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Excusable consent in duress

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While the illegitimate pressure theory provides a more satisfactory theoretical basis for duress in contract law than the overborne will theory, it insufficiently addresses why a victim who has given deliberated consent should be excused from contractual responsibility. The paper proposes that the additional element of 'excusable consent' enhances the current analytical framework: first, by recognising that the law makes value judgments of both the threatening party's actions and the victim's response; secondly, by lightening the burden of the illegitimate pressure element and providing it greater focus; and, thirdly, by providing a better fit for considerations such as 'no practical alternatives' that strain the existing framework.

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INTRODUCTION

The illegitimate pressure theory has firmly displaced the overborne will theory as the basis for working out duress in contract law.[1] While there is little doubt that it provides more satisfactory theoretical basis than the theory that the victim does not exercise his will when contracting under duress, there has been little critical examination of whether illegitimate pressure sufficiently explains why the victim is accorded a right to avoid the contract.[2] Under one of the current approaches, illegitimate pressure leads to an entitlement to rescind; the question that remains is whether the pressure caused the victim to enter into the contract.[3] Uncertainty attends how considerations such as the availability of practical alternatives should be mapped in this framework. Another approach sees duress as comprising illegitimate pressure and the absence of practical alternatives.[4] While this approach can be regarded as incorporating both defendant-sided and claimant-sided rationales, the nature of the claimant-sided rationale underlying the 'no

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1. *Universe Tankships v ITWF, 'The Universe Sentinel'* [1983] 1 AC 366; *Dimskal Shipping Co SA v International Transport Workers Federation, 'The Evia Luck'* [1992] 2 AC 152; *R v A-G for England and Wales* [2003] UKPC 22; *Borelli v Ting* [2010] UKPC 21.

2. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705.

3. *Dimskal Shipping Co SA v International Transport Workers Federation, 'The Evia Luck'* [1992] 2 AC 152 at 165, per Lord Goff. E Peel *(Treitel's) Law of Contract* (London: Sweet & Maxwell, 14th edn, 2015) at [10-006]–[10-010].

4. *The Universe Sentinel*, above n 1, at 400, per Lord Scarman; J Chitty *Chitty on Contracts* (London: Sweet & Maxwell, 32nd edn, 2015) vol 1 at [8-008].

practical alternatives' element has yet to be satisfactorily explained.[5] The illegitimate pressure theory continues to underpin this approach, as the value judgements have tended to focus on the illegitimate pressure element.

This paper suggests that in the transition from the overborne will theory to the illegitimate pressure theory, the role of consent has been unduly diminished. While the illegitimacy of the pressure is a key value judgement to be made, it is argued that the wrongfulness of the threatening party's actions does not sufficiently explain why the victim who agreed to the contract demanded of him should be entitled to avoid it. A second normative question needs to be answered: should the victim's consent to contractual responsibility be excused? The second value judgement – termed 'excusable consent' – deserves explicit recognition as an independent element. As an additional element to illegitimate pressure, it usefully supplements the current analytical framework and addresses the issue of responsibility that attaches to a conscious consent to a proposed agreement. In doing so, it helps to construct an analytical framework that provides a more satisfying explanation for why and when duress should operate as a vitiating factor for a contract entered into under pressure. As such, the position advanced in this paper represents a further step in the synthesis of claimant-sided and defendant-sided rationales for duress as a vitiating factor.

In Section 1, the paper demonstrates how consent came to be eclipsed as the theoretical basis shifted from the overborne will to illegitimate pressure. Section 2 discusses three problems in the current outworking of the illegitimate pressure theory. At heart, the problems lie in the failure to provide a theoretical rationalisation for how the considerations first articulated under the overborne will theory (and that are still considered relevant) should be fitted under the illegitimate pressure theory. Section 3 makes the case for recentring consent by building on the intuition that the victim's deliberated consent attracts responsibility. The victim has the burden of explaining why the usual legal significance should not be attributed to his consent. It is a process that engages legal values and should be recognised as such. Section 4 further advances the argument by demonstrating how, by alleviating the current burden borne by the 'illegitimate pressure' element, greater clarity is brought to the analysis and the policy values at stake.

1. FROM OVERBORNE WILL TO ILLEGITIMATE PRESSURE: THE ECLIPSE OF CONSENT

As contract formation is premised upon the consensual agreement of parties, it is unsurprising that the doctrine of economic duress developed by focusing on the consent of the victim. The genesis of the overborne will theory can be found in *The Siboen and the Sibotre*, where Kerr J said, '[T]he Court must in every case at least be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of any animus contrahendi.'[6] This claimant-centred approach was embraced by the Privy Council in *Pao On v Lau Yiu Long*,[7] where duress was seen to stem from 'a coercion

5. For a succinct overview of the issues that attend claimant-sided and defendant-sided rationales, see J Morgan *Great Debates in Contract Law* (Basingstoke: Palgrave Macmillan, 2nd edn, 2015) pp 194–205.

6. *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293 at 336.

7. *Pao On v Lau Yiu Long* [1980] AC 614 at 636.

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of will which vitiates consent'.[8] This conception of duress carries with it the implication that the contract was not entered into voluntarily.[9]

Drawing on the reasoning in *DPP v Lyn*ch,[10] Atiyah pointed to the rejection of the overborne will theory as the theoretical basis for duress in criminal law. The principal insight to be drawn from *Lynch* is that a person who is subjected to strong pressure to act in a certain way and succumbs to it in order to avoid another unpalatable outcome exercises a choice. His intentionality accompanies the act. It is therefore wrong to characterise the act as one being carried out without the person's will or consent. In the words of Lord Simon, '[D]uress is not inconsistent with the act and will, the will being deflected, not destroyed …'[11] – or, as Atiyah puts it:[12]

> A victim of duress does normally know what he is doing, does choose to submit, and does intend to do so … The more extreme the pressure, the more real is the consent of the victim.

Atiyah's critique targets the notion that duress rests on the absence of the victim's will in the act, and the notion that the victim had no choice. Conceptually, the victim was presented with undesirable choices and did make a choice. Atiyah's principal concern was to avoid the error of regarding the issue of duress as merely turning on a matter of fact – whether the will was overborne.[13] Such an approach fails to engage with the difficult issues that attend the working out of the duress as a vitiating factor.[14] While not developing the theory of illegitimate pressure, Atiyah pointed to the correct way of thinking about duress – the need to differentiate between permissible and impermissible threats.[15]

Atiyah's critique of the overborne will theory turned the tide towards a more defendant-centred approach with a focus upon the illegitimacy of the pressure exerted by the defendant. The rethinking of the conceptual foundation is evident in Lord Diplock's speech in *The Universe Sentinel* where, after noting that the victim is conscious of the terms and reasons for the contract demanded of him, he said:[16]

> The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable ...

Lord Scarman's exposition of the law in the same case similarly repudiates the notion that there was a lack of will on the victim's part; significantly, he reframes compulsion of the will as involving no practical choice:[17]

8. Ibid.
9. Ibid.
10. *DPP v Lynch* [1975] AC 653.
11. Ibid, at 695.
12. PS Atiyah 'Economic duress and the overborne will' (1982) 98 L Q Rev 197 at 200.
13. PS Atiyah 'Duress and the overborne will again' (1983) 99 L Q Rev 353 at 356.
14. Ibid.
15. Ibid.
16. *The Universe Sentinel*, above n 1, at 384. See also Lord Goff's judgment in *The Evia Luck*, quoted at n 40.
17. *The Universe Sentinel*, above n 1, at 400.

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> The authorities … reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim, and (2) the illegitimacy of the pressure exerted. There must be pressure, the practical effect of which is compulsion or the absence of choice … The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him ...

While Lord Scarman's analytical approach does not portend a focus on the defendant to the exclusion of the claimant, it signalled an approach where the weight of the value judgement is located in 'illegitimate pressure'. Indeed, it might even be characterised as the key element, which incorporates the legal values that discriminate between pressures that hold the potential of vitiating a contract and those that do not. In the succinct words of the Privy Council in *Borelli v Ting*, 'Duress is the obtaining of agreement or consent by illegitimate means.'[18] 'Compulsion of the will', it seems, came to be regarded as a factual question, identified with the question of whether there was a practical alternative.[19] The concept of duress today may be said to be centred on wrongdoing and what amounts to *illegitimate* pressure, albeit pressure that must have compelled the will of the victim.[20]

Under the current analytical frameworks, the nature of the victim's consent is treated largely as a factual question. Its role lies first in the formation of contract. Having yielded to the pressure to enter into the contract demanded, the victim has exercised a choice and given consent sufficient for the formation of contract. Secondly, in the analytical framework that considers 'no practical alternatives' an essential element to operative duress, consent is embedded in what is primarily regarded as a factual enquiry. Thirdly, consent is embedded in the causation question. Did the pressure bring about the victim's consent, or did other factors bring about the victim's consent? There is currently some debate over the correct test for causation to be applied for economic duress. Should it be that articulated in *Barton v Armstrong*[21] ('a' reason), or the more usual 'but – for' test? Indeed, there seems to be a suggestion that it might consist of a more stringent test.[22] Thus, consent is seen in monochromatic terms. Has consent been given? Was it given when there were no practical alternatives? Was it brought about by the impugned pressure? There is little focus on the *quality* of the consent as an independent consideration.[23]

18. *Borelli v Ting* [2010] UKPC 21 at [34].
19. See eg *R v A-G for England and Wales* [2003] UKPC 22 at [15].
20. *Chitty on Contracts* analyses duress as a combination of pressure and absence of practical choice: Chitty, above n 4, vol 1 at [8-008]. Cf Peel, above n 3, which analyses economic duress in terms of illegitimate pressure and causation (at [10-006]–[10-010]).
21. *Barton v Armstrong* [1976] AC 104.
22. In *Huyton v Cremer*, Mance J went on to suggest that the pressure must have been 'decisive or clinching': [1999] 1 Lloyd's Rep 620 at 636.
23. In Singapore, the quality of the consent is a relevant consideration for ascertaining the illegitimacy of the pressure: *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd* [2006] 4 SLR (R) 451 at [78], per Andrew Phang J ('pressure that *so distorts the voluntariness of the consent* that the law regards such pressure as illegitimate'). This conception of how the quality of consent features in the illegitimate pressure theory of duress can be traced to Phang J's article written when he was a university professor. See A Phang 'Economic duress – uncertainty confirmed' (1992) 5 J Cont L 147 at 151.

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2. PROBLEMS WITH THE CURRENT APPROACH

(a) The unstructured multifactorial approach

Whether illegitimate pressure exists is currently assessed by reference to multiple factors. In the context of a threatened breach of contract, Dyson J in *DSND Subsea v Petroleum Geo Services ASA* set out a number of relevant factors, which include: whether the victim has any realistic practical alternative but to submit to the pressure; and whether the victim protested at the time.[24]

These two factors are traceable to Lord Scarman's dictum in *Pao On v Lau Yiu Long*:[25]

> In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy …

An important difference is that *Pao On v Lau Yiu Long* has as its theoretical premise the overborne will theory. Materially, the factors were considered relevant for determining the plea of duress *generally*, and not for illegitimate pressure.

With the rise of the illegitimate pressure theory, whether the victim protested and whether there was a practical alternative were simply reallocated the role of being relevant to the evaluation of the pressure exerted by the defendant. The problem is that it is not clear *how* these factors are relevant to the assessment of the legitimacy or otherwise of the pressure. How, for example, is the victim's protest relevant to the nature of the pressure that proceeds from the defendant? Why does the presence of a practical alternative render the defendant's threat or demand more legitimate? After all, if the party seeking a price adjustment had initially agreed to a price below the market, it is difficult to see how the availability of alternative performance at market price should render the demand for adjustment a legitimate one. Clearly, the transposition of these factors articulated in the context of the overborne will theory to the context of the illegitimate pressure theory has been insufficiently theorised. The illegitimate pressure theory strains to contain these factors, which have more to do with the victim's responses than with the defendant's wrongful acts.

(b) No practical alternative: a necessary ingredient or merely a relevant factor?

Under the current theoretical conception of duress, some uncertainty attends how the availability of practical or reasonable alternatives features in the doctrine of duress. As the terms 'no alternative',[26] 'no reasonable alternative'[27] and 'no practical alternative'[28] are used synonymously in the judgments, no distinction is made between them here. The consideration has been regarded as relevant since the inception of the

24. *DSND Subsea v Petroleum Geo Services ASA* [2000] BLR 530 at 545.
25. *Pao On v Lau Yiu Long* [1980] AC 614 at 635.
26. Lord Scarman in *Pao On v Lau Yiu Long*, ibid; Griffith LJ in *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 at 426.
27. Griffith LJ in *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 at 428; Hobhouse J in *The Alev* [1989] 1 Lloyd's Rep 138 at 146–147.
28. Lord Scarman in *The Universe Sentinel*, above n 1, at 400; Kerr LJ in *B & S Contracts v Victor Green* Publications [1984] ICR 419 at 429 ('practical choice').

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economic duress doctrine.[29] Materially, it has survived the eclipse of the overborne will theory by the illegitimate pressure theory, although it is unclear how it maps on to the latter theory. In *DSND Subsea*, Dyson J viewed it as a relevant factor in ascertaining whether or not there is illegitimate pressure.[30] Professor Enonchong maps it differently; in his view, 'no reasonable alternative' goes towards the satisfaction of the causation test.[31] In *Huyton v Cremer*, Mance J regarded it as an independent element, though not 'an inflexible third essential ingredient of economic duress'.[32]

Problematically, the judgments have not fully explored *why* it is important even if there appears to be common agreement that it is a relevant factor. If it is to be an independent ingredient in addition to illegitimate pressure and causation, it needs to be satisfactorily rationalised with the illegitimate pressure theory of duress. A theoretical justification of the element is needed. If it is to be regarded as a factor for application of the causation test, one has to grapple with the necessary transformation of the causation test once it is grafted on to the existing causation test.

The uncertainty over the role of 'no practical alternative' distils into the following questions. First, is it a necessary element, or merely a relevant consideration? Secondly, whether it is a necessary ingredient or a relevant consideration, where should it be mapped in the doctrine of economic duress? Thirdly, why does it apply only to economic duress?

A few preliminary observations are apposite to highlight the problem of 'fit' with the illegitimate pressure theory. The 'no practical alternative' consideration focuses on the position of the victim – was such an alternative available to him? The focus of the enquiry is *not* on whether the stronger party had knowledge of such alternatives. If illegitimate pressure directs one's attention to evaluating the permissibility of the pressure exerted by the threatening party, it is difficult to see how the enquiry into practical alternatives, with its focus on the position of the victim and the alternatives known to him, should feature in the evaluation of the legitimacy of the pressure. This consideration does not readily 'fit' the current conception of the illegitimate pressure theory for duress, whether as a factor relevant to evaluating legitimacy or as an independent factor.

The alternative is to map it on to causation. This, indeed, is the position adopted by Enonchong, who takes the view that there should not be different tests of causation for the different types of duress.[33] In Enonchong's view, therefore, the *Barton v Armstrong* test applies to all categories of duress, and the availability of practical alternatives serves only as evidence that the agreement was not induced by the illegitimate pressure.[34] The first problem with Enonchong's view is the low evidential threshold posited by the *Barton v Armstrong* test. Under the *Barton v Armstrong* test, once the victim credibly cites the threat as a reason for his entering into the contract, the threatening party has the burden of proving that the impugned threat did not feature at all in the

29. *Pao On v Lau Yiu Long* [1980] AC 614 at 635; *The Universe Sentinel*, above n 1, at 400.
30. Above n 24.
31. N Enonchong *Duress, Undue Influence and Unconscionable Dealing* (London: Sweet & Maxwell, 2nd edn, 2012) at [4-025]. This is a view shared by the editors of Chitty, above n 4, at [8-033] and Peel, above n 3 ('In assessing whether causation is established, the court will take into account what courses of action (other than submission to the threat) were reasonably available to that person, e.g. whether it would have been reasonable for him to have resisted the threatened wrong by taking legal proceedings': at [10-008]).
32. *Huyton v Cremer* [1999] 1 Lloyd's Rep 620 at 638.
33. Enonchong, above n 31, at [4-010].
34. Ibid, at [4-030].

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victim's decision making process. The presence of practical alternatives does not negate the threat operating as 'a' reason. Neither are they strongly suggestive of the threat not operating as 'a' reason. To the contrary, the presence of practical alternatives can yet be totally consistent with the threat setting into motion the decision to accede to the wrongdoer's demands; *ergo*, the threat can remain 'a' reason despite the presence of practical alternatives. The second problem with Enonchong's position is that the treatment of the consideration in the judicial precedents does not suggest that it is merely of evidential value in the application of the *Barton v Armstrong* test.[35] It is thus difficult to reconcile Enonchong's view that 'no practical alternative' is merely evidential of causation with the prominent role it plays in the judgments.

The difficulty with the view that 'no practical alternative' features in causation does not abate even if the 'but – for' test is regarded as the correct test of causation for economic duress.[36] The principal enquiry in the 'but – for' test is whether the agreement would have been made had the threat not been issued. If 'no practical alternative' is to be an important consideration in the application of the 'but – for' test, its incorporation materially reshapes the nature of the test. It will no longer be the usual 'but – for' enquiry, but a more stringent test. If so, the justification for a stricter test of causation has neither been articulated nor has it been subjected to scrutiny. Indeed, a more stringent test would render the causation test for economic duress inconsistent with that applicable to other scenarios of unjust enrichment.[37]

(c) The causation-led approach

The causation test for duress of the person is well settled by *Barton v Armstrong*. It suffices that the illegitimate pressure constitutes one of the reasons for the victim entering into the contract; the applicable causation test is not 'the reason, nor the predominant reason nor the clinching reason … why the complainant acted as he did'.[38] Pertinently, it is not necessary for the victim to prove that but for the illegitimate pressure, he would not have entered into the transaction. Accordingly, it does not matter that there existed other reasons apart from the illegitimate pressure that drove the victim to conclude the contract.

In affirming the existence of economic duress in *The Evia Luck*,[39] Lord Goff couched the minimal conditions of the plea in the following manner:[40]

> [E]conomic duress may be sufficient to amount to duress … provided at least that the economic pressure may be characterized as illegitimate and has constituted *a significant cause* inducing the plaintiff to enter into the relevant contract.[41]

35. *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; *North Ocean*; *Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; *The Alev* [1989] 1 Lloyd's Rep 138; *Atlas v Kafco* [1989] 1 All ER 41; *DSND Subsea v Petroleum Geo-Services ASA* [2000] BLR 530; *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3481.
36. *Huyton v Cremer* [1999] 1 Lloyd's Rep 620 at 636; *Kolmar v Traxpo* [2010] 1 Lloyd's Rep 653 at [92].
37. AS Burrows *The Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2011) pp 91–95, 270.
38. *Barton v Armstrong* [1976] AC 104 at 121.
39. *Dimskal Shipping Co SA v International Transport Workers Federation, 'The Evia Luck'* [1992] 2 AC 152.
40. Ibid, at 165, per Lord Goff.
41. See *Barton v Armstrong* [1976] AC 104, 121 per Lord Wilberforce and Lord Simon.

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'A significant cause' – as the causation test is characterised by *The Evia Luck* – is in its original context a transposition of the *Barton v Armstrong* test to economic duress.[42] Thus, there is room to query Mance J's view in *Huyton v Cremer* that 'a significant cause' signified the declaration of a more stringent test of causation.[43] Even if the original meaning intended to be conveyed by the use of the phrase 'a significant cause' may be challenged, one might agree with Mance J that the minimum test of subjective causation in economic duress ought to be the 'but – for' test.[44]

First, the employment of 'a reason' as the applicable test for economic duress sits poorly with how economic duress has developed. Even as the early development of economic duress was based on the 'overborne will' theory, this theory of duress is conceptually inconsistent with the notion that the pressure exerted on the victim is but one amongst many reasons for the victim entering into the transaction.[45] An overborne will does not admit of an exercise of the will that is also motivated by other reasons. Rather, it is compelled by the wrongdoer's threat to adopt the course of action desired by the threatening party. The overborne will theory that Atiyah criticised posits that duress connotes *no* exercise of the will. If one relaxes the premise that there is *no* exercise of the will, an exercise of the will in highly constrained circumstances manipulated by the threatening party might yet be characterised as overborne. This more nuanced conception of the overborne will theory addresses Atiyah's criticism of how 'no practical alternative' fits the overborne will theory.[46] Yet, even under this more nuanced conception of the overborne will theory, the notion that 'a reason' suffices for causation purposes is nonetheless inconsistent with the conception of duress. If the stronger party's manipulation of the constraints leaves the victim with no practical alternatives, the resultant causation must at least satisfy the 'but – for' test. As such, the very conception of the overborne will is necessarily inconsistent with the notion that 'a reason' suffices as the causation test for economic duress under the initial conception of duress. Even though *The Evia Luck* extended the *Barton v Armstrong* test to economic duress and termed it 'a significant cause', the correctness of applying this test to economic duress is today doubtful. The balance of opinion – of both judges and scholars – regards the usual 'but – for' test as the correct test to be applied.[47]

Secondly, the usual causation test for connecting a wrong to the loss is the 'but – for' test. Underlying this test is the notion that the wrongdoer is not to be attributed responsibility for the loss unless the wrong is a necessary cause for the victim's placement on the trajectory that culminated in the loss. This test posits that in the absence of the wrong, the victim would not be on this trajectory. Under the 'but – for' test, the wrong must be a necessary reason for the course of conduct that the victim embarked upon; the

42. In Australia, the *Barton v Armstrong* test was applied to economic duress: see *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40 at 46.
43. *Huyton v Cremer* [1999] 1 Lloyd's Rep 620 at 636.
44. Ibid.
45. *The Siboen and the Sibotre*, above n 6.
46. Atiyah's criticism was of the logical incoherence of '[a] rule which declares that it only operates when a person has no choice but then requires examination of the choices open to him': Atiyah, above n 12, at 201. He particularly targeted Lord Scarman's dictum in *Pao On* (p 636) that the duress is confined to cases where the victim 'had no alternative course open to him'.
47. *Huyton v Cremer* [1999] 1 Lloyd's Rep 620 at 636; *Kolmar v Traxpo* [2010] 1 Lloyd's Rep 653 at [92]. See also Chitty, above n 4, at [8-028]; Peel, above n 3, at [10-006]; G Virgo *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 2nd edn, 2006) p 208.

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fact that it had *contributed* to the decision leading to the course of conduct is insufficient.

In *Barton v Armstrong*, the New South Wales Court of Appeal applied the 'but – for' test to the facts, and found that the threat to physically harm the victim was but one among several reasons for the buy-out agreement reached with the wrongdoer. Overruling the Australian court's decision that causation was not thereby proved, the Privy Council categorically repudiated the usual 'but – for' test and instead adopted the more relaxed 'a reason' test. In doing so, the Privy Council drew inspiration from the causation test applicable for fraudulent misrepresentation.[48] Whether or not this more relaxed test should be extended to economic duress should not be a matter of mere analogical reasoning. While the satisfaction of the 'a reason' test and the 'but – for' test both primarily involve a factual enquiry, the *choice* of the test to be adopted is a legal question implicating the values that underpin the conditions for liability. The employment of 'a reason' as the causation test for fraudulent misrepresentation and duress to the person may be seen as an outworking of the strength of the disapproval with which the law regards the wrongful behaviour.[49] The former involves a conscious expression of an untrue statement, namely a statement dishonestly made and intended to lead the innocent party into the contract. The latter involves a conscious statement of a threat to harm a person should the victim not consent to a contract on the terms demanded by the stronger party. These involve contumelious behaviour of a different order compared to the threat not to perform an existing contract unless more favourable terms are given. After all, the threat not to perform a contract could stem from a mistaken view of one's entitlement to be excused from performance of the original contract, just as it could stem from cynical strategic behaviour that seeks to exploit the vulnerabilities of the victim trapped in a bilateral monopoly. It does not obviously attract the opprobrium that attends fraud and the threat to harm a person physically. Fraud and the threat of physical harm may, from a policy values perspective, be so objectionable that it should not even be seen to *taint* the decision making process. The 'a reason' causation test may thus be regarded as a vindication of the policy value that the kind of wrong in question should not feature at all in the chain of causation leading to the decision to enter into the demanded contract. This, indeed, is the effect of adopting 'a reason' as the causation test – against the victim's plea that the wrong featured in his decision to enter into the contract, the stronger party effectively has the burden of disproving a credible claim that the wrong featured in the decision to enter into the contract. Given the different degree of opprobrium that might be attached to a generic threat not to perform a contract compared to fraud and the threat of physical harm, it is not immediately obvious why the victim should have the benefit of a more relaxed test and not have to bear the burden of the more usual 'but – for' test.

Yet, even as one may agree that the usual 'but – for' test is the appropriate causation test for economic duress, it has been suggested that the 'but – for' test 'could lead too readily to relief being granted'.[50] This has led Edwin Peel, the present editor of *Treitel's Law of Contract*, to propose that 'the two factors [viz the illegitimacy of the pressure and the causal threshold] may be said to be interdependent in the sense that the more illegitimate the pressure the lower the causal threshold'.[51]

48. *Barton v Armstrong* [1976] AC 104 at 118–119.
49. N Seddon 'Compulsion in commercial dealings' in PD Finn (ed) *Essays on Restitution* (North Ryde, NSW: Law Book Company, 1990) p 156.
50. *Huyton v Cremer* [1999] 1 Lloyd's Rep 620 at 627, per Mance J.
51. Peel, above n 3, at [10-006].

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If the operation of the 'but – for' test is to be refracted through the 'no practical alternative' consideration, it is no longer the usual 'but – for' test. In so far as the 'but – for' test embodies the policy value that the victim has to demonstrate that the wrong was a necessary cause, the requirement of 'no practical alternative' or an amorphous 'something more' goes beyond the usual rigour demanded for demonstrating a causative link. The better position is to view causation and 'no practical alternative' as conceptually distinct, and allow the causation test to perform its usual function.

The ratcheting up of the causation test is suggestive of an incrementalist approach motivated by the desire to restrict the ambit of the doctrine through dicta first articulated in cases premised on the overborne will theory. If the concern is that there should be sufficient checks to safeguard against too liberal a doctrine of economic duress, the checks should be developed in a principled manner. At its core, these should be driven by a sound conception of economic duress and the values it seeks to serve. Rather than create a new causation test, the aim of circumscribing the ambit of duress should be carried out through required elements that reflect its desired ambit. This reveals more transparently why the law provides the victim with an entitlement to exit from the responsibility that usually attaches where there is consent to the contract.

The 'no practical alternative' consideration has a role to play in determining operative duress, but it deserves a theoretical justification. As we will see in the next section, 'no practical alternative' can be conceptually grounded in 'excusable consent', a claimant-sided rationale the incorporation of which in the current framework promises to provide a more satisfying explanation for when duress should be operative.

3. RECENTRING CONSENT

The rise of the illegitimacy pressure theory should not necessarily mean the eclipse of the element of consent. Nonetheless, under the current analytical frameworks for duress, consent is no longer a salient element. The overborne will theory is justly criticised for its premise that there is no exercise of the will – no consent – in cases of operative duress. However, this should not mean that consent has no role as a constituent component in the construction of operative duress.

To be sure, consent is not irrelevant in the current analytical framework. A close examination will reveal that it is embedded in the elements. It is present, but in an understated and even oblique fashion. This section begins by first looking at the diverse shades of consent in contract law and how these different notions of consent have been employed to work out contractual responsibility. It then argues that as the victim of duress is *ex hypothesi* making a conscious decision when indicating consent to the contract demanded by the threatening party, the law should necessarily enquire into whether the consent should be excused. There is a need to explain *why* the *conscious* assent to the assumption of responsibility should be excused. The 'no practical alternative' enquiry can be characterised as a particular working out of a broader element – 'excusable consent'. 'Excusable consent', therefore, provides the conceptual basis for working out the 'no practical alternative' consideration. In addition to providing a conceptual peg on which to hang 'no practical alternative', 'excusable consent' promises to take some of the weight off the overburdened illegitimate pressure element.

(a) Consent and its shades of legal significance

That consent was given which is sufficient to form a contract does not exhaust the role of consent. Consent continues to be relevant in working out many of the vitiating

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factors, in which the *nature* of the consent is often a critical consideration. The type of consent relevant to the formation of contract needs to be distinguished from the type of consent relevant to the specific vitiating factors. For the formation of contract, what is relevant is a party's manifested consent. What did he say? What does the conduct communicate? This is consistent with the objective theory of contract formation. The nature and quality of a contracting party's consent often enters the picture as a vitiating factor. While a mistaken consent *simpliciter* has no excusatory potency, a party who is mistaken as to the terms of the contract is entitled to argue that he is not bound by the contract to which he has indicated assent if the mistake is known to the counterparty. *Hartog v Colins & Shields*[52] is classic example. The buyer of Argentinian hare skins who accepted a quote on the basis of the price per pound was unable to enforce the contract against the seller, as he knew that the basis on which the seller intended to trade was on a per piece basis. *Ergo*, where the seller made a mistake in conveying the terms on which he was prepared to trade, the buyer's purported acceptance with knowledge of such mistake is given no legal effect. Thus, where the terms offered are known to be mistaken, the law does not attach the usual consequences to the manifestation of an offer met by an acceptance; instead, the law takes the view that no contract is formed. In these circumstances, then, the contract purportedly formed by the buyer's acceptance is void.

Misrepresentation – which might also be characterised as involving a wrongfully induced mistake – attracts a different legal response. Here, the law regards the contract as validly formed but provides the mistaken party the right to rescission; that is, the right to break off the contract and be free of the contractual responsibilities assumed. The legal consequence is different from operative unilateral mistake, for the contract is regarded as valid until the mistaken party elects to rescind the contract. Without the *problematic* consent – which may be located in the mistaken party's reliance on the misleading statement – misrepresentation would not be operative.[53] Defective consent is thus embedded in the reliance element in misrepresentation.

Embedded consent is similarly located in the causation element in duress. The problem with the causation element in duress, as we have seen, lies with the uncertain nature of the causation test. As earlier argued, the *Barton v Armstrong* test of 'a reason' is at odds with economic duress as it was first conceived.[54] Even if this dissonance is now perceived as a matter of historical interest, given the rise of the illegitimate pressure theory, both judicial and scholarly opinion currently weigh against the application of the *Barton v Armstrong* test for economic duress. The prevailing view is that the applicable test is minimally 'but – for' causation. But there continues to be concern that 'but – for' causation inadequately disciplines the doctrine. It is submitted that it is this concern for additional safeguards to prevent an over-extensive duress doctrine that drives the desire for 'something more'.[55] This, however, runs into the problem that, in moving from physical duress to economic duress, the rigour of the causation test is not only increased, but increased beyond the usual 'but – for' test. It is submitted that if this 'something more' is underpinned by the desire to limit the ambit of duress, it should be recognised for what it is – a conceptual element that shapes how much duress should

52. *Hartog v Colins & Shields* [1939] 3 All ER 566.
53. *JEB Fasteners Ltd v Mark Bloom & Co* [1983] 1 All ER 583, affirming [1981] 3 All ER 289.
54. See text to n 45.
55. Above n 50.

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cover. The test for causation should be left to serve the concern for a causal nexus, and not be burdened with additional amorphous considerations that are meant to keep operative duress within acceptable bounds.[56] Accordingly, 'no practical alternative' and the amorphous 'something more' should not be fitted on to causality to make it bear a burden of legal discrimination that it does not usually shoulder. The embedded consent in 'but – for' causation seeks the answer to the counterfactual – but for the threat, would the contract have come about. Did it induce the contract? If a different kind of consent is desired to keep the doctrine within acceptable bounds, it should be recognised as a conceptually distinct element. It is submitted that the doctrine of duress would be rendered much more coherent with the express recognition that, in addition to illegitimate pressure, the law requires an evaluation to be made of the consent given before it is prepared to find operative duress.

(b) The responsibility for consent and the need to be excused from one's actions

The current approach to duress, where the value judgement principally takes place in the illegitimate pressure element, might be characterised as the wrongs-caused contract. Yet conceptually, there is something amiss with an approach in which the consent element is only hinted at when working through the elements. The current approach takes the victim as an object. Was he subjected to illegitimate pressure? Was the said pressure of such potency as to compel the victim to take the course of action demanded?

If one starts from the premise that the consent to the contract resulted in contractual responsibility, the necessary question that needs to be addressed is why the contract should now be voidable at the option of the contracting party. The undeniable fact is that the victim exercised a choice. He could have withheld his consent. Instead, he consented and agreed to the contract demanded by the threatening party. Accordingly, one has to ask why, having exercised that choice, the victim should be afforded an opportunity to be relieved of the usual responsibilities that come with that choice. One has to be persuaded that the consent given in the circumstances is excusable and that it is right for the consent to be revocable. That there was illegitimate pressure is only a partial answer – for the responsibility for the consent needs to be addressed. One has to be further convinced that in the face of the illegitimate pressure, the victim made an excusable or justifiable choice in circumstances under which he should be accorded the entitlement to revisit that choice. Illegitimate pressure does not necessarily connote an absence of autonomy. As deliberated consent prima facie signifies an exercise of autonomy – even if it is of a constrained kind – there is a need to enquire into the nature of the consent before one should be prepared to allow the victim to resile from the contractual responsibility.

(c) Working out excusable consent

Consent is responsibility generating. That there was a wrong committed by the counterparty in the generation of the consent does not quite answer the question of whether one should be entitled to be relieved of the responsibility assumed. If the wrong consists of a misrepresentation and the consent was given on a mistaken basis induced by the

56. This view resonates with theories that advocate keeping a clear distinction between factual causation and the scope of liability to avoid conceptual and legal confusion: see J Stapleton 'Choosing what we mean by "causation" in the law' (2008) 73 Miss L Rev 433; RW Wright 'The NESS account of natural causation: a response to criticisms' in R Goldberg (ed) *Perspectives on Causation* (Oxford: Hart Publishing, 2011) p 285.

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counterparty, there is little question that the representee should be accorded a right to revoke the consent given. However, where the decision making capacity of the victim is unimpaired and the consent is given when he is fully conscious of the constraints – even if these constraints were engineered by the counterparty – the constraints need to be shown to have an impact on the autonomy of the victim in an unacceptable manner in order for the victim to be excused.[57]

The absence of practical alternatives fits nicely into this framework. If, despite the availability of substitute performance at the contracted price, the victim agrees to the increased price demanded by the threatening party, there are good grounds for concluding that the victim was exercising his autonomy and should be bound to his decision. There are insufficient grounds for concluding that the consent was an excusable one. The absence of practical alternatives supplies the additional rationalisation that satisfies the intuition that the victim bears the burden of explaining satisfactorily why his consent should be revocable. Excusable consent therefore explains and justifies the correctness of considering whether there are practical alternatives.

The argument that there should be an additional element of 'excusable consent' added to the current doctrinal framework resonates with the two-pronged theory of duress advocated by Rick Bigwood.[58] The first prong advocated by Bigwood – the Proposal Prong – examines the nature of the pressure exerted. The Proposal Prong is thus congruent with the illegitimate pressure element found in the current analytical framework. The second prong – the Choice Prong – consists of two components: coercion in fact and in law. Coercion in fact tracks the issue of causation. Coercion in law, which is concerned with the question of 'whether the recipient of the threat was … *justified* in manifesting his or her contractual assent in response to the pressure',[59] involves a normative question. It draws upon Lord Scarman's dictum in *The Universe Sentinel* that there must be 'pressure amounting to compulsion of the will'; accordingly, Bigwood conceives of coercion in law as 'concerned essentially with the issue of whether a coercive proposal is regarded as grave enough to justify the victim succumbing to it'.[60] 'Excusable consent' finds common ground with Bigwood's 'coercion in law' in holding the view that a value judgement needs to be made of the victim's decision to accede to the demands that accompany the threat. Nonetheless, there are at least two differences.

The first difference lies in the scope of enquiry. Whereas the 'judgment of coercion' (as Bigwood terms it) is primarily concerned with the 'no reasonable alternative' enquiry, 'excusable consent' is broader. The latter extends to instances where the victim did not consider his autonomy of action unduly constrained. The pressure intended by the threatening party to steer the decision of the victim might have achieved its intended effect by setting into motion a consideration of the demand made by the threatening party and subsequently bringing the contract about; nonetheless, the victim might be quite willing to accede to the demand because he feels that the demand is commercially

57. Cf SA Smith 'Contracting under pressure: a theory of duress' (1997) 56 Camb L J 343, who argues that either illegitimate pressure or absence of autonomy is sufficient to constitute duress. Unfortunately, the judicial precedents do not support the position that Smith advances.

58. R Bigwood 'Coercion in contract: the theoretical constructs of duress' (1996) 46 U Toronto L J 201, which is restated in his *Exploitative Contracts* (Oxford: Oxford University Press, 2003) ch 7. Bigwood's two-pronged framework draws on A Wertheimer *Coercion* (Princeton, NJ: Princeton University Press, 1987) ch 2.

59. Bigwood, above n 58, at 252 (emphasis original).

60. Ibid, at 258.

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justified, this notwithstanding the illegitimacy of the pressure. The consent given in such circumstances is quite consistent with the victim's exercising his autonomy. This provides a more satisfactory explanation for the outcome in *Pao On v Lau Yiu Long* than causation.

In *Pao On v Lau Yiu Long*, the buyers of certain shares threatened not to carry through with the contract unless the vendor gave a guarantee or an indemnity in the event that the shares declined in price. The vendor acceded to the demand after weighing the prospect of liability; he deliberated his options and made the judgement call that the risk was not one of great concern.[61] When subsequently called upon to pay on the guarantee, the vendor failed in his attempt to invoke economic duress. While the outcome has been rationalised as an instance in which the coercive pressure did not cause the amended contract, one cannot help but wonder whether this is an altogether satisfying explanation. But for the purchasers threatening not to perform the original bargain, the vendor would not have agreed to the amended contract where the repurchase obligation was converted to an indemnity. It is difficult to argue that there was no causation.

The decision comports with the overborne will theory because the court found that the vendor of the shares had considered the risk of liability and adjudged it worthwhile taking. The deliberation and the conclusion that the revised bargain was worthwhile making is inconsistent with an overborne will. However, one struggles to explain this under the illegitimate pressure theory. Is one to say that the threat was not illegitimate but mere commercial pressure? The threat to breach the contract was blatant and made knowing it to be a breach. There were no extraneous factors that changed the nature of the bargain. There were no other purchasers waiting to buy the block of shares. Rather, the problem lies with the nature of the consent. The vendors made an error in judgement, one that they later regretted. Since they did not feel pressurised, and saw the revision as an acceptable compromise, there is little reason why they should later be entitled to have it unravelled. The consent given is not excusable because it was given in circumstances in which the victim considered the revision not one worth wrangling over. The key to why the vendor failed in invoking economic duress lies in his making a judgement call that the terms demanded did not carry risks beyond those he was willing to bear. In the circumstances, the agreement to the revised terms was borne out of an exercise of autonomy that the vendor did not feel was compromised. As such, there is little reason to excuse the consent to the revised terms demanded by the purchasers. Indicators of whether the victim felt pressurised include expressions of protest and attempts at persuading the threatening party to accept more reasonable terms. Excusable consent does not require the victim to have protested or, for that matter, to have made counterproposals; nonetheless, the lack of protests coupled with the admission that he had not considered the proposed change to involve a material change in risks points to a deliberated assessment that the revised bargain was acceptable. In such circumstances, there is very little reason to excuse the consent given and allow for its revocation.

As will be seen in Section 4, by distinguishing the value judgement made of the threatening party's pressure from that made of the victim's consent, 'excusable consent' also allows for the possibility of the law making the value judgement that the victim is

61. The trial judge made a factual finding that the victim 'must have considered the matter thoroughly in light of the then marketing condition and formed the opinion that the risk in giving the guarantee was more apparent than real': [1980] AC 614 at 626. From this, the Privy Council concluded that there was 'commercial pressure, but no coercion': ibid, at 635.

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expected to live with choices made in the face of certain commercial pressures, whether or not they are wrongful.

A second difference between excusable consent and coercion in law lies in the terminology employed. Bigwood characterises the normative question as one involving whether the victim was *justified* in acceding to the demand. In so far as the victim has assumed contractual liability and seeks to be relieved of the consequences of indicating consent, it is more accurate to speak of the enquiry as involving whether the consent is *excusable*. If moral choices are not implicated – as is the case where the choice is between suffering the consequences of the breach of an existing contract or entering into a contract on the terms demanded by the threatening party – 'justification' is inappropriate, as it does not carry the connotation that one has made a right or praiseworthy decision. Rather, it only carries the weaker connotation of the choice being understandable in the circumstances and deserving of sympathetic treatment. Fundamentally, it distils into whether the victim should be excused from the choice made.

4. ALLEVIATING THE BURDEN BORNE BY THE ILLEGITIMATE PRESSURE ELEMENT

The problem with the current illegitimate pressure theory of duress is that the element of illegitimate pressure is made to bear an undue burden while the question of the victim's responsibility for acceding to the threat is left unaddressed. Under one of the current analytical frameworks, once an illegitimate threat is proven, the question that remains is whether it caused the transaction.[62] This syllogism is defensible where the threat is to inflict physical harm on the victim. A person's right against physical injury, and indeed the very threat of physical injury, currently receives strong legal protection. They are backed up by the torts of battery and assault, respectively. The criminal law adds to this by attaching criminal sanctions for such behaviour. Given this, there is little question that the victim is justified if he chooses to accede to the contract demanded rather than suffer the physical consequences threatened. In short, the question relating to the victim's responsibility for consenting is answered by the choice made being clearly excusable.

The same cannot be said for threats not to perform a contract. This is not to say that there have not been attempts to characterise threats to breach a contract as illegitimate. McKendrick inclines towards the position where 'every threatened breach of contract is in principle illegitimate'.[63] In *Kolmar v Traxpo*, Clarke J accepted the proposition that '[a] threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented'.[64] However, the decided cases do not show the courts to have adopted

62. Above n 3.

63. E McKendrick 'The further travails of duress' in A Burrows and Lord Rodger of Earlsferry *Mapping the Law: Essays in Honour of Peter Birks* (Oxford: Oxford University Press, 2006) p 188. *Contra* P Birks 'The travails of duress' [1990] Lloyd's Mar & Com L Q 342 at 346; Burrows, above n 37, pp 274–275.

64. *Kolmar v Traxpo* [2010] 1 Lloyd's Rep 653 at [92]. This was one among four propositions advanced by counsel, which were accepted by Clarke J as an accurate reflection of the authorities summarised in Lord Goff of Chieveley and G Jones *The Law of Restitution* (London: Sweet & Maxwell, 7th edn, 2007) at [10-025]–[10-051]; J Chitty *Chitty on Contracts* (London: Sweet & Maxwell, 30th edn, 2008) at [7-014]–[7-015]; and *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 at [131].

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any presumptive position associated with a threat to breach a contract; instead, any finding of illegitimate pressure is arrived at only after a holistic evaluation of all the relevant factors.[65] As such, the current law reveals a certain reluctance to characterise a threat not to perform a contract as illegitimate without more.

This reluctance to adopt a more categorical stance might first be explained by the concern that post-contract renegotiation, which is commonly engaged in by commercial parties, might be undermined.[66] A party may have an arguable case for withholding performance under the contract. The change in circumstances may give rise to a defence in frustration, or there may be an arguable case that there exists an implied term that excuses performance in the new environment. Renegotiation when circumstances change is common enough whether or not there are indeed legal grounds for discharge from the contract or for withholding performance. The difficulty with a more categorical stance is compounded by the very thin line that separates an indication of inability to honour one's assumed obligations *simpliciter* and a threat not to perform.[67] The former conveys information and helps prepare the counterparty for what is likely to happen. It plays a legitimate and even valuable role. The problem is that the two elide into each other. After all, the threat not to perform need not be express. It suffices if the circumstances indicate that a party is suggesting that he will not perform unless more favourable terms are forthcoming.[68] A mere communication that one is hard put to continue with a contract that has turned unprofitable and that performance will entail greater loss almost inevitably carries an invitation to renegotiate. If one adopts the moralistic position that a threat not to perform is always illegitimate, one is in effect rendering a bid for renegotiation illegitimate. The fact that the commercial world does not regard requests for renegotiation as per se illegitimate renders it difficult for the law to take such a position. Moreover, such a categorical approach promises to invalidate contractual modifications and risks undermining legitimate expectations in the finality in renegotiated deals. Functionally, this resurrects the problem that existed under the *Stilk v Myrick*[69] position on consideration, and that *Williams v Roffey*[70] addressed by adopting the notion of practical benefits (factual consideration). As noted by Mindy

65. *Pao On v Lau Yiu Long* [1980] AC 614; *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; *Atlas v Kafco* [1989] 1 All ER 641; *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530.

66. John Carter puts it well when he says, 'It would throw that area of law into profound confusion if a threat not to perform were to be regarded as illegitimate pressure merely because of an error in assessment of contractual obligation or liability': JW Carter *Contract Law in Australia* (Chatswood, NSW: LexisNexis Butterworths, 6th edn, 2013) at [22-20].

67. Cf *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, where there was no suggestion of a threat as the offer to pay more came from the main contractor after he became concerned that the subcontractor would not be able to provide timely delivery according to the contract.

68. *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 (a contract provider of exhibition stands did not make any overt demands – it was nonetheless clear that unless the defendants made the extra payment, he would walk off the job); *North Ocean Shipping v Hyundai Construction, 'The Atlantic Baron'* [1979] QB 705 (there was no express statement that the ship builder would breach the contract; however, it was clear that unless extra payments were made to make up for the shortfall arising from the foreign currency movements, the owner could not expect the ship to be delivered as contracted).

69. *Stilk v Myrick* (1809) 2 Camp 217.

70. *Williams v Roffey* [1991] 1 QB 1.

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Chen-Wishart, the benefit from the relaxation of the doctrine of consideration would be taken away by such a conception of duress.[71]

The desire to preserve a space for renegotiation can therefore explain the absence of any clear position on whether a threat not to perform a contractual obligation amounts to illegitimate pressure. Even then, it is difficult to defend why a bald threat not to perform unless more favourable terms are given can still be characterised as 'mere commercial pressure'. The introduction of 'excusable consent' allows the illegitimate pressure element to focus on making a value judgement on the acceptability of the threatening party's actions without being distracted by the value judgement relating to the excusability of the victim's actions.

Even if no presumptive position is taken, the evaluation of the legitimacy or permissibility of the threatening party's actions should not be confounded by whether the threat was so coercive as to render the victim's assent excusable. This is not to say that the coercive potential of the threat does not go towards evaluating its legitimacy. It does. But it should be recognised that the coercive potential is relevant in a slightly different fashion when working out the legitimacy of the pressure exerted, and in providing an excuse for the victim's choice.

Instead of 'illegitimate pressure' being a conclusion of a compound legal judgment of, first, the acceptability of the threatening party's conduct and, secondly, of being sufficiently coercive to justify the victim making the choice, 'illegitimate pressure' should be a judgement involving the acceptability or permissibility of the threatening party acting as he did. With this clearer focus, the uncertainties over the relevance of bad faith and good faith resolve.

Some commentators argue against incorporating bad faith and good faith into ascertaining the legitimacy of demands to renegotiate. McKendrick, for example, reasons that the determination of breach is independent of whether a contracting party is acting in good faith or bad faith.[72] A contracting party who in good faith believes that he has a legal entitlement to withhold performance may yet be in breach of contract; the question is decided by whether the purported legal reason for withholding performance is valid. The party's good faith belief in his entitlement does not affect the question of breach. Contrariwise, if the party has a lawful reason for withholding or terminating performance, his use of that reason in bad faith to escape from a bargain is yet permitted. As such, bad faith and good faith should not go towards evaluating the legitimacy of a threat not to perform a contract.

The answer to the objection lies in the different nature of the enquiry. While bad faith and good faith may not be material in determining breach, the question here is a different one. The relevant question that should concern the law in working out duress is this: in recognising that there is a need for space to be given to a legitimate call to negotiate (if one backed up by the threat not to perform), when does one cross the line and be considered to be making an *illegitimate* demand? Framed thus, the relevance of bad faith becomes obvious. If one knows that one's contract has locked the counterparty into a particular trajectory that leaves him little room but to accede to one's demands, one's strategic behaviour to take advantage of his present vulnerabilities is rightly adjudged

71. M Chen-Wishart 'Consideration, practical benefit and the emperor's new clothes' in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995) p 146.

72. McKendrick, above n 63, p 188.

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illegitimate. The case is most obvious when there is no change to the external environment and the only inference that can be drawn is that the party is seeking to adjust the bargain by reason of the counterparty's vulnerabilities as the time for performance approaches.[73]

On the other hand, good faith demand for renegotiation should not inoculate it against the taint of illegitimacy. As the value judgement regarding the illegitimacy of the pressure is to be made by the legal system and not solely determined by the subjective intentions of the threatening party, there is yet room for a determination that the demand for renegotiation is illegitimate; this is so even if the threatening party *honestly believes that he is entitled* to seek a better deal, say, in changed circumstances. The nature of the threat and the circumstances in which it is made necessarily feed into how the law adjudges the permissibility or legitimacy of the pressure.

This invites us to revisit where 'mere commercial pressure' should be mapped.[74] Currently, mere commercial pressure amounts to a conclusion that the pressure is legitimate – acceptable and permissible.[75] Under the revised framework, mere commercial pressure is preferably mapped on to the 'excusable consent' element. This allows pressure to be illegitimate but at the same time to amount only to commercial pressure that does not render the consent an excusable one. This may arise because the pressure is one that the law adjudges as something that a commercial party should be expected to live with. As such, even if the commercial pressure crosses the line and is considered illegitimate, the victim is not necessarily entitled to cave in. Depending on the sphere in which one operates – whether this be in ship chartering, commodity sales or as a consumer – the law can have different expectations of how one should respond, and whether the response can be revisited. As such, the law can avoid countenancing cynical advantage taking while expecting the victim to respond robustly. Just as he is expected to mitigate in the face of a breach, he is also expected to provide a robust response to illegitimate commercial pressure.

CONCLUSION

The illegitimate pressure theory does not satisfactorily explain why and when the victim should be given an entitlement to revoke his consent. The victim should answer for the conscious consent to the demanded contract, even if the pressure exerted is wrongful. Contractual responsibility is prima facie generated by such consent. It is necessary to explain why the deliberated consent, albeit given under illegitimate pressure, should be excused. The eclipse of consent with the rise of the illegitimate pressure theory is thus unfortunate, for an important step leading to the entitlement to rescission has been buried in the framework. As has been seen, consent is embedded in the causation enquiry, which inadequately addresses the intuition that the victim's conscious choice needs to be justified. This, together with the issue relating to how one should map the 'no practical alternative' consideration, invites a recentring of consent.

73. P Birks *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) p 183 (threat 'intended to exploit the plaintiff's weakness rather than to solve financial or other problems of the defendant').
74. *The Siboen and the Sibotre*, above n 6 (mere commercial pressure insufficient to give rise to duress).
75. *Atlas v Kafco* [1989] 1 All ER 641 at 645, where Tucker J acknowledged that the borderline between economic duress and commercial pressure may 'in some cases be indistinct'.

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The element of 'excusable consent' brings to the fore the legal values that attend the evaluation of whether the victim's deliberated exercise of consent should be excused. The presence of practical alternatives undercuts the sympathy with which such deliberated consent should be regarded; it can be regarded as being underpinned by the policy imperative that a choice made when there are practical alternatives should not be excused. 'Excusable consent' also promises to alleviate the heavy burden of normative evaluation underlying the illegitimate pressure enquiry. A threat not to perform a contract can be characterised as illegitimate while the victim can at the same time be required to justify why his choice should be treated sympathetically. As such, it allows for the value judgement that, notwithstanding the wrongfulness of the pressure, a contracting party in certain settings is expected to cope with such pressures and live with the consequences of his response. This might apply in a commercial setting where certain kinds of pressure might be regarded as par for the course, with the consequence that the victim is expected to live with his choice despite the unwelcome pressure. By recentring consent and recognising the legal values relevant to the evaluation of the victim's choice, 'excusable consent' supplements the current analytical framework and makes for a more satisfying conception of the duress doctrine.

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