A BARREN FUTURE? EQUITY'S CONSCIENCE AND WOMEN'S INEQUALITY

BY DIANNE OTTO*

[*This article examines the equitable doctrines of unconscionability and undue influence from a feminist perspective. An examination of mostly Australian cases reveals how women's subordination is implicitly constructed in the guise of 'equality' by these doctrines. Equity's potential to transcend the confines of liberal notions of equality, and to provide a means for challenging gendered inequalities is explored. The author concludes that Equity's promotion of self-interest and materialism are fundamental hurdles to feminist change.*]

Equity's continuing potential for 'childbearing', in the sense of pioneering creative legal responses to changing social circumstances, is the subject of much debate.[1] The equitable jurisdiction's discretionary power to appeal to principles of justice and fairness in the development of legal rules suggests a progressive role for this area of law. Historically this has resulted in substantive, procedural and remedial innovation which has supplemented the rigidity of the common law in many respects, but not necessarily progressively.[2] In this article, my aim is to explore the potential for Equity to transcend the confines of liberal legal notions of 'equality' and recognize interests and remedies which provide a means for challenging social inequalities in power that are attributed to gender.

In its evolution as a supplement to the common law, Equity has developed some doctrines which set out to deal with inequalities between parties to transactions. Indeed the renegade Lord Denning has suggested that the 'single thread' of equitable intervention into bargains concluded between parties rests on 'inequality of bargaining power'.[3] This suggestion has been firmly rejected by the legal establishment because of its 'unruly' openendedness and lack of precision.[4] It is nevertheless apparent that concern with inequalities in power has been one of Equity's preoccupations.

Feminists are also concerned with power imbalances between parties in legally regulated relationships and have used the language of (in)equality to

* B.A. (Adel.), LL. B. (Hons) (Melb.). Thanks are due to Lisa Sarmas and Wayne Morgan for their challenging comments on various drafts of this article. The author hopes she has done them justice. Thanks also to Marie Andrews for her encouragement of this endeavour.

1 See *e.g.* Mason, Sir Anthony, 'Themes and Prospects' in Finn, P. D. (ed.), *Essays in Equity* (1985) 242.

2 Chesterman, M., 'Equity in the Law' in Troy, P. N. (ed.), *A Just Society? Essays in Equity in Australia* (1981) 51, 63, identifies three limitations to Equity's reforming potential: that its focus is primarily oriented to resolving disputes between propertied litigants; that in its rare dealings with unpropertied or disadvantaged people the equitable ethical concepts are applied so as to operate against their interests; and that the jurisdiction functions in a way that favours the interests of wealthy individuals over considerations of public policy like, for example, redistributive justice.

3 *Lloyds Bank v. Bundy* [1975] 1 Q.B. 326, 339.

4 See *Muschinski v. Dodds* (1985) 160 C.L.R. 583, 594 *per* Deane, J.; Sealy, L. S., 'Undue Influence and Inequality of Bargaining Power' (1975) *Cambridge Law Journal* 21; Cope, M., *Duress, Undue Influence and Unconscientious Bargains* (1985) 169-72.

articulate this.[5] As a consequence of feminist efforts to attain legal cognizance of gender inequality, 'equality' legislation has been enacted in most common law jurisdictions.[6] However, experience is showing that the operation of these laws tends to confirm rather than contest the social construction of gendered inequalities.[7] This has led some to decry the potential of equality as a legal standard capable of achieving change.[8] Feminist analysis of the liberal construction of equality provides a useful framework for exploring Equity's potential to contribute to change in the subordinate social position of women.

In the first section of this article, the capriciousness of equality as a legal standard will be discussed, drawing largely on feminist debates and experience. The second section will examine the equitable doctrines of unconscionability and undue influence in order to assess the extent to which Equity has acknowledged gendered differences in power in its conceptualization of inequalities between parties to transactions. In the third section, the social construction of women by these doctrines will be examined. Finally some conclusions will be drawn about the limitations and potential of Equity in relation to the promotion of equality for women.

EQUALITY AS A LEGAL STANDARD

Equality is a comparative right.[9] In liberal legal thought, the essence of equality is that likes be treated alike.[10] Equity's allegiance to equality is encapsulated by the maxim 'equity is equality'. According to Halsbury, this maxim

> expresses in a general way the object both of law and equity, namely to effect a distribution of profits and losses proportionate to the several claims or several liabilities of the persons concerned. Equality in this connection does not mean literal equality, but proportionate equality.[11]

The historical focus of Equity's concern with equality has been on achieving a proportionate and formal equality between parties to legally regulated transactions. Equity has not aspired to the goal of actual equality, nor has it purported to recognize structural social differences in power that may in a general way impinge on the transaction in question. As will become apparent, Equity's measurement of profits and losses, and thus its assessment of equality, has been materially based. This has resulted in less tangible claims and liabilities, such as diminished social power or opportunity, being positioned outside its terms of reference.

5 See Cain, P. A., 'Feminism and the Limits of Equality' (1990) 24 *Georgia Law Review* 803; Lahey, K., 'Feminist Theories of (In)equality' (1987) 3 *Wisconsin Women's Law Journal* 5; Littleton, C., 'Reconstructing Sexual Equality' (1987) 17 *California Law Review* 1279.

6 *E.g.*: Equal Opportunity Act 1984 (Vic.); Sex Discrimination Act 1984 (Cth).

7 Taub, N. and Schneider, E. M., 'Women's Subordination and the Role of Law' in Kairys, D. (ed.), *The Politics of Law: A Progressive Critique* (2nd ed. 1990) 151.

8 Thornton, M., 'Hegemonic Masculinity and the Academy' (1989) 17 *International Journal of the Sociology of Law* 115, 118.

9 Simons, K., 'Equality As A Comparative Right' (1985) 65 *Boston University Law Review* 387.

10 Westen, P., 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537, points out the tautological nature of this principle and its lack of substance. Westen, however, ignores the gendered content of equality discourse.

11 Hanbury, *Halsbury's Laws of England* (4th ed. 1976) vol. 16, 872.

A recent illustration of the operation of Equity's equality principle is the High Court's decision in *Baumgartner v. Baumgartner.*[12] In this case, the parties had lived together in a *de facto* relationship for about four years. During this time they had pooled their earnings 'for the purposes of their joint relationship'.[13] The respondant generally gave her pay packet to the appellant who banked it in a common account from which all the expenses associated with the relationship were paid. Both parties earned a wage throughout the relationship except for a period of three months during which Ms Baumgartner did not have paid work because she gave birth to and cared for their child. Land was purchased from the common fund, a house was built and furnished, and a home was made. Mr Baumgartner had sole legal title to the property but, as the High Court found, it was unconscionable for him to assert this title because of the joint contributions.

In deciding how the common property should be divided at the end of the relationship, the High Court considered what account should be taken of the three month period of homemaker contributions. In its assessment of proportional equality the Court took the unusual step of attributing a monetary value to these contributions so that they could be included in its calculations. In so doing the High Court moved a small step away from the equitable tradition that has regarded domestic contributions[14] as altruistic, as part of the natural order of things, as without any material value, and therefore as outside any assessment of proportionate profits and losses.[15]

Although the *Baumgartner* decision is still a long way from recognizing domestic contributions as providing the sole basis for recognition of an equitable interest in the property of a relationship, it is perhaps a small step in this direction. In reconstruing domestic work as a contribution to the pooling of resources which enabled property of the relationship to accumulate, the High Court has opened the potential for domestic labour to be repositioned *within* the equality equation as 'like' the contribution of a wage.

As *Baumgartner* illustrates, the corollary to the proposition that likes be treated alike is that those not alike are to be treated differently — unless homemaker services are conceptualized as like monetary contributions they do not count in the equality calculation. It is readily apparent that much depends on what is recognized as 'like' and 'unlike'. In making determinations about this the law plays a constitutive role in the meaning and processes of social equality.

Feminist analysis has shown that the liberal legal standard of equality

12 (1987) 164 C.L.R. 137.

13 *Ibid.* 149 *per* Mason C.J., Wilson and Deane JJ.

14 By 'domestic contributions' I include the multi-faceted functions and responsibilities traditionally attributed to the roles of wife and mother.

15 Neave, M., 'Three Approaches to Family Property Disputes' in Youdan, T. G. (ed.), *Equity, Fiduciaries and Trusts* (1989) 247, 254. Prior to the line of cases that led to the decision in *Baumgartner, de facto* homemakers had only succeeded in establishing an interest in property of the relationship based on common intention: *e.g. Hohol v. Hohol* [1981] V.R. 221; *Green v. Green* (1989) 17 N.S.W.L.R. 343.

positions women as 'unlike' men or, in Simone de Beauvoir's words, 'other'.[16] As Catharine MacKinnon observes, this has resulted in a situation where, as with the privileging of waged work over domestic work, 'virtually every quality that distinguishes men from women is . . . affirmatively compensated in this society'.[17] In attempting to identify strategies that will counter liberal equality's privileging of men, feminists have found themselves locked in debate over the relative merits of 'sameness' and 'difference': can equality be achieved by legal change which promotes identical treatment of women and men, or alternatively can equality be attained by legal redefinition of women's differences as equivalent (alike in status) to qualities considered to be male?[18]

The lines of this sameness/difference debate may be illustrated by the solution each suggests to the *Baumgartner* case's question of homemaker contributions. Protagonists of the 'sameness' model would argue that equality is best achieved by attributing an economic value to housework, thereby constructing a means of direct comparison with monetary contributions. This approach resonates most strongly with the materialism of Equity's equality maxim, and was taken by the High Court in *Baumgartner*: a value equivalent to what Ms Baumgartner would otherwise have earned in the workforce was assigned to the three month period during which she gave birth to a child and consequently did not earn a wage. One problem with this approach is that outcomes reflect the lower monetary value attributed to women's work and an apportionment of less than 50% of the joint property to the woman would usually result.

The High Court did not indicate how it would value the contributions of a full-time homemaker. This is not surprising as the absence of a male equivalent to domestic labour presents an obvious dilemma for an approach which seeks to treat women and men identically. It is possible for the *Baumgartner* decision to be interpreted narrowly as only acknowledging wages actually foregone in lieu of domestic services. Such an interpretation still leaves the full-time homemaker without a remedy because she has no workforce position by which the economic value of her domestic contributions could be assessed in terms of wages foregone. This illustrates the bluntness of the sameness model of equality when it comes to making comparisons between contributions or activities socially and legally constructed as different by the dominant patriarchal view.

The proponents of the 'difference' model would argue that homemaker services should be recognized as something that women, at present, uniquely contribute towards joint acquisition of property in a relationship, and that this should be accorded an equivalence with male contributions *per se*, without the assignment of an economic value or other comparative indice.

16 de Beauvoir, S., *The Second Sex* (1972), first published 1949.
17 MacKinnon, C. A., *Feminism Unmodified: Discourses on Life and Law* (1987) 36.
18 Charlesworth, H., 'A Law of One's Own? Feminist Perspectives on Equality and the Law' (1992) 51 *Meanjin* 67, 68-72.
19 Cain, *op. cit.* n. 5, 806.

Under this scheme the *Baumgartner de facto* wife would be likely to receive a 50% share of the property of a relationship.

One unfortunate by-product of this approach is its potential to uncritically affirm gendered social differences. By uncritically embracing patriarchally defined differences between women and men, the construction of women as more naturally inclined to domestic work than men is confirmed. This operates to legitimate women's subordination to men by relegating women to a secondary social and domestic role. Unless the difference approach can find a way of also revaluing what is currently seen as 'women's work', it runs the risk of entrenching gendered inequalities with a feminist stamp of approval.

Ultimately, the sameness/difference models of equality remain trapped within the like/unlike dualism, both sides of which are defined by reference to the male position as normative. As Patricia Cain remarks, 'debates about equality have unmasked the fact of the male standard, but seem . . . unlikely to change the standard'.[19] The sameness and difference models achieve a questionable equality for women: women are 'equal' to the extent that they are able to emulate a male standard or alternatively prove a worth that is comparable with measures of male worth. Either way, fundamental inequalities remain intact.

An alternative to the sameness/difference paradigm recognizes gender inequality as the outcome of domination, rather than locating it in the context of differences between women and men.[20] This view directly challenges the liberal eulogizing of *laissez faire* self-interest in property transactions, reflected in the words of Salmond J.:

> The law in general leaves every man [*sic*] at liberty to . . . dispose of his own property as he chooses . . . [however] improvident, unreasonable or unjust . . . such bargains or dispositions may be.[21]

The domination/subordination model reveals that one effect of self-interest is to normalize domination. The professed neutrality of 'liberty' as a social norm is unmasked as a justification for exploiting power differences. The domination/subordination model impugns the notion of liberty which allows every man the freedom to self-interestedly dispose of his property no matter how 'improvident, unreasonable or unjust'. By looking beneath formal appearances of equality, and acknowledging the reality of institutionalized power differences, this approach seeks to force acknowledgment of the social power that men wield which subordinates women.

The domination/subordination model of equality promotes legal interventions that question alleged gender differences. The model indicates strategies which will alter the distribution of power that creates and maintains women and men as unequal on the basis of difference. As Elizabeth Sheehy summarizes, the effect of using this model is that

20 MacKinnon, *op. cit.* n. 17, 42.
21 *Brusewitz v. Brown* [1923] 42 N.Z.L.R. 1106, 1109.

> [p]ractices, policies, and laws are evaluated to assess whether they operate to maintain women in a subordinate position. If these laws and policies are purportedly justifiable on the basis of women's differences, then the differences themselves must also be examined to ascertain whether they are a consequence of social or economic oppression.[22]

On the basis of this examination, it is envisaged that laws will develop which affirmatively compensate women for the gendered social injury[23] they endure, and which assist in the transformation of relations between women and men so they are no longer founded upon male domination. Social change is thereby promoted which will eventually result in a construction of gendered differences, if they exist at all, as benign because they are no longer aligned to differences in power.

The standard of equality adopted by this alternative framework is that of non-domination or non-subordination. With regard to homemaker contributions, this approach would expose the fact that women's socially attributed role in the domestic sphere benefits men at the expense of women. For example, it reduces women's opportunities and status as workforce participants whilst freeing men to primarily identify themselves as paid workers. This work-based differentiation helps to justify the domination of women by men in domestic relations. The legal construction of inequality as domination/subordination suggested by this model would result in the *Baumgartner de facto* wife receiving more than 50% of the redistributed property in order to compensate for the social and economic effects of the subordinate position of wife/mother.

The next section will canvass equitable constructions of (in)equality that emerge from the doctrines of unconscionability and undue influence. The sensitivity of these doctrines to gender inequality will be examined in light of the models of equality outlined above.

EQUITABLE CONSTRUCTION OF (IN)EQUALITY

The equitable formulations of unconscionability[24] and undue influence may both be characterized as responses to the limited capacity of the common law to redress gross power imbalances between parties to transactions. Professor P. D. Finn identifies three main strands of the spectrum of equitable standards that have evolved in the legal regulation of consensual social interrelationships.[25] These are, in diminishing order of acceptable self-interest, the standards of 'unconscionability', 'good faith' and 'fiduciary'.

22 Sheehy, E. A., 'Personal Autonomy and the Criminal Law: Emerging Issues for Women', Background Paper for the Canadian Advisory Council on the Status of Women, September 1987 in Graycar, R. and Morgan, J., *The Hidden Gender of Law* (1990) 42.

23 Howe, A., '"Social Injury" Revisited: Towards a Feminist Theory of Social Justice' (1987) 15 *International Journal of the Sociology of Law* 423, 433 locates gender-specific injury in a broader framework of social injury as a strategy which will result in 'women's substantive differences — for example, the way we feel the pain of sex stereotypes substantively different from men — [being] taken into account by law reform'.

24 'Unconscionability' is both a specific equitable doctrine and a broader equitable principle. This discussion is referring to the former.

25 Finn, P. D., 'The Fiduciary Principle' in Youdan, T. G. (ed.), *Equity, Fiduciaries and Trusts* (1989) 1, 3.

He positions the doctrines of undue influence and unconscionability in the grouping at the less exacting end of his scale which accepts the liberal premise

> that one party is entitled as of course to act self-interestedly in his [*sic*] actions towards the other. Yet in deference to that other's interests, [Equity] then proscribes excessively self-interested or exploitative conduct.[26]

In promoting this standard, and setting certain limits to self-interest, Equity appeals to the conscience of the wrongdoer in the name of morality and justice.

The idea of inequality is encapsulated by the concept of 'special disadvantage' in the doctrine of unconscionability and the notion of 'relation of influence' in the doctrine of undue influence. They will be examined in turn.

'Special Disadvantage' in the Doctrine of Unconscionability

The modern conception of unconscionability provides a remedy for a disadvantaged party where a transaction has resulted from unconscientious advantage being taken by a stronger party of the other's weaker position/special disadvantage. The existence of inequality of bargaining power between the parties is not by itself considered sufficient to invoke the doctrine.[27] It is necessary that the stronger party knew, or ought to have known, of the other's disadvantage and that the transaction was the result of unconscionable conduct exploiting the disadvantage.[28]

The categories of 'special disadvantage' which, if exploited, may attract equitable intervention are generally accepted to be open-ended.[29] The common characteristic of relevant disadvantages was described by Fullagar J. as having 'the effect of placing one party at a serious disadvantage *vis-à-vis* the other'.[30] He felt the 'essence of such weakness is that the party is unable to judge for himself [*sic*]'.[31] Mason J. expressed a similar view:

> that the disabling condition or circumstance [must be] one which seriously affects the ability of the innocent party to make a judgment as to his [*sic*] own best interests.[32]

These views underline the importance of the liberal value of self-interest in equitable thinking. The emphasis is placed on ensuring that the weaker party is able to act in their own self-interest, rather than on curbing or questioning self-interest as a revered social value.

The High Court has made reference to a wide range of relevant disadvantages. Some, such as drunkenness[33] and lack of explanation or independent advice at the time of the transaction,[34] are specific to the individual con-

26 *Ibid.* 4.
27 *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447, 462 *per* Mason J.
28 *Ibid.*
29 *Ibid.* 461 *per* Mason J.; 474 *per* Deane J.
30 *Blomley v. Ryan* (1956) 99 C.L.R. 362, 405.
31 *Ibid.* 392.
32 *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447, 462.
33 *Blomley v. Ryan* (1956) 99 C.L.R. 362, 405 *per* Fullagar J.
34 *Ibid.*; *Wilton v. Farnworth* (1948) 76 C.L.R. 646, 654 *per* Rich J. with whom Dixon J. agreed; *Commercial Bank of Australia v. Amadio* (1983) 151 C.L.R. 447, 468 *per* Mason J., 477 *per* Deane J.

cerned or temporary in their effect. Others, such as poverty, age, sex, lack of education[35] and unfamiliarity with the English language,[36] speak to disadvantages that may be characterized as structural, as arising from institutionalized arrangements of social power. This suggests a potential for 'special disadvantage' to encompass inequality in broad social terms. A more restrictive application is however connoted by Mason J's insistence that the word 'special' qualifies the meaning of disadvantage so as to 'disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties'.[37] He is clearly distancing himself from Lord Denning's proposition, alluded to earlier, that inequality of bargaining power provides the basis for equitable intervention.[38] The solitary mention of 'sex' by Fullagar J. in 1956, in his long list of possible relevant disadvantages in *Blomley v. Ryan*, remains just that.[39] No other judge has since referred approvingly to the possibility that 'sex' may be a special disadvantage for the purposes of the doctrine.

More elucidating as to the potential for gender to be regarded as a special disadvantage is the situation of Cesira Amadio, an elderly Italian migrant, the sole female seeking to rely on the doctrine of unconscionability in the High Court to date. Mrs Amadio and her husband both signed a guarantee which secured all the debts of their son's company to the Commercial Bank of Australia by way of a mortgage over land that they owned. They were seriously misinformed about the terms of the guarantee and the dire state of their son's financial situation. The bank manager, who went to their home to obtain their signatures, did nothing to correct their misapprehensions although he was aware of them.

A majority of the High Court, consisting of Mason, Wilson and Deane JJ., found that the bank took unconscionable advantage of the Amadios' special disadvantage. The respondents' age, migrant background, unfamiliarity with the English language, lack of business experience, and misplaced reliance on their son were all variously cited as factors contributing to their position of disadvantage. These factors created a situation where their 'ability to judge whether entry into the transaction was in their own best interests . . . was sadly lacking'.[40]

Mrs Amadio's position in relation to the transaction was described by Dawson J. as follows:

35 These circumstances were included in Fullagar J.'s list in *Blomley, supra* n. 33, 405; Rich J. referred to lack of education in *Farnworth, supra* n. 34, 654.

36 *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447, 464 *per* Mason J., 489 *per* Dawson J.

37 *Ibid.* 462.

38 *Lloyds Bank v. Bundy* [1975] 1 Q.B. 326, 339.

39 (1956) 99 C.L.R. 362, 405. Stark, J. C., Seddon, N. C. and Ellinghaus, M. P., *Cheshire and Fifoot's Law of Contract* (6th Aust. ed. 1992) 426 suggest that the reference to sex in Fullagar J's list of relevant disadvantages should be 'struck off'. They refer to *European Asian of Australian Ltd v. Kurland* (1985) 8 N.S.W.L.R. 192, 200 *per* Rogers J. This judgment sees gendered differences as an anachronism. This view fails to see the inequalities in power associated with sex.

40 *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447, 464 *per* Mason J.

> [t]here was no suggestion that the female respondent would have done other than follow her husband's lead and *there is no basis for treating her position differently* for the purpose of the application of the relevant principle.[41]

Although in dissent, Dawson J.'s view reflects the position implicitly taken by the majority who treated the Amadios as one entity, and chose the husband to represent that oneness. It was Mr Amadio's involvement with the transaction that constituted the 'facts' upon which the decision was made. This has the effects of dismissing the relevance of Mrs Amadio's experience and silencing the issues of gender which were involved.

Substituting Mrs Amadio's view for her husband's, it becomes apparent that she was not even included in the brief negotiations finalizing the transaction in question, which took place in her kitchen whilst she was occupied with washing up.[42] Deane J. noted, but without further comment, that

> Mrs Amadio... by her own admission, had been unable properly to understand the conversation in English that took place between Mr Virgo [the bank manager] and her husband prior to the execution of the document.[43]

From Mrs Amadio's point of view it is doubtful that a contract ever came into existence on the basis of ordinary rules of offer and acceptance. But leaving this aside, the disadvantage suffered by Mrs Amadio was not only that which she shared with her husband in terms of age and lack of English language skills. Another aspect of her special disadvantage arose from her position as a wife. This secondary social position resulted in her exclusion from participation in the negotiation of the agreement, and seriously affected her ability to act in her own self-interest. This remained unacknowledged because of the privileging of Mr Amadio's experience.

Arguably there was no need for the majority to consider Mrs Amadio's situation because they found an unconscionable dealing in any case. But by constructing the fact situation from the husband's point of view the Court evinced no concern with Mrs Amadio's independent interests, and missed an important opportunity to acknowledge the effects of gender as a special disadvantage. Adopting the male view results in a particular definition of the boundaries of legal concern which renders the female presence either invisible or not relevant. It is a familiar judicial manoeuvre that inevitably results in the silencing of women's experience.[44]

The South Australian Supreme Court, and more recently the High Court, displayed a similar 'blindness' to their gender partiality in response to Mary Louth's situation in the case of *Diprose v. Louth*.[45] The question in the case was whether the gift of a house to Ms Louth from Mr Diprose, who was infatuated with her, was the result of her taking advantage of his feelings towards her. In constructing his infatuation as a 'special disadvantage', the

41 *Ibid.* 490 (emphasis added).
42 *Ibid.* 476 *per* Deane J.
43 *Ibid.* 472.
44 Mossman, M. J., 'Feminism and Legal Method: The Difference It Makes' (1986) 3 *Australian Journal of Law and Society* 30, 44.
45 *Diprose v. Louth (No. 1)* (1990) 54 S.A.S.R. 438; (No. 2) (1990) 54 S.A.S.R. 450 (Full Ct); *Louth v. Diprose* (1992) 110 A.L.R. 1.

South Australian Supreme Court focused on the actions of Louth which the majority found to be manipulative and intended to deliberately manufacture a crisis which led to the gift in question.[46] The Court completely overlooked the seven years of sexual harassment that she had endured at the hands of Diprose.[47] King C.J. at first instance, whose findings of 'fact' were heavily relied upon by the majority of the Full Court on appeal, went so far as to judge Louth's reluctance to allow Diprose to temporarily move in with her as 'niggardly',[48] when it clearly would have meant subjecting herself to his infatuation in a situation from which she would have no escape. A majority of the High Court also refused to disturb these findings of King C.J.[49]

Acknowledgment of the gendered dimensions of the situation could have led to a completely different result, as suggested by the dissenting judgments of Matheson and Toohey JJ. in the South Australian Supreme Court and High Court respectively. Matheson J. did not agree that Diprose occupied a position of special disadvantage *vis-a-vis* Louth. In fact he suggested that Louth was dependent on Diprose in many ways.[50] He referred to Louth's depressive illness caused by a number of factors including the earlier breakdown of her marriage, and the fact that she had been brutally raped in a situation where she thought that she was also going to be killed.[51] He found that Louth looked to Diprose for support and friendship, especially during her periods of depression. This characterization of the relationship paints an entirely different picture to that drawn by the majority. Toohey J. disagreed with King C.J.'s finding that Louth's actions amounted to 'the manufacture of an atmosphere of crisis where no crisis existed [which] was dishonest and smacked of fraud'.[52] In Toohey J.'s view there was not sufficient evidence to support this finding, either as an inference or as a fact.[53] Unfortunately neither Matheson J. nor Toohey J. took the further step of explicitly suggesting that an important factor in Louth's experience was her subordinated social position as a woman.

Despite issues associated with gendered disadvantage in both the *Amadio* and *Diprose* cases, the only glimmer of judicial recognition of such issues comes from Matheson J. The sexual harassment of Ms Louth and the lack of consultation with Mrs Amadio are disqualified from relevance by the majority judgments. Despite the long and open-ended lists of relevant disadvantages set out in the cases, it would appear that the equitable construction of 'special disadvantage' does not acknowledge the social construction of gender as a potential source of disability in either an individual or a structural sense.

46 *Diprose v. Louth (No. 2)* (1990) 54 S.A.S.R. 450, 474 *per* Legoe J.
47 Diprose followed Louth when she moved from Hobart to Adelaide, sent her screeds of explicitly sexual love poems over the years, and still harboured the hope that she would change her mind despite her consistent insistence that her only interest in him was platonic.
48 *Diprose v. Louth (No. 1)* (1990) 54 S.A.S.R. 438, 449.
49 *Louth v. Diprose* (1992) 110 A.L.R. 1, 4 *per* Mason C.J.
50 *Diprose v. Louth (No. 2)* (1990) 54 S.A.S.R. 450, 481.
51 *Ibid.* 480-1.
52 *Louth v. Diprose* (1992) 110 A.L.R. 1, 27 *per* Toohey J.
53 *Ibid.*

The model of equality being applied in these cases is one that excludes recognition of women's gendered experience altogether. The interpretation of facts and the moulding of legal responses from a male standpoint, constructs the women as 'other'. The women's 'different' gendered experience is conceptualized so as to fall outside the equality principle that likes be treated alike. The legal reasoning involved masquerades as neutral, as 'point-of-viewlessness'.[54] But it has the effect of according male self-interest legal protection, whilst denying female self-interest in Cesira Amadio's case and disapproving of it in Mary Louth's case. The different, unequal and subordinate position of the women is rendered natural, uncontroversial and not legally cognizable. This results in a conceptualization of 'special disadvantage' that regards male experience as universal and is consequently blind to inequalities of gender.

The 'Relationship of Influence' in the Doctrine of Undue Influence

The equitable concept of undue influence provides a remedy for a party who is subject to the influence of another, in situations where the stronger party has benefited from a transaction as a result of the unconscientious use of their position of ascendancy over the other. The doctrine operates when the independent will of a party is affected or overborne.[55] It 'looks to the quality of the consent or assent of the weaker party'.[56] Recently, in England, there is also the suggestion that the weaker party must suffer 'manifest disadvantage' before the doctrine will apply.[57]

There are three categories of undue influence that have been recognized by the courts. A relationship of undue inflence will be presumed in two situations: in certain prescribed relationships of confidence, and where it may be inferred from the circumstances of a relationship. When the presumption of undue influence is successfully raised, the onus of proof falls on to the stronger party to rebut it. The third category of undue influence arises where it can be proved that a transaction resulted from the actual unconscientious operation of a relation of influence.

Relationships in the first category of presumed undue influence include parties who stand in the relation of 'parent and child, guardian and ward, trustee and *cestui que trust*, solicitor and client, physician and patient, and cases of religious influence'.[58] Historically, the presumption also arose between a man and his fiancee but this was rejected by the English Court of Appeal in 1961 as out of step with formal, liberal notions of equality.[59]

54 MacKinnon, C. A., 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' (1983) 8 *Signs* 635, 638-9.

55 *Johnson v. Buttress* (1936) 56 C.L.R. 113, 134, *per* Dixon J.; *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447, 461 *per* Mason J.

56 *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447, 474 *per* Deane J.

57 *National Westminster Bank v. Morgan* [1985] A.C. 686; *Bank of Credit and Commerce International S.A. v. Aboody* [1990] 1 Q.B. 923; *Farmers' Co-operative Executors & Trustees Ltd v. Perks* (1989) 52 S.A.S.R. 399.

58 *Johnson v. Buttress* (1936) 56 C.L.R. 113, 119 *per* Latham C.J.

59 *Ibid.* 134 *per* Dixon J. expressed the traditional view; *cf. Zamet v. Hyman* [1961] 3 All E.R. 933.

The operation of the presumption is justified on the grounds that public policy needs to proscribe transactions between parties in a relationship of dominance/dependence.[60]

In the second category of presumed undue influence, the presumption arises when there are circumstances from which a relation of influence may be inferred:

> [w]herever the relation between donee and donor is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter.[61]

Situations in which the inference has been made out include: the voluntary conveyance of land by a father who was 'feeble-minded, weak and unable to transact any business whatsoever' to his son upon whom he relied;[62] a guarantee to the full value of a devoted father's farm to secure the business debts of his only son;[63] and the voluntary transfer of a house by an illiterate man of 'less than average intelligence' to an educated and experienced female friend on whom he depended.[64]

It is well settled that the relationship between husband and wife, let alone between men and women generally, is not one where undue influence is presumed as a matter of course,[65] although it may be possible to raise the presumption by inference from the circumstances of a particular relationship. The exclusion of the relation of husband and wife from the established relationships of presumed dominance/dependence may at first glance appear to be an application of the equality model that promotes identical treatment of women and men. However this is not the explanation proferred by Dixon J. in *Yerkey v. Jones* where Mrs Jones was persuaded by her husband to take out a second mortgage on her house to secure part of his arrangement to purchase land which he planned to use for poultry farming and dog breeding.[66] In Dixon J's view:

> [t]he reason for excluding the relation of husband and wife from the category to which the presumption applies is to be found in the consideration that there is nothing unusual or strange in a wife from motives of affection or even of prudence conferring a large proprietary or pecuniary benefit upon her husband.[67]

The apparent legal concern is to encourage women's selflessness in marital relationships rather than to promote equality. This is the same viewpoint that results in the exclusion of domestic labour from the calculation of contributions to the accumulation of property of a relationship discussed above in relation to the *Baumgartner* case. It is also consistent with the construction of reality that results in the silencing of women's experience as with the *Amadio* and *Diprose* cases. In all these situations the highly valued liberal concept of self-interest is denied legal protection in the case of women.

60 *Allcard v. Skinner* (1887) 36 Ch.D. 145, 171.
61 *Johnson v. Buttress* (1936) 56 C.L.R. 113, 119 *per* Latham C.J., 670-4 *per* Dixon J.
62 *Spong v. Spong* (1914) 18 C.L.R. 544.
63 *Lloyds Bank v. Bundy* [1975] 1 Q.B. 326.
64 *Johnson v. Buttress* (1936) 56 C.L.R. 113, 120-1 *per* Latham C.J.
65 *Yerkey v. Jones* (1940) 63 C.L.R. 649.
66 *Ibid.* 656 *per* Latham C.J.

The automatic presumption of a relationship of influence between husband and wife, and between men and women generally, *could* be consistent with the domination/subordination model of inequality, depending on the purposes behind the presumption. If it is applied paternalistically so as to protect the wife/woman because of her subordinate position, the presumption does nothing to change her position of inequality. In effect, it operates to institutionalize her subordination by presuming that protection is necessary. On the other hand, if the presumption arises from an acknowledgement of the socio-structural origins of women's inequality, and the legal response is directed towards altering the distribution of power that creates the relation of influence, some broader social change may result. This could be achieved, for example, by requiring husbands/men, in rebutting the presumption, to show that they have taken tangible steps to alter their position of social dominance in the relationship in question. A starting point may be to require a relational standard of behaviour akin to the 'good faith' model which P. D. Finn describes as qualifying a party's self-interest 'by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other'.[68]

Actual undue influence, the remaining category of undue influence, is more difficult to prove because the onus is on the weaker party to show specific illegitimate pressure rather than on the stronger party to rebut the presumption of undue influence. The South Australian Supreme Court found actual undue influence when Joy Perks transferred her share of a farming property to her husband in the context of long-term and brutal domestic violence.[69] (She was later murdered by him.) Duggan J. took considerable care to arrive at his conclusion even though this situation was extreme. Despite his finding that the deceased 'lived in great fear of the defendent and that his violent behaviour . . . enabled him to exercise considerable influence and dominion over [her]',[70] he emphasized that this 'history of violence . . . is only one step in establishing the plaintiff's allegation of undue influence'.[71] His laboured concern that a direct connection between the transfer of property and the violence be established, leaves the impression of caution in relation to the violence because it was 'domestic'. This cautiousness casts serious doubt on Latham C.J's earlier contention that the relationship between husband and wife may make the burden easier to prove actual undue influence,[72] and Dixon J.'s assertion that the relationship of husband and wife 'has never been divested completely of what may be called equitable presumptions of an invalidating tendency'.[73]

The issue as to what is required in order to show undue influence between husband and wife has come to the fore in recent years in the heavily

67 *Ibid.* 675.
68 Finn, *op. cit.* n. 25, 4.
69 *Farmers' Executors v. Perks* (1989) 52 S.A.S.R. 399.
70 *Ibid.* 409.
71 *Ibid.* 410.
72 *Yerkey v. Jones* (1940) 63 C.L.R. 649, 659.
73 *Ibid.* 675.

litigated area of spousal guarantees. There is widespread discussion about the need for legislative reform to adequately deal with the problems in this area, but a debate of statutory options is beyond the scope of this article.[74] Classically these cases involve wives being 'persuaded', by lending institution and husband in concert, to guarantee the husband's business debts in situations that are of dubious advantage to the wife.[75] The response of the English courts (but not yet the High Court) to this scenario has been to justify, on the basis of old authorities, a requirement that the transaction be of 'manifest disadvantage' to the wife before undue influence may be proved.[76] Prior to this it had been generally accepted that this element was not required.[77] This shift clearly works against the interests of women who, given their already subordinate position in marriage, are particularly susceptible to pressure from husbands with mounting bad debts. This shift also serves to re-emphasize Equity's understanding of disadvantage in narrow *material* terms by favouring a purely commercial assessment of the disadvantage.

In the English case of *Bank of Credit and Commerce International S.A. v. Aboody*,[78] the judge at first instance found that Mr Aboody had exerted actual undue influence in causing his wife to enter several transactions, but refused to set them aside because of the absence of manifest disadvantage to her.[79] On appeal, the questions considered by the Court of Appeal were firstly, whether manifest disadvantage was required once actual undue influence had been proved, and if so, whether the judge had been correct in concluding that Mrs Aboody suffered no manifest disadvantage. The particular transaction in question was a charge over Mrs Aboody's house to secure the debts of a family company in which she and Mr Aboody were the directors and shareholders. The Court of Appeal held that in the absence of a finding of manifest disadvantage, a transaction resulting from the exercise of actual undue influence could not be set aside.[80]

In assessing whether there was manifest disadvantage in Mrs Aboody's situation, the Court weighed the risk of the loss of her house against the possibility of survival of the family company as a result of taking the risk.[81] This is a very subjective calculation which can be made from several viewpoints. On balance the Court decided that this did not constitute a manifestly disadvantageous transaction for Mrs Aboody, on the basis of a

74 See *e.g.* Duggan, A. J., 'Trade Practices Act 1974 (Cth), Section 52A and the Law of Unjust Contracts' (1991) 13 *Sydney Law Review* 138, 161 where he doubts the efficacy of s. 52A in relation to contracts of guarantee.

75 See *e.g. National Westminster Bank Plc v. Morgan* [1985] A.C. 686; *Bank of Credit and Commerce International S.A. v. Aboody* [1990] 1 Q.B. 923.

76 *Bank of Credit and Commerce International S.A. v. Aboody* [1990] 1 Q.B. 923, 961 makes it clear that manifest disadvantage is a requirement for all categories of undue influence.

77 Cope, M., 'The Review of Unconscionable Bargains in Equity' (1983) 57 *Australian Law Journal* 279, 286.

78 [1990] 1 K.B. 923.

79 *Ibid.*

80 *Ibid.* 964.

81 *Ibid.* 966.

narrow commercial calculation.[82] It is possible that many women in Mrs Aboody's position would disagree with the Court's assessment, and consider the loss of their home to be a risk that vastly outweighs the uncertain benefits of assisting a struggling family company to survive a little longer.

A further difficulty with the Court's reasoning, and with Equity's calculation of risks and benefits generally, is the emphasis on material indices of manifest disadvantage as opposed to physical, emotional or structural factors. It was clearly established that Mr Aboody was a 'bully', and that Mrs Aboody chose 'peace' rather than the exercise of any judgment that differed from his.[83] Yet the Court explicitly rejected the suggestion by Mrs Aboody's counsel that, in determining whether a transaction involves manifest disadvantage to one party, 'it does not suffice merely to look objectively at its commercial, financial and practical implications'.[84] The Court did not accept the argument that Mrs Aboody's lack of real choice about entering the transaction, her powerlessness, was a manifest disadvantage in itself.

The loss that Mrs Aboody suffered as a result of the transaction is not fully comprehended by measures of material forfeiture alone. Her subordination to her husband is a loss of social power which was affirmed by the transaction. Her powerlessness was reinforced by the inability of the solicitor, engaged by the bank in an attempt to provide independent advice to her, to stand up to Mr Aboody. The result of this decision is to legitimate the subjection of wives to the 'freedom' of action of husbands in the domestic sphere.[85] Unless the assessment of manifest disadvantage includes a weighing of the losses emanating from gendered subordination, it provides yet another example of an equitable standard that excludes the experience of women.

It remains to be seen whether the High Court will follow the lead of the English courts and require manifest disadvantage as a component of undue influence. It was held by the Queensland Supreme Court in *Baburin v. Baburin* that it was not necessary to show manifest disadvantage in order to establish undue influence.[86] Yet the decision in the *Perks* case indicated that it may be a requirement.[87] The High Court is not bound by either of these decisions.

The equitable doctrine of undue influence arose from dissatisfaction with the common law rules of duress which were narrowly concerned with proscribing transactions that had come about as the result of physical

82 *Ibid.* 967.
83 *Ibid.* 952.
84 *Ibid.* 965.
85 Feminists have exposed the liberal legal framework's distinction between public and private as supporting male domination in the domestic (private) sphere. This insight informs this discussion but is not directly taken up. See *e.g.* O'Donovan, K., *Sexual Divisions in Law* (1985); Pateman, C., 'Feminist Critiques of the Public/Private Dichotomy' in Benn, S. I. and Gaus, G. F. (eds), *Public and Private in Social Life* (1983).
86 (1990) 2 Qd.R. 101, 109 *per* Kelly S.P.J.
87 *Farmers' Co-operative Executors and Trustees Ltd v. Perks* (1989) 52 S.A.S.R. 399, 404 *per* Duggan J. See also *European Asian of Australia Ltd v. Kurland* (1985) 8 N.S.W.L.R. 192, 200 *per* Rogers J.

pressure. This equitable intervention opened the potential for a range of different forms of domination to be legally recognized. However this potential has not embraced recognition of gendered subordination as shown by the cases of *Jones, Perks* and *Aboody*. In fact, it appears that quite the opposite is happening. Women's difference from men founds the view that husbands and wives do not stand in a position of presumed undue influence, not because this doesn't happen in this relationship, but because it is 'natural' for wives to make gifts of their property to their husbands. There are remnants of this assumption in the English spousal guarantee cases which are developing ways around findings of undue influence in marital relationships.

As with the construction of special disadvantage, the question of gender equality is yet to emerge as a serious factor in the determination of a relation of influence. Again, the difference of women from men is used to justify or ignore women's subordination. Equitable constructions of equality exclude the recognition of women's gendered experience and interests, thereby sanctifying male self-interest.

The next section of this article leaves this examination of how law constitutes women's inequality, to look more broadly at the knowledges about women promulgated by these equitable doctrines.

THE CONSTRUCTION OF WOMEN IN THESE EQUITABLE DOCTRINES

As illustrated by the foregoing discussion, the law is an influencial force in constructing the gendered ways in which social power is conceptualized and distributed. As Carol Smart points out:

> If we accept that law, like science, makes a claim to truth and that this is indivisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgments) but also in its ability to disqualify other knowledges and experiences.[88]

The liberal legal system exerts powerful influences on the construction of social reality by failing to acknowledge the choices it makes. Through its gendered processes, discourses which subordinate women are affirmed and allowed to lay claim to the position of neutral and objective truth.

One effect of the meanings of gender constructed by the doctrines of unconscionability and undue influence is to fix women in the classic, well-worn stereotypes of 'good' and 'bad'. The good women are silent, compliant and stand behind their men. They include Mrs Amadio who signs a guarantee which she does not fully understand to benefit her spendthrift son,[89] Mrs Aboody who executes a charge over her house to 'save' the floundering family business and for the sake of peace,[90] and Mrs Jones who takes out a second mortgage on her house to support her husband's risky dog breeding and poultry farming venture.[91] The implication in each case is that it is part

88 Smart, C., *Feminism and the Power of the Law* (1989) 11.
89 *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447.
90 *Bank of Credit and Commerce International S.A. v. Aboody* [1990] 1 Q.B. 923.
91 *Yerkey v. Jones* (1940) 63 C.L.R. 649.

of their role as dutiful wives to enter these precarious transactions. Another variation on the judicial response to women constructed as 'good' is to perceive them as in need of the court's protection. Matheson J's dissenting view of Mary Louth provides an example of this.[92]

The 'bad' women are characterized as relatively autonomous, and as having questionable relationships with men whom they exploit. Evidence of this strand is provided by the South Australian Supreme Court and High Court majorities' views of Mary Louth as emotionally dominant and manipulative, and the High Court's construction of the deceased Stella Wilton in *Wilton v. Farnworth*.[93] Mrs Wilton's character was impugned by the implication that she had exploited the lack of education and 'small intelligence' of her former husband, despite this not being of relevance in the case which was concerned with undue influence in the relationship between her son and ex-husband.[94]

Judicial condemnation of the 'bad' woman is starkly illustrated by a comparison of the unconscionability cases of *K v. K*[95] and *Diprose*[96] where women occupy the positions (legally defined) of weaker and stronger parties respectively. Both cases acknowledge a special disadvantage arising from a party's emotional condition. The New Zealand case of *K v. K* deals with a separation agreement between husband and wife, the terms of which are patently disadvantageous to the wife. This, together with other evidence, led O'Regan J. to conclude that Mrs K 'by reason of her emotional condition and distress . . . was bereft of proper judgment'.[97] The contrasting approach of the majority in the *Diprose* case focuses on the behaviour of Ms Louth which they construct as reprehensible.[98] The emphasis in the latter case is on being critical of Ms Louth, whilst the judgment in the former case is sympathetic to Mr K who is portrayed as having taken care to consult with his wife and as distressed by the marriage breakdown.[99] The contrast of the vitriolic judicial condemnation of Ms Louth becomes even more extraordinary when compared with the representation of the wrongdoers in other cases. The son in *Wilton*, the purchaser in *Blomley*, and the bank in *Amadio* are scarcely chastised by the High Court although in each case it was concluded that their actions were unconscionable.

By constructing women according to their relationships with men, as 'good' or 'bad' or both, a strong affirmation of women's position of subordination is achieved. Women who fall into the 'bad' category are discredited and maligned. Positioning in the 'good' category results in women being

92 *Diprose v. Louth (No. 2)* (1990) 54 S.A.S.R. 450, 480-1; see also the approach taken to Mrs K in *K v. K* [1976] 2 N.Z.L.R. 31.

93 (1948) 76 C.L.R. 646.

94 *Ibid.* 654 *per* Rich J. The case was concerned with whether Mrs Wilton's son had exerted undue influence over his stepfather after her death.

95 [1976] 2 N.Z.L.R. 31.

96 *Diprose v. Louth (No. 1)* (1990) 54 S.A.S.R. 438; (No. 2) (1990) 54 S.A.S.R. 450.

97 *K v. K* [1976] 2 N.Z.L.R. 31, 39 *per* O'Regan J.

98 *Diprose v. Louth (No. 1)* (1990) 54 S.A.S.R. 448 *per* King C.J. whose view was affirmed by the majority on appeal in both the Supreme Court of South Australia and the High Court.

99 *K v. K* [1976] 2 N.Z.L.R. 31, 37-8.

silenced or protected. But these categories are fluid and unstable, as Carol Smart points out:

> Woman has always been both kind and killing, active and aggressive, virtuous and evil, cherishable and abominable, not either virtuous or evil. Woman therefore represents a dualism, as well as being one side of a prior binary distinction.[100]

Either way the discourses on women produce them as different to men. This leaves women firmly within the corollary to liberalism's equality principle which enables, even promotes, different treatment of those defined as different. So long as women are legally constructed as 'other', in contradistinction to men, the liberal idea of equality justifies their inequality.

THE POSSIBILITIES AND LIMITATIONS OF EQUITY IN RESPONDING TO GENDER (IN)EQUALITY

Despite the unpromising outcomes described above, the language employed by judges in these cases is often akin to the domination/subordination model of equality. There are references to stronger and weaker parties, superior bargaining power, vulnerability, exploitation, unconscientious use of power, and to domination itself. It has been shown that language plays a constitutive role in the construction of social reality; that it is not just a reflection of predetermined arrangements.[101] The language of these equitable doctrines may be read to acknowledge that domination and subordination are the essence of inequality, and that it is power differences that must be countered. This suggests that there may yet be potential for Equity as a site for the resistance of women's subordination.

The second feature of Equity which opens possibilities is its 'enduring vitality' and fluidity.[102] The process of applying the 'conscience' of Equity involves

> reference to the residual discretion of the equitable jurisdiction to resolve doubtful points of principle through recourse to the loose ethical concept of equity'.[103]

This leaves the way open for judges to reinforce traditional and moralistic views about women, as illustrated in the previous section. However it also presents fertile possibilities for contestation and innovation. Current developments in the area of constructive trusts, of which the *Baumgartner* case[104] is one example, provide evidence of this potential.[105] The challenge is to broaden the ethical values informing Equity so that its conscience is 'shocked' by gender inequality.

Whilst these possibilities may appear utopian, the law is not static nor monolithic. It is one site of struggle for change. The equitable branch of law has a self-proclaimed proud history of 'childbearing' although always as

100 Smart, C., 'The Woman of Legal Discourse' (1992) 1 *Social and Legal Studies* 29, 36.
101 Weedon, C., *Feminist Practice and Poststructuralist Theory* (1987) 22.
102 Mason, Sir Anthony, 'Themes and Prospects' in Finn, P. D. (ed.), *Essays in Equity* (1985) 242.
103 Chesterman, *op. cit.* n. 2, 58.
104 (1987) 164 C.L.R. 137.

a supplement to the common law,[106] and not always with progressive effects.[107] It cannot alone contest gendered social inequalities but it is a forum that could play a powerful role.

These possibilities are somewhat overshadowed by the limitations which fetter Equity's potential. Major restrictions are inherent in the liberal roots of Equity which involve a fundamental allegiance to liberty and individualism. This has the effect of giving self-interest a very high legal value which results in the reinforcement of powerful social interests at the expense of those less powerful. The gendered expression of this bias is evidenced by the importance placed on male self-interest and the concommitant expectation of female altruism. So long as liberalism clings to its notion of the ideal transaction as *laissez faire*, the potential of Equity to recognize structural disadvantage will be severely hampered.

Another limit to Equity's potential to counteract gendered inequalities is its conception of inequality as based on formal differences rather than on an understanding of power. This is illustrated by the prominent strategy identified in the cases to counteract inequality: the idea that the receipt of independent advice or adequate information can transform the position of a weaker party to one of equality.[108] This may assist in some situations, but it totally misunderstands that inequality is created by social arrangements of power which cannot be compensated for by mere formal gestures. Mrs Aboody provides a good example.[109] Her rejection of independent legal advice, recommending that she not sign the charge in question, was because her consent was a result of her subordination to her husband, not an outcome of lack of knowledge or explanation.[110] Independent advice did nothing to change the balance of power between her and her husband. Mrs Aboody was not able to say no because of her domination by Mr Aboody.

However, the most serious impediment to the recognition of gender inequality by the conscience of Equity is its gendered viewpoint, which entrenches existing inequalities by failing to acknowledge their operation, and/or by justifying their existence as normal and natural.[111] The construction of women as 'other' reinforces the existing social structures that rely on the imbalance of power between women and men. The question of equality is prevented from being applied to gender relations by the definition of women's experience as peculiar to women and therefore unlike men's and thus beyond the boundaries of equitable doctrines concerned with equality.

105 Bryan, M., 'The Conscience of Equity in Australia' (1990) 106 *Law Quarterly Review* 24 cautions that state courts are reacting conservatively to this potential.

106 Kitto, F. W., 'Forword to the First Edition' in Meagher, R. P., Gummow, W. M. C. and Lehane, J. R. F., *Equity Doctrines and Remedies* (3rd ed. 1992) vii.

107 The doctrine of unconscionability had its origins in the defence of private property and middle class wealth in the 'catching bargains' cases, *e.g. Earl of Aylesford v. Morris* (1873) Ch. App. 484.

108 See *e.g. Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447; *Johnson v. Buttress* (1936) 56 C.L.R. 113.

109 *Bank of Credit and Commerce International S.A. v. Aboody* [1990] 1 Q.B. 923.

110 *Ibid.* 952.

111 Cain, *op. cit.* n. 5, 838-41.

Feminist change is faced with 'the problem of challenging a form of power without accepting its [law's] own terms of reference and hence losing the battle before it has begun'.[112] To conceptualize inequality as founded on the differences between women and men will achieve only superficial gains for some women because it amounts to an affirmation of liberalism's gendered equality framework.

The essence of inequality is power, and what is at stake are foundational social values. Professor Finn's continuum characterizes Equity as promoting a range of relational obligations on a scale moving from self-interest to good faith to selflessness.[113] This scale does not acknowledge the gendered operation of these liberal legal values. It does not account for the legal reinforcement of self-interest as a male value and selflessness as a female value.

To value equality and self-interest concurrently is a basic contradiction. It directly raises the question as to which social values are promoted by the conscience of Equity. Unless it is able to contemplate changes to the distribution of social power, changes that place a higher value on community than self-interest, Equity will continue to implicitly construct women's subordination in the guise of equality.

112 Smart, *op. cit.* n. 88, 5.
113 Finn, *op. cit.* n. 25, 4.