggests that the onus is on C. K Mason, JW Carter and GJ Tolhurst, *Mason and Carter’s Restitution Law in Australia* (LexisNexis Butterworths, Australia, 2nd ed, 2008) [2324].

¹⁴⁴ Klinck, above n 1, 224.

that whilst the liability in *Bridgeman v Green* is strict, this is an exceptional liability which modern courts have been somewhat reluctant to rely upon. Furthermore, the victim of a breach of trust has other claims and remedies which weaken the case for pursuing D to the extent of strict liability.

V CONCLUSION

The liability of an innocent third party recipient of a gift from C that is tainted by the actual or presumed undue influence of X is not based on fault. As Lord Wilmot's evocative statement of principle in *Bridgeman v Green* suggests, it is a strict liability: 'Let the hand receiving [the gift] be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it'.¹⁴⁵ There are four clear and persuasive rationales for this strict liability, but these are cumulative and co-dependent. The dominant rationale is that of conscience in the technical equitable sense of that term. Conscience in this sense is based upon the lack of mutuality between C and D combined with the tainted nature of the gift (whether that taint is described as the vitiation of C's consent to the gift, X's equitable wrongdoing or a combination of the two does not matter) and the fact that the parties can be returned substantially to their original positions. Conscience here does not at any time require awareness by D of the relationship of influence between C and X. The conscience rationale draws strength from, and is dependent upon, two further rationales. These concern the nature of equitable rescission and the lack of any strong policy concerns against disrupting gifts in this context. Similarly to their interaction with the conscience rationale, the rescission rationale and the fragility of gifts rationale interact with each other: concerns about protecting security of receipt of gifts are accommodated by the sensitive, discretionary application of the remedy of rescission when dealing with two innocent parties. Underpinning this trinity of rationales is a (historically) strong pragmatism. Courts were loath to countenance X's equitable fraud simply because the benefit had instead gone to a close relative or associate of X. It was felt that X would still benefit in such a case. Rather than an alternative remedy being made available against X (to compensate for C's loss, for example) D was made strictly liable to return the gift to C where that was still possible. That is, there was only one possible claim and remedy available to C and courts were reluctant for this to be lost too easily. The pragmatic rationale is not as strong today, but cannot be discounted completely where X and D are closely related and given that there is still only one remedy available to C. On the other hand, the remaining two possible rationales, depending respectively on a loose conception of agency and a contest between C and D's property rights, turn out to be less convincing.

The rationales that support strict liability in the *Bridgeman v Green* scenario provide some support for imposing strict liability upon the innocent volunteer recipient of misappropriated trust property. The conscience based rationale seems readily applicable given that D is a volunteer who was not properly entitled and assuming that restoration of the parties to the pre-transfer position is possible without hardship. The conscience rationale, however, is strongly dependent upon the mild, flexible and discretionary nature of equitable rescission in the undue influence context. It also draws credibility from the pragmatic realisation that no other remedy is available to C.

¹⁴⁵ (1757) Wilm 56, 64-65; 97 ER 22, 25.

This is not the case in relation to the victim of a breach of trust or fiduciary duty and the cogency of Burrows' argument is accordingly weakened. This paper has defended the conscience explanation for D's liability as an enduring and useful explanation of the lower level legal norms underlying the operation of equitable doctrine. Nonetheless, given that the strict liability in *Bridgeman v Green* is an exceptional liability and an unusual instance of 'conscience', judges should be cautious in extending it to new scenarios or to reform existing, well-established legal doctrine. When the rationales for the liability in *Bridgeman v Green* are analysed they do not provide a compelling case for reformulating existing equitable fault-based claims, such as recipient liability for breach of trust or fiduciary duty, as strict liability claims.