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Articles

The judgments of the plurality and Gordon J in the recent High Court decision of *Thorne v Kennedy* have undoubtedly altered the prior law relating to undue influence in Australia. But the most significant alterations, which are twofold, are both unacknowledged and unsupported by justificatory reasons. First, undue influence is presented as a single concept not having different forms, or involving different principles, across the traditional categories or 'classes' of undue influence. Accompanying that is surreptitious abandonment of the 'fiduciary' explanation for the second, 'relational' category of undue influence, prominent in antecedent authorities such as *Johnson v Buttress*. This is demonstrated, in particular, by the unacknowledged and unexplained evaporation of the 'prophylactic' function and content of the traditional 'presumption' of undue influence. But nowhere do their Honours openly address and credibly respond to the conventional rationale — the generic policy foundations — that originally motivated the strict fiduciary regulatory regime in those cases where the presumption traditionally operated. Second, as a single concept, undue influence is, in stark contrast to unconscionable dealing, rationalised as a 'plaintiff-sided', 'impaired-consent' ground of relief. Although prior dicta existed to support such an outlook on undue influence, those dicta, themselves of dubious lineage, were accepted in *Thorne* without pause or explanation, and certainly without acknowledgment of a strong current of senior judicial opinion to the contrary, both domestically and abroad. We are left, then, in the wake of *Thorne*, with an unexplained disjunctive rationalisation of two equitable exculpatory doctrines that are nevertheless acknowledged to be 'closely related'. This does not augur well for the logical taxonomisation of those sibling doctrines, both as between themselves and relative to other exculpatory categories that equally function to discipline the abuse of unofficial power–vulnerability relationships or encounters in connection with bilateral transactions.

The English courts have for some time awarded as damages a sum which has variously been described as 'user damages', or a 'licence fee' or a 'release fee'. The essential idea is that the sum in question is what the parties, acting reasonably, might have negotiated that the defendant should pay to have been released from the obligation owed to the claimant. While longstanding in relation to certain torts and some equitable wrongs, more recently the courts have been concerned with whether such an award should be made, and in what circumstances, for breach of contract. The Supreme Court has now had its opportunity to contribute to this debate in the *One Step* case. This paper

analyses the law in this area in light of the decision reached by the court. While the principal focus, as in the *One Step* case, is on the award of damages for breach of contract, it also reflects on the nature and scope more generally of what the court has said should be referred to as ‘Negotiating Damages’.