# ARCHETYPES OF AGE AND ROMANCE: UNCONSCIONABLE CONDUCT AND THE HIGH COURT IN *THORNE v KENNEDY*

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## I INTRODUCTION

The High Court's decision in *Thorne v Kennedy*[1] represents a significant departure from recent Australian jurisprudence on unconscionable conduct.[2] *Thorne* is a difficult case, notably for the fact that it involved a dispute between a woman from a poor third world background and a multi-millionaire from the first world.[3] Within the doctrine of unconscionable conduct, *Thorne* is the first Australian case at a senior appellate level to feature a conflict between a member of the global poor and a member of the global elite. This is a particularly significant development for a doctrine that was developed to preserve the interests of the wealthy.[4] *Thorne* also represents the first decision of the High Court on prenuptial agreements under the *Family Law Act 1975* (Cth), but it has ramifications that extend far beyond marriage.

The salient features that put *Thorne* at odds with other cases within the doctrine are the absence of any reference to a 'predatory state of mind',[5] the lack of deception on the part of the stronger party[6] and the presence of independent advice.[7] This places *Thorne* perilously close to undermining one of the central tenets of the principle set out by Mason J in *Commercial Bank of Australia Ltd v Amadio*.[8]

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1 (2017) 91 ALJR 1260.

2 For example, the absence of deception in *Thorne* is somewhat problematic given the importance that it has been afforded in cases like *Louth v Diprose* (1992) 175 CLR 621, *Mackintosh v Johnson* (2013) VSCA 10 and *Wu v Ling* [2016] NSWCA 322.

3 (2017) 91 ALJR 1260, [4]. As Keifel CJ, Bell, Gageler, Keane and Edelman JJ noted, 'Ms Thorne, who was an Eastern European woman, was living in the Middle East. She was 36 years old. She had no substantial assets'. In contrast, Mr Kennedy is described as 'a 67-year-old Greek Australian property developer. He had assets worth between $18 million and $24 million'. The facts of *Thorne* virtually invite a critical analysis of gender and class roles. However, that is beyond the scope of this article which will confine itself to a doctrinal analysis of unconscionable conduct.

4 *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, 491 (CA). See also *O'Rorke v Bolingbroke* (1877) 2 App Cas 814, 822 and *Fry v Lane* (1888) 40 Ch D 312, 322.

5 See *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392, [161].

6 See above n 2. Deception is not a necessary feature of the type of equitable fraud at issue in unconscionable conduct cases. See *Hart v O'Connor* [1985] AC 1000, 1024 (Lord Brightman). Likewise, in *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [291], Allsop P noted that unconscionability could extend to a range of conduct including 'bullying or thuggish behaviour, undue pressure and unfair tactics, taking advantage of vulnerability or lack of understanding, trickery or misleading conduct'. See also *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15, [187] (Bathurst CJ).

7 The absence of independent advice has been decisive in other cases. See *Bridgewater v Leahy* (1998) 194 CLR 457.

8 (1983) 151 CLR 447, 462. In *Amadio*, Mason J acknowledged the existence of 'an underlying general principle which may be invoked whenever one party by reason of some condition of

As Deane J noted in *Louth v Diprose*:

> The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimization.[9]

*Thorne* is an altogether more puzzling decision in light of *Wu v Ling*.[10] In *Wu*, a businesswoman who was the victim of an internet fraud borrowed $350,000 across five loans from a friend. The friend was not a party to the fraud. Yet, by the time of the fifth loan, he was aware that the woman was being defrauded. His conduct was held not to be unconscionable.[11] In *Wu*, the New South Wales Court of Appeal drew upon a conception of unconscionable conduct that appears to require 'naked exploitation'.[12] This is the notion identified by Bigwood[13] as emerging from the High Court's decision in *Kakavas v Crown Melbourne Ltd*.[14]

*Thorne* might well be the case that exposes a fault-line in the decisions that have followed *Amadio*. As Bigwood has noted, unconscionable conduct is 'under-theorised, and hence under-explained' in Australia.[15] As a result, the well-endorsed *Amadio* principle has unwittingly created a dichotomy within the jurisprudence between those cases of unconscionable conduct that involve 'naked exploitation' and those that involve 'passive exploitation'.[16] The position of the latter within the doctrine is open to question. In part, the difficulty stems from the lack of clarity in the relationship between key sub-doctrinal concepts. While the basic rules of unconscionable conduct are well settled, the meaning and hierarchy between terms such as 'victimization' and 'exploitation' is largely unclear. Further, a third category of conduct which falls short of exploitation can be appended to the dichotomy. This third category should be seen as automatically falling outside of the parameters of the doctrine.

In *Kakavas* the High Court suggested that proof of a predatory state of mind was part of the *Amadio* principle.[17] The absence of the phrase in *Thorne* without elaboration may suggest that there has been some modification of the principle. This is a significant development given the impact of *Kakavas* on lower courts. Notably, the

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circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party'. See also *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392, [6].

9 (1992) 175 CLR 621, 638.

10 [2016] NSWCA 322. Interestingly, the High Court rejected a special leave application in *Wu v Ling* at roughly the same time that it would have been considering its judgment in *Thorne*. See *Wu v Ling* [2017] HCA Trans 209 (20 October 2017). See also *Lauvan Pty Limited & Anor v Bega (No 2)* [2018] NSWSC 155, [347] (Gleeson JA).

11 [2016] NSWCA 322

12 See Rick Bigwood, 'Still Curbing Unconscionability: Kakavas in the High Court of Australia' (2013) 37 *Melbourne University Law Review* 463, 476. Bigwood states, 'the ultimate doctrinal consequence of *Kakavas* is confirmation, for Australia at least, that nothing less than proof of naked exploitation suffices to justify state interference with an objectively concluded bargain transaction'.

13 Ibid.

14 (2013) 250 CLR 392.

15 Bigwood, above n 12, 478.

16 Ibid.

17 *Kakavas* (2013) 250 CLR 392, [6].

phrase a 'predatory state of mind', which first appeared in *Kakavas*, has become an accepted part of unconscionable conduct jurisprudence in Australia.[18]

The absence of the phrase is all the more curious in light of the fact that in *Paciocco v Australia and New Zealand Banking Group Ltd*,[19] Allsop CJ referred to 'predation' in his Honour's elucidation of the *Amadio* principle. In *Paciocco v Australia and New Zealand Banking Group Limited*,[20] in the High Court, Keane J cited Allsop CJ with approval. Likewise, the other judges of the High Court in *Paciocco* endorsed Allsop CJ's treatment of unconscionable conduct, though they too made no reference to a 'predatory state of mind'.

This article explores the High Court's treatment of unconscionable conduct in *Thorne v Kennedy* and advances four criticisms of the decision and the doctrine. The first is that the Court does not adequately acknowledge the complexity of Thorne's motivations for entering into the agreement and relationship with Kennedy. Though this worked in her favour on appeal, it also denied her the full extent of her autonomy and agency. The second is that the Court gives an unconscionable hue to otherwise colourless facts. The third is that the Court generally undervalued Kennedy's desire to protect his children.[21] The fourth is that the doctrine assigns archetypal roles to the parties and that this obscures the reality of their dealings. This is as much a result of the language of the doctrine as it is of judicial choice in *Thorne*. In sum, *Thorne* is inconsistent with other recent decisions on unconscionable conduct. This inconsistency is a troubling feature of the jurisprudence. It would appear that the doctrinal retreat that was so evident in *Kakavas* has now ended.[22]

## II UNCONSCIONABLE CONDUCT IN *THORNE V KENNEDY*

The names 'Thorne' and 'Kennedy' are both pseudonyms. Respectively, they represent the Anglicisation of the identities of a 36-year-old Eastern European woman who was living in the Middle East and a 67-year-old Greek Australian man.[23] Kennedy first came across Thorne's profile when he was perusing a matrimonial website. The pair subsequently met online and shortly thereafter Kennedy flew to the Middle East to meet Thorne.

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18 See also *Mavaddat v HSBC Bank Australia [No 2]* [2016] WASCA 94, [79] (McLure P); *Commonwealth Bank of Australia v Stephens* [2017] VSC 385, [418] (Sloss J); *Roo Roofing Pty Ltd v Commonwealth* [2017] VSC 31, [135] (Dixon J); *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186, [59] (Allsop CJ); *Donnelly v Australia and New Zealand Banking Group Ltd* [2014] NSWCA 145, [41] (Macfarlan JA); *Lauvan Pty Limited & Anor v Bega & Ors (No 2)* [2018] NSWSC 155, [346] (Gleeson JA); *Nalbandian v Commonwealth of Australia* [2017] FCA 45, [53] (Burley J); *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18, [193] (Besanko and Gilmour JJ).

19 (2015) 236 FCR 199, [280], [296], [330].

20 (2016) 258 CLR 525, [292].

21 Though unconscionable conduct can occur without any dishonesty. See *Johnson v Smith* [2010] NSWCA 306, [101] (Young JA).

22 See W Swain, 'The Unconscionable Dealing Doctrine: In Retreat?' (2014) 31 *Journal of Contract Law* 255, 257. Swain noted that the High Court's decision in *Kakavas* appeared to 'mark a return to a more cautious approach' to unconscionable conduct.

23 Though it is beyond the scope of this paper to explore, there is an argument that the High Court's reasoning in *Thorne v Kennedy* reflects Anglo-Saxon conceptions of marriage and property. In turn, this may have resulted in the shared cultural understanding of the parties over the need to preserve Kennedy's wealth for his children being under-appreciated by the Court. In a multiracial, multicultural and pluralistic society this type of monocultural thinking should be resisted.

At the outset of their relationship, Kennedy told Thorne that if they were to marry, 'you will have to sign paper. My money is for my children'.[24] During their courtship, Kennedy took Thorne on a tour of Europe and met her family. He provided her with expensive jewellery and in early 2007 he brought her to Australia with the intention of marrying her.

The wedding date was set for 30 September 2007. In early August, Kennedy instructed his solicitors to prepare a prenuptial agreement. The agreement was presented to Thorne on 19 September 2007, just eleven days prior to the wedding. Kennedy did arrange for Thorne to consult with an independent solicitor. The solicitor advised Thorne that the agreement was the worst that she had ever seen. Nonetheless, Thorne signed the agreement. After the marriage, Thorne signed another agreement on largely the same terms.

Under the agreement, Thorne would receive $50,000 if the parties separated within three years and without the relationship having resulted in a child. The agreement also stipulated that Thorne would receive $4000 per month during the relationship.[25] The agreement did make a rather more agreeable accommodation for Thorne if Kennedy were to die during their marriage. Under those circumstances, Thorne would receive a penthouse or unit valued at $1.5 million, a Mercedes Benz car and the income from the management rights from a property development project or $5000 per month if that was the larger sum.

Taken as a whole, the payments within the agreement were structured towards incentivising Thorne to stay within the relationship and minimising Kennedy's risk in the event that the relationship failed.

The pair separated in 2011 at Kennedy's behest.[26] Thorne commenced proceedings in 2012 claiming that the agreements should be set aside under ss 90K and 90KA of the *Family Law Act*.[27] Thorne was successful at first instance in the Federal

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[24] *Thorne* (2017) 91 ALJR 1260, [5].

[25] Ibid [8]. Thorne's solicitor advised her that this amount was 'very poor provision from someone in Mr Kennedy's circumstances'. The lead judgment of the High Court acknowledged this advice, but made no comment on the peculiarity of Thorne receiving maintenance payments during the marriage.

[26] There is only an oblique reference to the reason for the separation in the trial judge's judgment. See *Thorne & Kennedy* [2015] FCCA 484, [62]. Demack J noted, 'Mr Kennedy's evidence was that he signed the Separation Declaration at a time when he had told Ms Thorne repeatedly to stop "frustrating him", and she didn't'. Quite what Kennedy meant by the suggestion that Thorne was 'frustrating him' was left unexplored by Demack J. Given that Kennedy would have been 72 years old in 2011 at the time of separation there is an issue of vulnerability that may have been worth examining. In particular, as he was in very poor health and died during the trial in early 2014, he would have been somewhat vulnerable in a domestic context to his much younger wife. While there is no evidence or suggestion of wrongdoing on Thorne's part it is curious that much is made of her economic vulnerability and situation in assessing special disadvantage in the trial judgment and in the High Court, but little is made of Kennedy's age though it surely affects the assessment of his conduct and their relationship in the context of special disadvantage.

[27] Section 90K(1) provides in part that 'a court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that … in respect of the making of a financial agreement — a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable'. Section 90KA provides in part that 'the question whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts'.

Circuit Court. One of the peculiarities in the decision of the trial judge was her failure to differentiate between duress and unconscionable conduct.[28]

On appeal in the Full Court of the Family Court it was held that the agreements were not voidable due to duress, undue influence or unconscionable conduct.[29]

In three separate judgments, the High Court found in favour of Thorne. In the lead judgment, a plurality comprising Keifel CJ, Bell, Gageler, Keane and Edelman JJ, found that the agreements were voidable for undue influence and unconscionable conduct.[30] In a separate decision, Nettle J concurred with the plurality.[31] Gordon J found that no undue influence had occurred, but that Kennedy's conduct was unconscionable.[32] The reasoning behind the various judgments in the High Court is set out below.

### A *Unconscionable Conduct in the High Court*

A finding of unconscionable conduct requires (i) the existence of a special disadvantage in the weaker party;[33] (ii) knowledge of that disadvantage on the part of the stronger party;[34] and (iii) the unconscientious taking of advantage by the latter.[35]

The plurality afforded barely three paragraphs to the discussion of unconscionable conduct between the parties in *Thorne*.[36] This meant that they were heavily reliant upon the trial judge's characterisations of the parties. This is an important point given the tenor of that judgment.[37]

The trial judge found that Thorne was 'powerless' and had 'no choice' but to enter into the agreements.[38] The trial judge did not identify this state of affairs as a special disadvantage.[39] However, the trial judge based her findings on a combination of six factors which in turn were relied upon by the plurality to suggest that Thorne was at a special disadvantage. These factors were:

(i) her lack of financial equality with Mr Kennedy;
(ii) her lack of permanent status in Australia at the time;
(iii) her reliance on Mr Kennedy for all things;
(iv) her emotional connectedness to their relationship and the prospect of motherhood;

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28 *Thorne* [2015] FCCA 484, [68]. Demack J stated, 'conduct which is unconscionable would have a bearing on the validity or enforceability of an agreement. Duress is a form of unconscionable conduct'. In the High Court, the plurality interpreted this as the use of the term 'unconscionable', 'in the sense described by Gaudron, McHugh, Gummow and Hayne JJ in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 409, as "to characterise the result rather than to identify the reasoning that leads to the application of that description"'. See *Thorne* (2017) 91 ALJR 1260, [45].

29 *Kennedy & Thorne* [2016] FamCAFC 189.

30 *Thorne* (2017) 91 ALJR 1260, [37]–[53], [63]–[65].

31 Ibid [74]–[78].

32 Ibid [109]–[123].

33 *Blomley v Ryan* (1956) 99 CLR 362.

34 *Kakavas* (2013) 250 CLR 392.

35 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. Also *Thorne v Kennedy* (2017) 91 ALJR 1260. See also *Gillian Fisher-Pollard by her tutor Miles Fisher Pollard v Piers Fisher Pollard* [2018] NSWSC 500, [124].

36 Ibid [63]–[65].

37 See discussion below nn 91–97.

38 *Thorne* (2017) 91 ALJR 1260, [47].

39 The trial judge addressed these factors under the category of duress, though the language used would seem to fit more comfortably within the doctrine of unconscionable conduct.

(v) her emotional preparation for marriage; and
(vi) the 'publicness' of her upcoming marriage.[40]

The plurality added the further consideration that Kennedy had partly created Thorne's special disadvantage by causing the 'urgency with which the prenuptial agreement was required to be signed and the haste surrounding the postnuptial agreement and the advice upon it'.[41]

The plurality tied Kennedy's unconscionable conduct to the urgency around the signing of the agreements and the lack of an offer to assist Thorne and her family with return travel in case Thorne did not sign the agreements.[42] Further, the plurality rejected the Full Court's finding that there had been no unconscionable conduct on Kennedy's part. The Full Court's reasoning was based in part upon the observation that Kennedy had been consistent in his representations throughout the relationship.[43]

Nettle J's decision almost grounded Thorne's special disadvantage in the nature of the relationship itself. His Honour stated:

> In effect, it was a position of special disadvantage which he created by bringing her to this country, keeping her here for many months in a state of belief that he would marry her, allowing preparations for the wedding to proceed, and only then, when she had ceased for all practical purposes to have any other option, subjecting her to the pressure of refusing to marry her unless she agreed to the terms of the first agreement.[44]

His Honour further stated:

> In all likelihood, things would have been different if, instead of waiting until the eleventh hour, Mr Kennedy had made clear to Ms Thorne from the outset of their relationship that his love for her was in truth so conditional that the marriage that he proposed would depend upon her giving up any semblance of her just entitlements in the event of a dissolution of their marriage.[45]

These two statements appear to ignore the representation that Kennedy made to Thorne at the outset of their relationship.[46] Likewise, it almost appears to deny Thorne any capacity for deciding for herself to journey to Australia and to pursue the relationship with Kennedy. The tone of Nettle J's decision is the closest in its nature that the three High Court opinions come to that of the trial judge. In essence, there is a strong under-current of moral judgment about the way in which the relationship had been carried out from the moment that Kennedy brought Thorne to Australia. This is something that the plurality was almost at pains to avoid when they centred their finding of unconscionable conduct on the narrow grounds identified above.

Gordon J based her finding of unconscionable conduct on Thorne's emotional and financial dependence on Kennedy.[47] In that context, Gordon J found Thorne to be

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40 *Thorne* (2017) 91 ALJR 1260, [47].
41 Ibid [65].
42 Ibid [65].
43 Ibid [53].
44 Ibid [74].
45 Ibid [75].
46 See above n 24.
47 *Thorne* (2017) 91 ALJR 1260, [117].

'unusually susceptible' to an 'improvident transaction'.[48] On this view, the unconscionable conduct that Gordon J identified in *Thorne* falls squarely within the parameters set out by Gaudron, Gummow and Kirby JJ in *Bridgewater*.[49] As with the other opinions of the Court, Gordon J's finding that the agreements were 'grossly improvident' does have the effect of denying Thorne her autonomy. This stands somewhat at odds with the approach in *Kakavas* where privacy and autonomy were evoked as reasons for not interfering with a gambler's substantial losses.[50]

## III A DOCTRINE OF TROPES AND ARCHETYPES

At its core, the doctrine of unconscionable conduct calls for judicial intervention to set aside transactions which the conscience of equity cannot let stand.[51] Where a transaction has taken place between two competent adults, this requires a compelling justification. It is hardly surprising then that the language of the unconscionable conduct doctrine tends towards strong and even emotive characterisations of the parties. The person who claims to be at a special disadvantage is often described by the courts as 'the innocent party'[52] or the 'weaker'[53] or the 'victimised' party.[54] The stronger party is said to have engaged in 'victimisation'[55] or 'exploitation'.[56] While the phrase is wholly absent in *Thorne v Kennedy*,[57] the High Court in *Kakavas* also made reference to the stronger party possessing a 'predatory state of mind'.[58]

These are not neutral terms. They are loaded with meaning and values. In their application, they lend themselves to the creation of polarised characterisations within the case law.

In *Kakavas v Crown Melbourne Ltd*, the High Court stated that the assessment of special disadvantage must be made in light of all the circumstances surrounding the transaction.[59] This is the principle established in *Jenyns v Public Curator (Q)*,[60] which

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48 Ibid.

49 Their Honours noted that the transaction in *Bridgewater* 'involved an improvident transaction which was neither fair nor just and reasonable'. See *Bridgewater* (1998) 194 CLR 457, 492.

50 *Kakavas* (2013) 250 CLR 392, [28]. See also *Wu* [2016] NSWCA 322, [16] (Leeming JA).

51 *Amadio* (1983) 151 CLR 447, 461 (Mason J). See also *Kakavas* (2013) 250 CLR 392, [18].

52 *Amadio* (1983) 151 CLR 447, 462 (Mason J). *Thorne* (2017) 91 ALJR 1260, [38] (Keifel CJ, Bell, Gageler, Keane and Edelman JJ). Also *Kakavas* (2013) 250 CLR 392, [6]. The term 'innocent' is never actually defined in the case law. Nonetheless, the Oxford Dictionary defines the term as meaning in part that a person is 'free from moral wrong; not corrupted'.

53 *Bridgewater v Leahy* (1998) 194 CLR 457, [39].

54 Ibid.

55 *Hart v O'Connor* [1985] AC 1000, 1028; *Louth* (1992) 175 CLR 621, 638; *Bridgewater v Leahy* (1998) 194 CLR 457, 479 [76]; Kakavas (2013) 250 CLR 392, 401 [18], 402 [22], 403 [26], 43–440 [161].

56 *Louth* (1992) 175 CLR 621, 626 (Deane J); *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 63 [9], 64 [14]; *Kakavas* (2013) 250 CLR 392, 439–440 [161].

57 This absence cannot be without some significance. The term does not appear in *Bridgewater* or *Louth* either.

58 *Kakavas* (2013) 250 CLR 392, [143], [161]. See *Wu* [2016] NSWCA 322, [18], [19] (Leeming JA), [111] (Bergin CJ). There is an obvious juxtaposition between an 'innocent party' who is subjected to 'victimization' at the hands of a stronger party who is in possession of a 'predatory state of mind'.

59 (2013) 250 CLR 392, [18]. The Court stated, 'The invocation of the conscience of equity' requires 'a scrutiny of the exact relations established between the parties' to determine 'the real justice of the case'.

posits that the application of equity's conscience depends upon 'a precise examination of the facts' allows for the variable circumstances under which claims of unconscionable conduct can be made.

The principle appears neutral on its face. Yet, it does not say much about the type of hue given to particular facts or the choice of facts which are regarded as essential or inconsequential. This is the point made by Lisa Sarmas in her deconstruction of the High Court's decision in *Louth v Diprose*.[61] The way in which a court recounts and assesses the facts within each judgment results in a narrative structure that is either favourable or unfavourable to the defendant. This is a necessary part of the judicial process. Along the way, there are choices that the judges make about the facts that are emphasised or under-emphasised. These choices are important because they are a necessary part of fitting the facts into the structures and categories created by the law.[62]

The criticism that I advance here is that the extremes of categorisation mandated by the language of the doctrine fail to reflect the ambiguity and complexity of relationships like that between Thorne and Kennedy. Judicial choice compounds the problem. The use of the term 'innocent' connotes an absence of blame or any impure or questionable motives. Similarly, to require the defendant to possess a 'predatory state of mind' or to have acted 'unconscientiously' may tend towards reading out nobler intentions or assigning a dubious colour to otherwise characterless actions.

My criticism is that the way in which the narrative choices and rules combine results in a distortionary effect. This is particularly evident in the *Thorne v Kennedy*. Neither party is quite what they are depicted as being in the various judgments. Thorne is not as powerless or naïve as she appears in the plurality's judgment. Kennedy is not as unconscientious as he appears. In the section below, I identify some of the choices made by the Court in setting out the facts in *Thorne* and offer a counter-perspective.

### A *Innocence and Passivity*

By assigning to Thorne the role of the victim, the High Court denied her the agency that she would have possessed when she entered her relationship with Kennedy. This has a twofold effect in *Thorne*. It obviates any of the complicating factors around her behaviour, but denies to her the autonomy granted to others.

#### 1 *Financial Motivations?*

Thorne was in a vulnerable position even before she met Kennedy. As the judgments suggest, by leaving the Middle East country in which she had resided she may have lost her right to enjoy a long-term residence there. Further, Thorne would have had no right to a permanent stay in Australia outside of the context of her relationship with Kennedy. However, there is nothing in the High Court's judgment or in the lower court decisions to suggest that Thorne was unaware of the consequences of accompanying Kennedy with regard to her right of residence in Australia or elsewhere. There is also no reason to believe that Thorne would have had no right of return to her country of citizenship.

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60 (1953) 90 CLR 113, 118–119.

61 L Sarmas, 'Storytelling and the Law: A Case Study of Louth v Diprose' (1994) 19 *Melbourne University Law Review* 701.

62 I acknowledge that a trial judge has the benefit of assessing each witness directly and also that choices must be made in recounting the facts. See P Heerey, 'Truth, Lies and Stereotype: Stories of Mary and Louis' (1996) 1(3) *Newcastle Law Review* 1, 17–20.

The various decisions of the High Court make much of her emotional connection to the marriage and her desire for children. In particular, this lead the plurality to endorse the 'vivid description' offered by the trial judge of Thorne's position:

> She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions. ... She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences to Ms Thorne. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world.[63]

What is missing here is any elaboration as to why Thorne would take the risk of pursuing the relationship with Kennedy in the first place. Herein lies a double-edged sword. The fact that the agreements were unfair to Thorne in economic terms was a contributing factor to the finding of unconscionable conduct. Yet, none of the decisions of the Court seem to acknowledge that Thorne might have had an economic motivation for pursuing her relationship with Kennedy. Only Nettle J appears to allude to this possibility in his assessment of Kennedy's conduct:

> In the scheme of things, it can hardly be supposed that a young woman in Ms Thorne's position would be persuaded to abandon her life abroad and travel halfway around the world to bind herself to a sexagenarian if, at the outset of the relationship, she had been made aware of the enormity of the arrangement that was proposed.[64]

In other words, if Thorne was aware that the failure of the relationship would result in her losing access to the lavish lifestyle enjoyed by Kennedy or any sizeable payout, she would not have been drawn to the relationship.

I do not raise the existence of an economic motivation in order to pass moral judgment on Thorne. Her reasons for entering the relationship may well have been many and varied. Even if the relationship was desired by her for purely financial reasons that is not necessarily wrong. However, what it does is that it muddies the waters around victimhood. It makes it much harder to suggest that she was at a special disadvantage.

The failure to acknowledge troubling motivations has in the past been a source of controversy with regard to other High Court decisions on unconscionable conduct. In her scholarship, Lisa Sarmas adeptly explored the somewhat misogynistic intentions of the plaintiff in *Louth v Diprose*.[65] In that case, the various judges of the High Court cast Diprose as a hapless romantic fool and regarded Louth as having created a false atmosphere of crisis. This obscured acts of aggression by Diprose, the socio-economic gap between the parties and his desire to control her through financial means.[66]

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63 *Thorne* (2017) 91 ALJR 1260, [47]. Strictly speaking, the suggestion that Thorne 'had nothing to return to anywhere else in the world' is untrue given her citizenship of an Eastern European country and the fact that her family lived there.

64 Ibid [75].

65 (1992) 175 CLR 621. See Sarmas, above n 61.

66 Sarmas, above n 61, 718–721.

### 2 *Autonomy*

The denial of Thorne's autonomy places the decision in *Thorne* into question. At the time that she met Kennedy, Thorne was 36 years old. She had been previously married and had experienced at least one other serious relationship. More to the point, Thorne had been living independently in a foreign country for some time. In short, she was not without the wit and intellectual skills to fend for herself and to make choices as to what was in her best interests.

In this context, Thorne's financial and emotional dependence on Kennedy was a particular choice. That is, to take the risk that the relationship with Kennedy would lead to long-term financial security. Yet, for the Court to recognise the existence of that choice, along with the inherent risks that it ordinarily entail, would have again complicated the depiction of her doctrinally required victimhood.

Instead, in its various opinions the Court chose to focus on the improvidence of the bargain to which Thorne had agreed. This is a particularly notable feature of the judgements of Gordon and Nettle JJ.[67] After all, the more improvident the bargain the more likely that it could only have been procured through defective consent.[68] As Chen-Wishart noted, 'vitiating the contract for reasons other than lack of voluntariness is generally regarded with suspicion'.[69] For its part the plurality emphasised Thorne's situational distress.[70]

As Nettle J stated:

> By the time he disclosed to her the full terms of the agreement, and by the time Ms Harrison had made Ms Thorne understand the purport of them, the circumstances in which Ms Thorne found herself appear so seriously to have affected her state of mind as to have rendered her incapable of making a judgment in her own best interests. As the plurality in effect observe, *there is no other rational explanation for Ms Thorne's decision* not to insist upon the substantive changes which Ms Harrison recommended, and instead to acquiesce in Mr Kennedy's extraordinary demands.[71]

However, if Thorne is given her full autonomy a different picture emerges. This requires permitting Thorne to assess for herself how the relationship with Kennedy would pan out. Thorne believed that she would never leave Kennedy. She never contemplated that he would leave her and given that the incentive structures within the agreements were designed to keep her in the relationship this would have made sense at the time she signed the agreements. In this context, her decision to ignore independent advice is rational, though not prudent.

It is undeniable that the agreements in Thorne were unreasonable. There is no doubt that Thorne would have been in a difficult situation, but she knew that an agreement preserving Kennedy's financial interests was always going to arrive.[72] More to the point, he had been consistent as to the nature of that agreement, if not its details. The agreement placed Thorne in a position in which she could not achieve her best

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67 *Thorne* (2017) 91 ALJR 1260, [64].

68 See above n 47.

69 'The Nature of Vitiating Factors in Contract Law' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 294, 297.

70 *Thorne* (2017) 91 ALJR 1260, [76] (Nettle J), [123] (Gordon J).

71 Ibid [76] (emphasis added).

72 Ibid [122].

outcome in all contingencies, but it did not render her unable to make a decision as to her best interests.

In *Bridgewater v Leahy*,[73] the majority failed to adequately account for the uncle's patriarchal attitudes. In turn, this arguably led to a mischaracterisation of the transaction which resulted in his selling part of his land to his nephew at an undervalue. What appeared on its face to be a 'grossly improvident'[74] transaction would have been wholly explicable if the uncle's patriarchal mindset was fully factored in to the assessment of the facts.

More troublingly, the construction of Thorne's special disadvantage stands in contrast to the way in which the courts have treated gambling addicts in *Kakavas* and in *Guy v Crown Melbourne Limited (No 2)*.[75]

In *Guy*, Mortimer J stated:

> The 'special disadvantage' which the applicant must establish for the purposes of s 20 and the unwritten law is, on the authorities, unlikely to be made out. That is because on the evidence those individuals with a gambling addiction or a gambling 'problem' retain a level of control (even if 'impaired' as the applicant contends) over their actions which is not consistent with the concept of a 'special disadvantage' existing in a gambler.[76]

There is an obvious contradiction here with *Thorne*. If some level of control is sufficient to deny special disadvantage in *Guy*, then why should the control that Thorne exercised over her own actions at various stages in her relationship be underplayed in the High Court's decision in *Thorne v Kennedy*? The answer is that it should not.

What might be at play here is a choice about how equity will treat personal relationships and consumer contracts. That is, that the decision in *Thorne* runs along a different set of (unarticulated) tracks than the decisions in *Kakavas* and *Guy*.[77] This would be why the High Court could state in *Kakavas*:

> A plaintiff who voluntarily engages in risky business has never been able to call upon equitable principles to be redeemed from the coming home of risks inherent in the business.[78]

Yet, in *Thorne* the autonomy recognised in the statement above is missing and the risks have been unsubtly shifted from one party to the other.

### B *Driving Unconscientious Conduct*

Just as Thorne's special disadvantage relies upon reading out troubling motives and autonomy, Kennedy's unconscientious conduct depends upon reading in a particular colour to otherwise characterless actions.

In *Thorne*, the plurality appears to assign ill-motives to Kennedy. In relation to the sense of urgency around the signing of the prenuptial agreement, the plurality observes:

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73 (1998) 194 CLR 457.
74 Ibid [121] (Gaudron, Gummow and Kirby JJ).
75 [2018] FCA 36.
76 [2018] FCA 36, [476].
77 This is a suitable topic for further research, though it is beyond the immediate scope of this paper.
78 *Kakavas* (2013) 250 CLR 392, [20].

> Ms Thorne and her family members had been brought to Australia for the wedding by Mr Kennedy and his ultimatum was not accompanied by any offer to assist them to return home.[79]

The implication is that had Thorne not signed the agreement, both she and her family members would have been stranded in Australia without any further assistance from Kennedy. Again, there is no clear indication on the facts of the case that this would have occurred. The absence of the offer is equally explicable by Kennedy having thought that it might logically follow the end of the relationship. Given Kennedy's financial position there would be no real reason for him be unwilling to pay for a return airfare for Thorne and her family.

Likewise, the phone call that Kennedy made to Thorne whilst she was receiving legal advice for the second time is also factored in to the assessment of his conduct.[80] Gordon J noted, 'Mr Kennedy not only sat in the car but telephoned her to ask how much longer she was going to be'.[81] The implication being that the phone call exerted some pressure on the mind of Thorne. This is suggested in the plurality's recounting of the facts.[82] Yet, this seems altogether trivial. The phone call is easily explicable by Kennedy's general impatience or even by the fact that the meeting had taken a while. It need not be construed as pressure, but neither of the two judgments that make note of it avert to a more innocent explanation.

The various judgments of the High Court base their assessment of Thorne's special disadvantage on the lack of time that Kennedy gave her to assess and reflect on the agreements. However, the substance of the agreements reflects exactly what Kennedy said to Thorne when they first met. That is, that his money was intended for his children and not her.[83]

An interesting shift occurs in the language used by the plurality in relation to that statement. Towards the end of the plurality's judgments their Honours state:

> Ms Thorne knew Mr Kennedy required her acknowledgement that his death would not result in her receiving a windfall inheritance at the expense of his children.[84]

However, the statement referred to at the beginning of the plurality's judgment is unambiguous and is not confined in any manner. However, by the end of the plurality's judgment it has been narrowed down to an inheritance. This is a subtle shift that deprives Kennedy of the benefit of any acknowledgment that he was consistent in his general terms of the relationship.

Gordon J does acknowledge the consistency:

> True it is that some kind of agreement or 'paper' relating to Mr Kennedy's wealth had long been in the contemplation of the parties, and that Ms Thorne

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79 *Thorne* (2017) 91 ALJR 1260, [65].
80 Ibid [118] (Gordon J).
81 Ibid.
82 Ibid [14].
83 Ibid [5].
84 Ibid [65]. This is in contrast to the statement recounted at [5], 'he told her that if he liked her then he would marry her but that "you will have to sign paper. My money is for my children"'.

> was not under any relevant misapprehension as to the effect of each agreement.[85]

Again, this does not actually reflect the nature of Kennedy's representation. His statement that 'you will have to sign paper. My money is for my children' appears to offer little in the way of a parting gift for Thorne if the relationship were to end abruptly.

At any rate, Gordon J found that the statement above was outweighed by:

> Having brought Ms Thorne to Australia promising to look after her like 'a queen', it was not until two weeks before the wedding that Mr Kennedy arranged for Ms Thorne to receive legal advice; and it was not until ten days before the wedding that she received detailed information about his finances and became aware of the specific contents of the first agreement.[86]

It is in this context that it is worth noting the other rhetorical shift in *Thorne*. That is, the absence of the phrase, 'a predatory state of mind' which was so notable in *Kakavas* and later cases, but which is missing in *Thorne*.

In *Kakavas*, the High Court stated:

> Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind.[87]

Yet, barely four years later 'a predatory state of mind' is no longer a requirement of the doctrine. On a doctrinal level this is a shift in the jurisprudence that is too significant to occur without judicial explanation. It might be that the requirement is limited to 'arms length commercial transactions', but whether such a qualification exists remains unclear after *Thorne*. Likewise, the plurality's statement that 'the other party knew *or ought to have known*' that a special disadvantage existed and would affect the weaker party represents a shift from the position on actual knowledge set out in *Kakavas*.[88]

The absence of predation creates an ambiguity that can be coloured in Kennedy's favour. It could be suggested that in the agreements that he went too far in his desire to protect his wealth for his children — after all, what do millions mean to a man nearing the end of his life? However indifferent Kennedy might have been to Thorne's fate in the event of a split, the sheer lack of cunning in the way in which he executed the signing of the prenuptial agreements suggested that in this instance he lacked the sophistication to be predatory or even opportunistic. Instead, the way in which Kennedy arranged matters is clumsy and all things considered, that should tell in his favour because it demonstrates the absence of intent to engage in contractual exploitation.

None of the opinions in the High Court consider the possibility that Kennedy might have unwittingly engaged in unconscionable conduct. This is more delicate ground. It is possible that a person with good intentions can still engage in unconscionable conduct. Kennedy's motivations towards his adult children would have

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85 Ibid [122].
86 Ibid.
87 (2013) 250 CLR 392, [161].
88 *Thorne* (2017) 91 ALJR 1260, [38]. I am grateful to the anonymous referee for this observation.

been unquestionably good. He might have been indifferent to Thorne's best interests.[89] A finding of unconscionable conduct would have to be conditional on this reading of the facts. In *Johnson v Smith*, Young JA stated:

> There are situations where a person who has no active intention of doing another down may still be guilty of unconscientious conduct if he or she accepts 'the benefit of an improvident bargain by an ignorant person acting *without independent advice* which cannot be shown to be fair'.[90]

As such, the independent advice twice afforded to Thorne would have and perhaps should have undercut any finding of unconscionable conduct. In *Johnson*, Young JA appears to have regarded a finding of unconscionable conduct in the absence of any intent to engage in active exploitation to be conditional upon the weaker party having been deprived of independent advice. On this reading of the doctrine it would matter little that Kennedy was required by law to ensure that Thorne received independent legal advice provided that he did not actively seek to exploit her.

### C *Archetypes of Age and Romance*

In the judgments, Kennedy receives the archetypal role of the heartless old man. This is most obvious in the observation that Nettle J offered of the relationship between him and Thorne.[91] In this role the only explanation for his actions is a desire to take advantage of a poorer and younger woman. Any other factors that motivate his conduct are read out of the construction of the facts. This results in an under-valuing of his desire to protect his wealth for his children or any loneliness or isolation that he might have felt in his old age. The latter is not a minor consideration. It is noticeable that the agreements are remarkably more generous to Thorne if the couple were still together when he died.

Given the endorsement of her findings by the plurality, the trial judge's opinion warrants attention. In her reasons, the trial judge puts forward a particularly unfavourable description of Kennedy. Demack J depicts Kennedy as ruthless. Her Honour stated:

> The husband did not negotiate on the terms of the agreement as to matters relating to property adjustment or spousal maintenance. He did not offer to negotiate. He did not create any opportunities to negotiate. The agreement, as it was, was to be signed or there would be no wedding. Without the wedding, there is no evidence to suggest that there would be any further relationship. Indeed, I am satisfied that when Mr Kennedy said there would be no wedding, that meant that the relationship would be at an end.[92]

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89 Here again might lie a point of difference between the interpersonal relationship cases and the consumer contract cases. In *Kakavas* (2013) 250 CLR 392, [161], the High Court noted that, '[h]eedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose'.

90 [2010] NSWCA 306, [101].

91 This is an inversion of the stock stories applied to Mary Louth in *Louth v Diprose*. See above n 60.

92 *Thorne* [2015] FCCA 484, [89]. Technically, Kennedy was not 'the husband' at the time that he presented Thorne with the prenuptial agreement. The use of the term is again not a neutral choice of language. It suggests that a husband has an obligation towards his wife and that Kennedy failed to meet it.

What is remarkable here is the repetition. In relation to the prenuptial agreement, Demack J stresses that Kennedy 'did not negotiate … did not offer to negotiate … did not create opportunities to negotiate'. A similar rhetorical device is applied by Demack J in relation to the wedding and the relationship. In essence, the terms 'no wedding' and the ending of the 'relationship' are stressed.

It is not contested that the prenuptial agreement was presented on a 'take it or leave it' basis. However, the repetition employed by Demack J in the passage above has a dramatic effect.[93] When Her Honour suggests that the wedding and relationship would be at an end if the prenuptial agreement were not signed, she neglects to mention that Kennedy should have been free to leave the relationship at any time for any reason. Demack J further stated:

> Every bargaining chip and every power was in Mr Kennedy's hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear.[94]

The use of language in describing Kennedy's actions, together with the employment of the device of repetition, has a distinct narrative effect. This has to be considered in light of the 'vivid'[95] description of Thorne that Demack J offered during this passage. In total, both characterisations lead to a narrative structure that pits a 'ruthless' Kennedy against an 'innocent' Thorne.

Thorne's 'innocence' is emphasised in the first instance judgment. Demack J stated:

> The applicant wanted a wedding. She loved Mr Kennedy, and wanted a child with him. She had changed her life to be with Mr Kennedy.[96]

The description is true, if not a touch melodramatic.

The 'vivid' description of Thorne offered by Demack J also has the effect of clothing the former in archetypes of purity — motherhood and marriage. Again, a repetition device is employed.[97] Demack J writes:

> Her emotional connectedness to their relationship and the prospect of motherhood, her emotional preparation for marriage, and the publicness of her upcoming marriage.[98]

This characterisation clearly influenced the reasoning of the plurality. However, it is problematic. Quite apart from depriving Thorne of the benefit of her own autonomy, it depicts her as a woman whose desire for marriage and children blinds her to a variety of risks. This is surely a reductionist characterisation of a complex person.

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93 Indeed, it is written to persuade.

94 Ibid [92].

95 Above n 41.

96 *Thorne* [2015] FCCA 484, [90].

97 In particular, '*her emotional* connectedness … *her emotional* preparation'. In the full paragraph 'her' is also repeated, '*her lack* of financial equality … *her lack* of permanent status in Australia … *her* reliance … *her* upcoming marriage'.

98 *Thorne* [2015] FCCA 484, [90].

### D *The Distortionary Effect*

As suggested by the language outlined above,[99] a finding of unconscionable conduct leaves precious little room for shades of grey. There has either been unconscientious exploitation and victimisation or the doctrine simply does not apply. A doctrine that does not admit any role for ambiguity within the application of its rules is liable to lead to the shoe-horning of the parties into pre-assigned roles. That is, one party must be the hapless victim and the other party a type of villain. Ultimately, in assessing claims of unconscionable conduct, the court must fit the parties into a narrative structure compelled by the doctrine. The risk is that the reality of the relationship and the bargain might be distorted.

This is the total sum of the narrative choices made in the judicial telling of the facts of *Thorne v Kennedy*. The cumulative effect of denying Thorne her autonomy, failing to consider that she may have had some financial motivation to seek a better life, and construing any ambiguity in the facts against Kennedy, all add up to a distortion of the facts of what transpired between them.

Another telling of their story is that Thorne was reckless in the way in which she pursued her relationship with Kennedy. She closed her eyes to the risks entrenched in the agreements not because she was powerless, but because her desire to enjoy the lifestyle and status that he brought allowed her to convince herself that the risks would not materialise. For his part, Kennedy was not an opportunistic predator. Instead, he went too far in attempting to preserve his wealth for his children. He failed to account for fairness towards Thorne in the event of a break-up. This story is not unconscionable conduct. It is something else. It is a story of love, both romantic and familial, and wealth disparity. Unfortunately, it is a story of our times.

## IV CONCLUSION

Unconscionable conduct requires a court to construct a power relationship between the parties. This requires a generally accepted telling of what has transpired between the parties so that equity's intervention is felt to be justified. In turn, this invites a court towards polarised characterisations of the parties. Both *Thorne v Kennedy* and *Louth v Diprose* share a familiar pattern wherein the trial judge opts for a very sympathetic drawing of one party and a harsh finding against the other. The High Court then mostly accepts the narrative offered by the trial judge even though there are cracks within it. The result is a case that sits uncomfortably within the doctrine. The outcome might be right, but the way in which the story has been told is not entirely fair.

*Thorne* is a difficult case that asks hard questions of the doctrine of unconscionable conduct. Though it is beyond the immediate scope of this article, *Thorne* is quite clearly a departure from *Kakavas* and *Wu*. As such it is a case that at worst falls at the latter end of the dichotomy constructed by Bigwood pertaining to the 'naked exploitation' and 'passive exploitation' cases of unconscionable conduct.[100] Arguably, *Thorne* is a case where Kennedy's honesty throughout about his intentions and the nature of the relationship might even deprive their dealings of any relevant form of exploitation. The doctrine of unconscionable conduct is well-designed to

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[99] See above nn 52–58.
[100] See above n 15.

capture predatory conduct which speaks to a high level of moral obloquy.[101] As those terms suggest, this is a doctrine of 'occasional application'.[102] It is ill-suited to serve as an instrument of ordinary regulation across a broad field of application.

[101] *Attorney-General (New South Wales) v World Best Holdings Ltd* (2005) 63 NSWLR 557, [121] (Spigelman CJ). However, in *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15, [275]–[277] (Leeming JA). In *Ipstar*, Leeming JA commented on Spigelman CJ's use of the term 'moral obloquy' in *World Best Holdings* and stated that His Honour 'was concerned to emphasise that to find that conduct was not "fair" or "just" was insufficient, and that the doctrine was one of "occasional application, when the circumstances are highly unethical"'.

[102] Ibid.