

What Becomes of the Broken-Hearted? Unconscionable Conduct, Emotional Dependence, and the ‘Clouded Judgment’ Cases

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The High Court’s decision in Louth v Diprose that emotional dependence significantly contributed to special disadvantage was a significant development within the doctrine of unconscionable conduct. The decision in Louth established a template of sorts that found useful application in the later cases of Williams v Maalouf, Xu v Lin and Mackintosh v Johnson. Though they are few, these cases form definable subset within the broader doctrine of unconscionable conduct that might broadly be termed ‘clouded judgment’ cases. These cases quite arguably blur the lines between the doctrines of unconscionable conduct and undue influence. There is a discernible pattern to these matters. In these cases, the donor has formed an attachment to the object of his or her affection. To put matters gently, the affection is misplaced. Nonetheless, the donor makes a gift to the object of his or her affection. Subsequent developments lead the donor to realise that the gift was both improvident and bestowed upon an undeserving party. This article argues that Louth v Diprose is a troublesome precedent. First, the primacy of deception, which was a key issue in Louth, is unduly reductive. It obscures the overall context of the defendant’s conduct. Secondly, the High Court in Louth overlooked facts that might have undermined the finding that the plaintiff was at a special disadvantage. Thirdly, the case reflects a concept, known as the ‘presumption of competency’ that unhelpfully tilted the balance in favour of the plaintiff. This presumption appears to have been somewhat reversed in Mackintosh.

I INTRODUCTION

Within the broader doctrine of unconscionable conduct there exists a slim seam of jurisprudence that might artfully be termed the ‘clouded judgment’ cases. These cases follow the basic template set out in *Louth v Diprose*¹ wherein a plaintiff forms a significant emotional attachment to another which ultimately leads to some improvident bargain.² The defendant is

* The author would like to thank Samantha Hepburn, Renata Grossi and Joshua Neoh and the participants of the Law and Love Colloquium for their comments on the earlier presentation on which this paper based. Any errors or omissions are entirely the author’s own.

1 (1992) 175 CLR 621.

2 See Samantha Hepburn, ‘Equity and Infatuation’ (1993) 18 *Alternative Law Journal* 208. As Samantha Hepburn notes at 208, ‘emotional dependency can

aware of the feelings that the plaintiff holds. However, the affections are not reciprocated, though this may not always be clear to the plaintiff. With some encouragement, either subtle or overt, the plaintiff then enters into a transaction, which may be a gift, loan or sale at a significant undervalue, that greatly benefits the defendant. The plaintiff subsequently discovers the true state of their relationship with the defendant and then attempts to recover his or her property.

This article argues that *Louth v Diprose* is now a precedent of uncertain value. In part the uncertainty has arisen due to sustained feminist critiques of *Louth*.³ It is beyond the scope of this article to explore those commentaries in depth, though the author is generally in agreement with their analysis. Notwithstanding the idea of structural gender bias within the law, there are other key features of the ‘clouded judgment’ cases that are deeply problematic. In particular, the primacy of deception, which emerged as a key issue in *Louth*, sets the bar too high for plaintiffs. Similarly, there is an argument to be made that in *Louth* the question of special disadvantage was addressed without due regard to those factors that might have undermined the plaintiff’s claim to equitable relief. One of the more interesting critiques, noted by Hepburn, concerns itself with the presumption of competency.⁴ This notion appears alive and well in recent cases, though its usage appears to have been slightly reversed. Such presumptions affect how the courts approach the all-important question of special disadvantage.

This article first sets out the basic template for clouded judgment cases. The article contends that the factual framework that emerges from *Louth* is roughly echoed in later cases like *Williams v Maalouf*,⁵ *Mackintosh v Johnson*⁶ and *Xu v Lin*.⁷ In *Williams*, a gift of money given by an elderly lady to her colleague was set aside for reasons of unconscionable conduct. In *Mackintosh*, a besotted plaintiff failed to regain the monies that he had gifted in different transactions to the defendant. In *Xu*, a man who sold his house at a great undervalue to a prostitute, in an attempt to win her favour, failed to have the transaction set aside. Notwithstanding that no special disadvantage was found in *Mackintosh* or *Xu*, these are all cases in which the plaintiff formed a serious emotional attachment to the defendant. The plaintiffs in each case had cause to regret their generosity.

Having addressed the basic framework of clouded judgment the article then addresses the issues of deception or dishonesty in unconscionable behaviour. The absence of outright dishonesty in *Mackintosh* is one of the

cloud the judgment of an individual when entering into transactions with the other party’.

3 Lisa Sarmas, ‘Storytelling and the Law: A Case Study of *Louth v Diprose*’ (1994) 19(3) *Melbourne University Law Review* 701. See also Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, Federation Press, 2002) 74-75.

4 Hepburn, above n 2.

5 [2005] VSC 346.

6 [2013] VSCA 10.

7 [2005] NSWSC 569.

only two real differences between that case and *Louth v Diprose*. The other key difference is that the financial capacity of the plaintiff in *Mackintosh* was far greater than that of the plaintiff in *Louth*. Yet, it is striking that the outcomes of the two cases are markedly different. In the view of the author, the judgment of the trial judge in *Mackintosh*, Misso J, should be preferred to the decision of the Court of Appeal, on the basis that his Honour gave due weight to the entirety of the defendant's conduct and the latter did not.

The article finally addresses special disadvantage advancing two arguments. The first is that the conduct of the plaintiff in *Louth* might have precluded him from pleading special disadvantage. The second is that in *Mackintosh* the Court of Appeal erred in suggesting that as the plaintiff made gifts to the defendant that were within his financial means that this precluded him from claiming emotional dependence. It may well be that the decision in *Mackintosh* reflects the broader 'doctrinal retreat' within unconscionable conduct. The academic literature that has emerged since the *Kakavas*⁸ case has noted that the courts are now more wary of finding unconscionable conduct.⁹ In part this reflects the presence of unconscionable conduct as an actionable claim within the Australian Consumer Law which in turn has imported commercial law ideas into the doctrine.¹⁰ It is beyond the scope of this paper to examine the broader debate around the doctrinal retreat, but this must surely affect the 'clouded judgment cases'.

II THE CLOUDED JUDGMENT CASES

There are three key features that appear in the clouded judgment cases. The first is the situational vulnerability of the plaintiff that arises due to his or her attachment to the defendant. This form of vulnerability emerges over a protracted period of time.¹¹ It is not confined to the immediate transaction that forms the basis of the dispute. Instead it sets the basis for that transaction to occur. In *Louth*, the emotional dependence of the plaintiff was created over the course of a few years. While the facts of *Louth* are well known, they bear repeating here for the purposes of illuminating this point.

8 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.

9 See Warren Swain, 'The Unconscionable Dealing Doctrine: In Retreat?' (2014) 31 *Journal of Contract Law* 255. See also Rick Bigwood, 'Kakavas v Crown Melbourne Ltd – Still Curbing Unconscionability: Kakavas in the High Court of Australia' (2013) 37(2) *Melbourne University Law Review* 463.

10 See *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 where the High Court took a much harder line on special disadvantage. In *Berbatis*, the Court held that the weaker position of the lessees, who were under financial strain due to the illness of their child, did not amount to a special disadvantage. The Court held that it was not unconscionable for the landlord to insist that the lessees drop a claim against him before granting them another lease. See also *Australian Competition and Consumer Commission v Samton Holdings* (2002) 189 ALR 76.

11 The facts of these cases could also support arguments of undue influence. However, this note is confined to the issue of unconscionable conduct.

In 1981, Louis Diprose was an employee solicitor living in Launceston when he met Carol Mary Louth at a party. A brief romantic and sexual relationship transpired shortly thereafter between the pair. For Carol, this all cooled rather quickly. However, Louis was clearly infatuated with Carol and he continued to pursue her despite her indifference. In fact, Louis proposed marriage to Carol, but she rejected him.¹² Eventually, she moved to Adelaide and in 1983 he did the same in order to be nearer to her. While Carol made it plain to Louis that she had no interest in rekindling a serious romantic relationship, she did suggest that they might have some occasional intimacy. Moreover, Carol tolerated Louis' attention and he would pay her bills and the school fees of her children.¹³

In Adelaide, Carol lived in the Tranmere house, which was owned by her sister and her husband. When they divorced it was suggested to Carol that she would have to move out. What happened next with regard to the representations that Louth made to Diprose was a point of some disagreement between the parties. Diprose alleged that in 1985, Louth told him that she would commit suicide if she was forced to vacate the house. That year, Diprose bought the Tranmere house and put it in Louth's name. When subsequently he realised that she had no affection for him he sued for the return of the house.

As Deane J noted, his special disadvantage arose through his emotional dependence upon her and his vulnerability to the suggestion that she would harm herself. Diprose's claim of unconscionable conduct succeeded on this basis. Nevertheless, a cursory glance at the facts of *Louth* would indicate several points at which the plaintiff chose to remain a party to that particular relationship. Yet, on a doctrinal level this must raise some difficulty in that the actions of the plaintiff will have significantly contributed to the special disadvantage that he or she later claims. That is to say, the situational vulnerability of the plaintiff is a voluntary decision to pursue particular relationships and to remain in them. While this does not immediately disqualify a plaintiff from successfully pleading special disadvantage, it does at least call for substantial scrutiny of this issue.

Further, the emotional dependence of the plaintiff can arise in relatively shorter periods and in a relationship where no emotional dependence previously existed. In *Williams v Maalouf*,¹⁴ the plaintiff suffered an abnormal grief reaction to the passing of her mother. As a consequence of this grief reaction the plaintiff, who had in the past survived ovarian cancer, formed an intense attachment to a co-worker who was herself then suffering from cancer. Though the plaintiff had known the co-worker for

12 Though it is not remarked upon in the High Court judgments, the transcript of the trial discloses that Louis Diprose even presented Carol Louth with a *contract* which stipulated that they would live together as husband and wife. See Transcript of Proceeding, *Diprose v Louth* (unreported, SASC, 1990), 95 cited in Sarmas above n 3, 715.

13 While this might have been evidence of calculation, it could also have easily been explained away as part of an untidy household. I am grateful to the first referee for this suggestion.

14 [2005] VSC 346.

some eight years, the emotional dependence only formed after her mother passed away in late January 2003.¹⁵ The plaintiff then gifted \$200,000 to the co-worker and her partner in July 2003 on the basis that the money be used for a house in which the co-worker could live during her illness. Though a house was bought, it was put into the name of the co-worker's partner. Subsequently, the co-worker died and her partner, who was also a colleague of the plaintiff, sought to retain the money. The conduct was held to have been unconscionable as the plaintiff's grief-stricken state, combined with her limited resources and financial skills, made her incapable of making a decision as to her best interests.¹⁶

Secondly, the past behaviour of the plaintiff should make it clear to the defendant that they are favourably disposed to making gifts to him or her. As is well-established, knowledge is crucial to determining whether a defendant has taken unconscionable advantage of a plaintiff.¹⁷ The unconscientious taking of advantage has to be judged within the context of the given relationship in the sense that some 'victimisation' must be present.¹⁸

The facts of *Mackintosh v Johnson* depict a plaintiff who repeatedly gave gifts to the defendant in the belief that the defendant cared for him and in the hope of securing a lasting relationship with her. In *Mackintosh*, the plaintiff and defendant engaged in a tempestuous sexual relationship within which the former was clearly deeply infatuated with the latter. At the time that the relationship began, the plaintiff was 73 years old and had been long divorced. He was clearly very lonely and keen for an intimacy and emotional support. The defendant was substantially younger, at 45 years of age, and was clearly aware of his general state of isolation. The defendant had been in the broader social circle of the plaintiff, but the nature of their relationship substantially changed after she made a series of sexual advances towards him. During the course of their sporadic relationship the defendant would point out her financial needs during their moments of reconciliation. Consequently, the plaintiff loaned the defendant three sums of money totalling \$125,000. In addition to these loans, which he forgave, he bought her other presents and paid for holidays away together. He ultimately gave her \$436,000 to buy a house in the hope that he would live there with her.

At first instance Misso J found that the conduct of the defendant was unconscionable. However, on appeal in the Victorian Court of Appeal this decision was reversed on the basis that he suffered no special disadvantage.¹⁹ In its judgment the Court of Appeal did not consider whether the defendant had taken unconscientious advantage of the plaintiff.²⁰ While

15 Ibid, [4]-[8].

16 Ibid, [184]-[185].

17 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, [150]-[160].

18 Ibid, [161].

19 My criticisms of the Court of Appeal's reasoning in *Mackintosh v Johnson* are set out in Pts III and IV of this article.

20 *Mackintosh v Johnson* [2013] VSCA 10, [84].

it is not the role of equity to protect parties against foolish transactions, it must act where a party unconscientiously manipulates another for financial gain.²¹

Thirdly, some particular event should precipitate the making of the impugned transaction. Moreover, such events must be viewed within the factual context of the parties' relationship. In *Mackintosh*, this took the form of the defendant remarking on her financial need during moments of reconciliation with the plaintiff.²² In *Maalouf*, it was the late colleague's complaints about her illness and accommodation, coupled with the money that the plaintiff had recently received.²³ That these features might be present in a given case does not make the conduct in that matter unconscionable per se. That question must be decided by the application of the established doctrinal rules to the facts.

Nevertheless, a clear knowledge of the true state of the relationship should preclude an argument of clouded judgment and emotional dependence. In *Xu v Lin*, a client who sold his house to a prostitute at a very considerable discount lost his claim for unconscionable conduct. In *Xu*, the plaintiff blatantly tried to buy the affection of the defendant. Furthermore, the plaintiff was never under any misapprehension as to the true state of their relationship. In the New South Wales Supreme Court, Barrett J found that the relationship between them was clearly never emotionally intimate.²⁴ Instead, for the most part the defendant was a prostitute and the plaintiff was her client. They had a friendly relationship in that context, but a sustained romantic relationship never fully developed between them. Barrett J noted:

Any special disability or disadvantage suffered by plaintiff because of his alleged infatuation was not sufficiently evident to the defendant. Although the plaintiff's generosity towards the defendant was shown by the numerous gifts to her, as well as his regular and frequent custom over the years, the defendant was, on reasonable grounds, under the impression that he was not committed to her beyond their commercial prostitute-client relationship.²⁵

The defendant did write on a greeting card that she wanted to marry the plaintiff, but she did this at his behest and in return for payment. The plaintiff sold her his house at a considerable undervalue. When he realised that a relationship was never going to come to fruition he attempted to reclaim the house. Relying upon the High Court's reasoning in *Louth*, Barrett J found that the plaintiff suffered no special disadvantage in the transaction. His Honour found that the 'defendant merely accepted the benefit of the transaction without dishonesty'.²⁶

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

22 *Johnson v Mackintosh* [2011] VCC 1400, [137].

23 *Williams v Maalouf* [2005] VSC 346, [80].

24 *Xu v Lin* [2005] NSWSC 569, [36].

25 *Ibid.*

26 *Ibid.*, [40].

III THE PRIMACY OF DECEPTION

One of the key issues to emerge in *Louth* was that of deception. At trial, King CJ found that Louth had deceived Diprose. His Honour stated:

I am satisfied that *she deliberately manufactured the atmosphere of crisis* in order to influence the plaintiff to provide the money for the house. I am satisfied, moreover, that *she played upon his love and concern for her by the suicide threats in relation to the house*. She then refused offers of assistance short of full ownership of the house knowing that his emotional dependence upon her was such as to lead inexorably to the gratification of her unexpressed wish to have him buy the house for her. I am satisfied that it was a process of manipulation to which he was utterly vulnerable by reason of his infatuation.²⁷

In the High Court, Mason CJ noted that the contention that Louth had ‘deliberately manufactured the atmosphere of crisis’ was open to question. Nevertheless, on balance Mason CJ found that King CJ’s preference for Diprose’s evidence over that of Louth was justified. Mason CJ stated:

By dishonestly manufacturing an atmosphere of crisis with respect to the house, the appellant played upon the respondent’s susceptibility where she was concerned. Her conduct was unconscionable in that it was dishonest and was calculated to induce, and in fact induced, him to enter into a transaction which was improvident and conferred a great benefit upon her.²⁸

Similarly, Deane J stated:

This case was one in which the appellant deliberately used that love or infatuation and her own deceit to create a situation in which she could unconscientiously manipulate the respondent to part with a large proportion of his property.²⁹

It is notable that the courts in the later cases of *Mackintosh* and *Xu* relied quite strongly on the statements of Mason CJ and Deane J in *Louth* about the defendant dishonestly manufacturing an atmosphere of crisis.³⁰ In *Xu*, the remarks of Mason CJ and Deane J were relied upon to demonstrate that the defendant had not taken unconscientious advantage of the plaintiff. In *Mackintosh*, the Court of Appeal relied upon the presence of deceit to differentiate the case from *Louth*.³¹ It would be putting matters too highly to say that the courts in *Mackintosh* and *Xu* equated unconscionable conduct with deception or other forms of dishonesty. However, findings of the absence or presence of dishonesty have clearly influenced the reasoning of both courts. For example, at first instance in *Mackintosh*, Misso J placed great store on her conduct in misleading the plaintiff as to the nature of their relationship.³² His Honour did note that the facts

²⁷ (1990) 54 SASR 438, 448. My emphasis added.

²⁸ *Louth v Diprose* (1992) 175 CLR 621, 626.

²⁹ *Ibid*, 638.

³⁰ See *Mackintosh v Johnson* [2013] VSCA 10, [78]; *Xu v Lin* [2005] NSWSC 569, [37]-[40].

³¹ *Mackintosh v Johnson* [2013] VSCA 10, [79], [82]-[83]. See also Gino Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 2015) 317.

³² *Johnson v Mackintosh* [2011] VCC 1400.

of *Mackintosh* were ‘not dissimilar’ to those in *Louth*.³³ In this sense, his Honour’s emphasis on the defendant’s actions in concealing her true feelings appears in part an attempt to fit the facts of *Mackintosh* into the basic framework set out by *Louth*.³⁴ The Court of Appeal took the view that this form of dishonesty was the ‘stuff of ordinary human relationships’.³⁵ Indeed, had the Court of Appeal in *Mackintosh* found that some other element of dishonesty existed in the defendant’s conduct, it seems highly likely that they would have affirmed the decision of Misso J.

Nonetheless, there are two problems with the reliance on deception. The first is that the focus on deception, or other acts of clear dishonesty, removes the evaluation of the defendant’s conduct from the unique factual scenario in which it has occurred. In *Paciocco v Australia and New Zealand Banking Group Limited*,³⁶ Allsop CJ, with whom Besanko and Middleton JJ concurred, stated:

That unconscionability contains an element of deviation from rectitude or right practice or of delinquency can be readily accepted, as long as the phrase ‘moral obloquy’ is not taken to import into unconscionability a necessary conception of dishonesty.³⁷

Context is crucial in clouded judgment cases and to seek out a clear act of dishonesty potentially obscures the impact that subtle manipulative behaviour has upon the vulnerable. Indeed, therein lies one of the difficulties with the Court of Appeal’s reasoning in *Mackintosh*.

In *Mackintosh*, the Court of Appeal gave no detailed consideration to the question of whether the defendant had acted dishonestly.³⁸ However, had the Court done so it would have had to assess her conduct in light of the particular factual matrix that existed between the parties. Crucially, the plaintiff was elderly and extremely lonely. He had been without a significant relationship for over 17 years. He lived alone and had in the past demonstrated a propensity to use his wealth to entice friends to stay with him. The defendant knew all of this, including his desperation to be in a lasting relationship with her. She was well aware that he was prone to using gifts to get her attention and affection. It is difficult to disagree with Misso J’s conclusion that this is why she would discuss her financial difficulties with the plaintiff.³⁹ More to the point, the defendant and the plaintiff had a sexual relationship. She would dramatically break this off and during the moments of reconciliation she would mention her financial needs.⁴⁰ She told the plaintiff no outright lies, but it is difficult not to see her behaviour as manipulative. Further, given that she would have been

33 Ibid, [148].

34 Ibid, [164].

35 *Mackintosh v Johnson* [2013] VSCA 10, [84].

36 [2015] FCAFC 50.

37 Ibid, [262].

38 *Mackintosh v Johnson* [2013] VSCA 10, [84].

39 *Johnson v Mackintosh* [2011] VCC 1400, [164].

40 Ibid, [137]. Misso J noted that ‘[a]lthough there were occasions when the plaintiff and the defendant had a downward spiral in their relationship, it was revived,

well aware of the impact of her behaviour on the plaintiff, it is hard not to view her conduct as unconscientious.

The most controversial instance of the plaintiff's generosity took place when he gave the defendant \$436,000 to buy a house. At the time that he provided the money it was clear that he anticipated that they might live there together. Though they did not habitually cohabit, they did spend time living together intermittently. In his note the plaintiff wrote, '[m]ay this be the foundation for many more beautiful dreams that we can share together'.⁴¹ Moreover, when he signed the cheque for the purchase of the house the plaintiff was in hospital recovering from heart surgery. The plaintiff wrote the cheque after a phone conversation with the defendant.

While as a general principle the courts should be slow to make moral judgments in the context of interpersonal relationships, this is unavoidable within the doctrine of unconscionable conduct. In *Paciocco*, Allsop CJ stated:

That a degree of morality lies within the word 'unconscionable' is clear. 'Unconscionability' is a value-laden concept. 'Obloquy' is 'the condition of being spoken against; bad repute; reproach; disgrace; a cause of detraction or reproach,; 'obliquity' is 'a deviation from moral rectitude, sound thinking or right practice; a delinquency; a fault or error'.⁴²

Notwithstanding the plaintiff's wealth, the defendant's actions in accepting large sums of his money, knowing that it was offered in the belief that a real relationship existed and would exist in the future, and that these actions emanated in large part from his loneliness, are clearly immoral. In this context it is quite arguably not consistent with equity and good conscience that she should be allowed to keep the gifts.⁴³ The fact that no outright deception took place does not change the moral hue of her conduct. When the behaviour is viewed in the context of the facts outlined by Misso J at trial, her actions appear predatory.

Nonetheless, in *Kakavas* the High Court made it plain that there must be either 'victimisation' or 'exploitation'. The 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. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose. The principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction. Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned.⁴⁴

The High Court's adoption of victimisation or exploitation is also evidence of a slight shift away from deception as an indicia for identifying

and it is more than coincidence that the revival occurred when the defendant was in need of money for her business'.

41 Ibid, [110].

42 *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, [262].

43 *Blomley v Ryan* (1956) 99 CLR 362, 401-402 (Fullagar J).

44 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, [161].

unconscientious conduct. Yet, the dichotomy that the Court outlined may not always be helpful in clouded judgment cases. In *Kakavas*, the High Court draws a clear difference between victimisation or exploitation on the one hand and indifference or inadvertence on the other. The facts of *Mackintosh* appear to fall rather unhelpfully between these two poles, though the Court of Appeal might have viewed the conduct of the defendant as being closer to indifference to the plaintiff's best interests. That said, in *Kakavas* the parties were engaged in gaming activities and the plaintiff earned his income as a professional gambler. As the High Court noted:

[T]he activities in question took place in a commercial context in which the unmistakable purpose of each party was to inflict loss upon the other party to the transaction.⁴⁵

This observation appears to underpin the Court's reasoning in *Kakavas*. It should be less applicable in clouded judgment cases where commercial considerations hold little sway.

The second difficulty with the primacy of deception in *Louth* is that, as the scholarship of Sarvas has demonstrated, the factual basis upon which it is based is somewhat shaky. Sarvas has noted that the trial judge and the High Court made very little of Louth's own vulnerability, including her precarious finances, her experience as a rape survivor and her fragile mental health.⁴⁶ Prior to the events that were in dispute, Carol Louth had previously tried to kill herself and had been dealt with rather generously by the courts over a shoplifting matter on the grounds of her mental health.⁴⁷ Notwithstanding her denial at trial of making any such suggestion, once Carol Louth's delicate mental health is taken into account it is much harder to dismiss the possibility that she might have been genuine in talking about suicide. On this basis it is rather hard to definitively say that she deliberately manufactured a false atmosphere of crisis.

As stated above, knowledge of the true state of affairs should be an effective bar to a finding that unconscionable conduct has taken place.⁴⁸ In this context, it is instructive that Diprose had access to legal advice at crucial stages of the transaction and that as a lawyer he would have fully understood the consequences of putting the house in Louth's name. Moreover, Diprose knew the entirety of Louth's vulnerabilities including her trauma stemming from the violent rape that she had endured in her younger years during which she thought she would be murdered.⁴⁹

IV SPECIAL DISADVANTAGE

One of the more troubling features of *Louth*, is the downplaying of the actions of Louis Diprose and its impacts upon Carol Louth. Given that the doctrine of unconscionable conduct has its basis in equity, a plaintiff

45 Ibid, [25].

46 Sarvas, above n 3, 714.

47 Ibid.

48 See *Xu v Lin* [2005] NSWSC 569.

49 Sarvas, above n 3, 714.

who argues special disadvantage should have clean hands.⁵⁰ However, it is a well-established equitable rule that the defence of unclean hands, ‘must have an immediate and necessary relation to the equity sued for’.⁵¹ The conduct which arose in *Louth*, that Sarmas and other have criticised, is likely too remote from the relevant equity to warrant the suggestion that Diprose should have been denied relief.⁵² Nonetheless, as special disadvantage in emotional dependence cases arises out of the voluntary decision of a plaintiff to pursue a particular relationship, some significant scrutiny must be brought to bear on the plaintiff’s own conduct. Behaviour that might be viewed as predatory or opportunistic, such as trying to dominate the life of a mentally ill and much poorer woman, is not consistent with being at a disadvantage.

Sarmas has argued quite convincingly that the casting of Diprose as the romantic fool tended to obscure his own aggression towards Louth.⁵³ For example, at trial there was a dispute between the parties as to an incident in Louth’s kitchen. It was contended by Louth that during an argument Diprose had grabbed her by the throat and that he had only released her after she had kicked him. Diprose did not convincingly challenge this assertion, but the trial judge said that it mattered little to the unconscionable conduct claim. Strictly speaking, this is true because it happened after the gift had been made, but it casts the relationship between the parties in an altogether different light.

Similarly, the explicit nature of the Mary Poems and Diprose’s continued romantic overtures to Louth may well have crossed over into sexual harassment.⁵⁴ It is telling that he refrained from contacting Louth for some time after he had arrived in Adelaide for fear of giving the impression that he was following her. The constant attempts by Diprose to be a presence in Carol Louth’s life also needs to be assessed in light of her fragility.⁵⁵

It is already a safeguard within the doctrine that foolhardy and improvident transactions will not justify the protection of equity.⁵⁶ Likewise, unfair or unsavoury behaviour towards the defendant should make it harder for a plaintiff to establish special disadvantage. If anything, the presence of such behaviour in *Louth* and its absence in *Mackintosh*, makes the difference in outcome between the two cases altogether odd.

Hepburn has also argued that a double standard on gender seems to underpin the reasoning of the judges in *Louth v Diprose*.⁵⁷ In Hepburn’s view this affected the assessment of special disadvantage. Hepburn states:

50 *Green v Sommerville* (1979) 141 CLR 594, 611 (Mason J).

51 *Dewhurst v Edwards* [1983] 1 NSWLR 34, 51.

52 *Meyers v Casey* (1913) 17 CLR 90.

53 Sarmas, above n 3, 716-717.

54 *Ibid.*

55 In this sense, the fact that Louth rejected offers from Diprose that fell short of ownership might well need to be viewed within the context of the relationship.

56 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, [20]. See also *Cranfield Pty Ltd v Commonwealth Bank of Australia* [1998] VSC 140, [95] (Mandie J).

57 Hepburn, above n 4, 211.

[T]he judgment displays an underlying discrepancy in the way it deals with gender issues. It is assumed that because Mr Diprose was a male solicitor he would not have acted in the manner in which he did if he had *not* been emotionally dependent. This is almost an underlying presumption.⁵⁸

On the one hand, Diprose was assumed to be a competent professional man, so his making of improvident gifts was taken by the judges to suggest that he had been manipulated.⁵⁹ Yet, on the other hand Louth was also assumed to be capable, so evidence of her weakness and fragility was downplayed and she was assumed to have concocted a scheme to take unconscientious advantage of Diprose.⁶⁰ Evidence that he understood the risks that he was taking, such as his nonchalant response to her suggestion that she might get married or take a lover even if he bought the Tranmere house for her appear to have been overlooked by the judiciary.

In *Mackintosh*, the Court of Appeal affirmed the presumption that Hepburn identified in *Louth*. The Court of Appeal stated:

[T]he inference of special disadvantage arose in *Louth v Diprose* because the man gave away nearly all of his assets to the woman, in circumstances where he simply could not afford it and he had three dependent children. In these circumstances, the gift was described by the trial judge as one which was:

... so improvident, judged in the light of the respondent's financial position, that it is explicable only on the footing that he was so emotionally dependent upon, and influenced by, the appellant as to disregard entirely his own interests.⁶¹

The Court of Appeal then used the same presumption to preclude the plaintiff from claiming emotional dependence due to his wealth:

Mr Johnson was a wealthy, successful businessman ... He made payments to her which were well within his means in the hope of an enduring relationship with her. *Having regard to his wealth, the payments were not of a size which permit any inference of emotional dependence, or inability to make decisions in his own interests. This is a case of mere folly by Mr Johnson.*⁶²

There is no doctrinal rule that places unconscionable conduct beyond the reach of the wealthy. Indeed, given that the doctrine arose as a means of protecting expectant heirs the Court of Appeal's remarks are rather odd.⁶³ Further, linking wealth to emotional dependence makes little sense and does not accommodate the complexity of human relations. In contrast, in its appraisal of *Louth v Diprose* the Court of Appeal viewed Diprose as having been emotionally dependent and inferred that the plaintiff, Johnson, was trying to buy a relationship.⁶⁴ This sets up a type of catch 22 situation for the hapless Johnson. On the one hand his wealth is no protection

58 Ibid.

59 Ibid.

60 Ibid.

61 *Mackintosh v Johnson* [2013] VSCA 10, [80].

62 Ibid, [82]. My emphasis added.

63 See *Earl of Potmore v Taylor* (1831) 4 Sim 182.

64 [2013] VSCA 10, [80]-[82].

against the factors that might give rise to a special disadvantage, such as age, loneliness and isolation. However, should those factors lead him towards an emotional dependency, and should he be manipulated by the defendant, his wealth is then used as evidence to suggest that he was at no special disadvantage. The Court of Appeal also gave little weight to the plaintiff's weakened physical condition after having had heart bypass surgery and the defendant's decision to mention her financial needs to him at that time.⁶⁵

The Court in *Williams*, also appeared to draw on the presumption from *Louth*.⁶⁶ Suffice to say, the courts are notably more generous to a poorer plaintiff. In *Williams* the gift of \$200,000 to a dying friend represented a very substantial portion of the plaintiff's overall wealth. The Court drew upon this fact in support of its finding that the plaintiff was at a special disadvantage. The Court stated:

[T]he gift was so improvident from the plaintiff's point of view that it is explicable only by reason that the plaintiff was affected by a special disadvantage at the time of making the gift. ... If the plaintiff had been thinking clearly, she would have realised that her days of earning an income through full-time work were limited.⁶⁷

The plaintiff in *Williams* fits into an image that the courts appear to have of plaintiffs who suffer from a special disadvantage. She was suffering from abnormal grief after the death of her mother, she was 67 years old, she had very limited financial means and her emotional dependence on her dying friend developed quite quickly in response to her own grief.⁶⁸ Nonetheless, the presumption should not be the only test for demonstrating emotional dependence. To use it in that manner is to effectively leave wealthier plaintiffs outside the protection of equity.

V CONCLUSION

Though there are few clouded judgment cases, they bear a distinct resemblance to each other. Discerning a sound basis for deciding future matters of this nature is not a simple task. While the judiciary has repeatedly accepted *Louth*, pointed academic criticisms have robbed it of much of its shine. At some point the courts should confront these criticisms and either accept them or explain them away. Yet, there are other features of the framework set out by *Louth*, such as the role of deception and the 'almost' presumption of competency, that warrant re-evaluation.

65 Ibid.

66 *Williams v Maalouf* [2005] VSC 346, [184].

67 Ibid, [185].

68 Ibid, [184]-[187] (Hargrave J).