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Renovating the Concept of Consent in Contract and Property Law

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I. Introduction

This chapter advocates reform of the concept of consent as it is used in contract and property law. The concept of consent/assent/intent[2] that underpins these laws is outdated and no longer functions as it ought to do. We must reassess the relationship between consent and legal responsibility, which is embedded in the foundations of property and contract law, and recast the legal concept of consent in light of current knowledge and in accordance with 21st century norms and values. These fundamental changes should then drive, and provide direction for, specific reforms of the rules about whether, how and by whom consent must be proven in property and contract claims.

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2 In this chapter, no distinction is made between these concepts and 'consent' is used for all of them.

II. The Problem with Consent

A. Underlying issues

Liberal ideology tethers responsibility to consent. In the context of private law, this means that, unless specifically justified (for instance by policy considerations), responsibility and obligation arise only from that which one has freely chosen. Yet, in practice, it often happens that undertakings are enforced and conveyances upheld notwithstanding that they were made in circumstances which suggest an alarmingly poor quality of consent. This is strikingly evident in cases pertaining to contracts and conveyances by elders.[3]

This discrepancy arises from a tension within liberal ideology: between its associated ideas of freedom of the individual (pursuant to which consent is a prerequisite for legal obligation) and the legal formalism which facilitates the rule of law. Although consent is fundamental, it is invisible. Crafting laws about consent necessitates regulating 'the unseeable interior' of the self, the mind. This difficulty is exacerbated by the fact that the most problematic cases occur within contexts traditionally designated as 'private' and so placed outside the purview of the law, that is, inside the home, the family and the marriage. Insofar as lawmakers have tended to see the home as something to be shielded from intrusion, it constitutes another kind of 'unseeable interior'. The same might be said of the institution of marriage.

The challenges presented by the task of maintaining the connection between responsibility and consent raise apprehensions, which have strongly influenced laws about consent. The primary concern is that consent is a matter not amenable to proof, so that challenges going to consent are easily made, but difficult either to substantiate or to refute.[4] Another concern is that, even where consent is compromised, it may be unfair to an 'innocent' party to reverse the transaction or release the subject from their undertaking, especially where that party has given value and/or relied upon the undertaking. Finally, it is considered that the public interest is not best served by too readily releasing individuals from their undertakings and reversing transactions because this undermines security of receipt, security of title and economic efficiency.

3 See, for example, *Johnson v Johnson* [2009] NSWSC 503 and *Anderson v Anderson* [2013] QSC 8.

4 Concern intensifies where the one who seeks to challenge the enforceability of an undertaking on the basis of consent is not the person who gave it, especially where that person is deceased so that direct evidence of her state of mind is unobtainable.

B. Effect on consent law

The concept of consent that emerges from laws skewed by these concerns has been warped in its formation and does not function properly. The most important aspects of this problem are briefly described as follows.

1. Inverted relationship between procedural law and substantive law

Normally substantive law holds primacy over procedural law – rules about *what* must be proven precede a consideration of *how* this ought to be achieved. However, in regulating consent, the issues of first concern have been the location of the onus of proof and the means by which that burden can be discharged.

Foremost among the procedural strategies for dealing with the 'unprovable' nature of consent are the presumption of capacity and the effective 'externalisation' of consent. Both common law and statute provide that every adult person is presumed to have the capacity to manage their own affairs.[5] In addition to this, strong preference has been given[6] to objectively ascertainable acts (over testimony about subjective intentions) as proof of consent. External evidence of consent has come to stand in place of consent itself. Thus, proving consent typically involves no more than establishing that the subject was an adult and that they complied with the pertinent formal requirements or otherwise acted in a manner that 'a reasonable bystander' would take to be an indication of consent. It falls to the party who would challenge on the basis of lack of consent either to prove that the subject lacked capacity or to make out one of the defences grounded in vitiated consent.[7]

This has two consequences: (i) regardless of who brings suit, the risk arising from the difficulties inherent in proving consent is borne by the party who challenges consent, rather than the one who relies on it; and (ii) the constituents and qualities of effective consent are seldom investigated, because the issue tends to be won or lost on allocation of the onus of proof.

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5 *Attorney General v Parnther* (1792) 3 Bro CC 441, 443; 29 ER 632, 634; *M'Naghten's Case* (1843) 10 Cl&Fin 200, 210; 8 ER 718, 722; *Murphy v Doman* (2003) 58 NSWLR 51, [36]. See also legislative provisions, such as *Guardianship and Administration Act 1990* (WA) s 4(3).

6 By means such as: the statutory imposition of formal requirements (e.g. executed deed, signed written instrument/evidence); the parole evidence rule; and the adoption of objective standards in ascertaining contractual assent or donative intent.

7 Such as *non est factum*, duress or undue influence.

2. No model of consent

Perhaps for want of opportunity therefore, the case law has provided no model to guide the development of laws which better connect responsibility to consent. Instead, consent remains out of focus: hiding in plain sight. It is not as well understood as it might be and mechanisms intended to facilitate it often miss the mark.[8]

3. Vitiated consent is too difficult to establish

An image of consent does emerge from the case law. However, this is no model; it is merely a reflection of the composite effect of laws laid down without the benefit of a blueprint and strongly influenced by concerns about proof. In operation, consent appears to be a binary and morally loaded concept.

(a) Binary

The effect of the presumption of capacity is that consent is either wholly present or absent. To displace the presumption, it must be proven that the subject failed to understand even the 'general nature of the transaction'[9] in question to the extent that they could not have understood it even if it had been explained to them.[10] Conversely, once the presumption has been rebutted, the other party can enforce the undertaking only if they can prove that it took place during a 'lucid interval'.[11] This suggests that persons are either 'lucid' (having full capacity) or wholly incapable. A similar approach is taken in the defences going to consent.[12] There is no contemplation of an 'acceptable level' of consent, nor of 'degrees' of freedom where it pertains to the will.

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8 For instance, independent legal advice is usually taken to be sufficient to counter a claim of vitiated consent. See, for example, the dictum of Lord Nicholls in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773, [54]. However, while such advice can provide the subject with the prerequisites for an independent decision, no advice can relieve her from the effects of a power imbalance that impinges upon her freedom of choice.

9 *Gibbons v Wright* (1954) 91 CLR 423, 438 citing *Ball v Mannin* (1829) 1 Dow & Cl 380; 6 ER 568.

10 *Gibbons v Wright* (1954) 91 CLR 423, 437–38.

11 *McLaughlin v Daily Telegraph Newspaper Co Ltd [No 2]* (1904) 1 CLR 243, 277; *Edna May Collins by her next friend Glenys Lesley Laraine Poletti v May* [2000] WASC 29, [54]; and *Stone v Registrar of Titles* [2012] WASC 21, 42.

12 See, for example, non est factum, which requires proof that the subject believed the instrument to be radically different from what it actually was (*Petelin v Cullen* (1975) 132 CLR 355, 359) and 'presumed' undue influence, which can be defended only by demonstrating that the undertaking in question was 'the result of the free exercise of the … [subject's] independent will' (*Johnson v Buttress* (1936) 56 CLR 113, 138).

(b) Morally loaded

Even where it has been proven that consent was absent or very badly compromised, this might not suffice. The defence of *non est factum* requires proof of a blameless absence of consent: that the subject's radical misapprehension as to the nature of the instrument was not the result of carelessness or otherwise their own fault.[13] In cases of incapacity falling short of *non est factum* (where consent was very badly compromised), the subject must also prove that the counterparty to the transaction knew or ought to have known of their incapacity.[14] Thus, nothing less than an *absence* of consent will, of itself,[15] suffice to absolve the subject from responsibility.

Taken together and in conjunction with the presumption of capacity, these factors make it very difficult to succeed in making a challenge based on vitiated consent.

4. Legal notion of consent is outdated and unrealistic

The concept of consent which emerges from the cases does not accord with what we now know about choice and decision-making. For instance, its binary character does not operate well in circumstances where cognitive ability fluctuates or declines gradually and unevenly. Consequently, it can prove extremely difficult for persons suffering from dementia or mental illness to access the defence of want of capacity, even when their condition has reached the stage where it is patently unsafe to assume that their consent was of a quality sufficient to form the basis of legal responsibility.[16]

III. Towards a Solution

We need a theoretical model of consent that will provide a schema for reform. This model should be based on an up-to-date understanding of decision-making and choice[17] and a reassessment of the role of consent as a prerequisite for responsibility.[18] At a minimum, it should illuminate the essential attributes of binding consent.

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13 *Gallie v Lee* (1971) AC 1004, 1019 cited with approval in *Petelin v Cullen* above n 12, 360.

14 *Imperial Loan Company v Stone* (1892) 1 QB 599, 602–3; *Anderson*, *Stone v Registrar* of *Titles* citing *Collins Edna May Collins by her next friend Glenys Lesley Laraine Poletti v May* [2000] WASC 29, [57] citing *Crago v McIntyre* [1976] 1 NSWLR 729. This is supposedly to justify why 'as between two innocent parties' the law should side with the one who asserts absence of consent. However, it has been insisted upon even in cases where the transaction in question was a gift.

15 That is, without requiring an examination of the other party's knowledge and/or behaviour.

16 See, for example, *Johnson v Johnson* above n 3.

17 Including the conditions and circumstances by which these may be constrained.

18 Autonomy may not be the only value to be considered.

A. Guidelines for change

We can then set about reforming the laws by which this model is given effect. In embarking upon this process, the following guidelines should be observed.

1. Open, not restrictive

The restrictive approach triggered by a preoccupation with the limitations of knowledge should be abandoned. More is to be gained by opening ourselves to the science and scholarship available within and beyond the law to develop our understanding of consent. For instance, lawyers should not be reticent to look to medical science for a better understanding of the processes of cognition. Property and contract lawyers might look beyond the boundaries of their own field to make fullest use of the resources available from legal scholarship. For example, feminist legal theory offers a rich source of scholarship on the impact of imbalance of power on freedom of choice.[19]

2. Substance over procedure

Given the nature of consent, difficulties of proof and a degree of uncertainty are inevitable and this should be reflected in our management of the relationship between procedural and substantive law. Procedural law should not be allowed to 'take over' to the extent that the means of proof dictate the nature of that which is to be proven.

3. Sensitivity to context

Context is critical. Different public policy considerations will apply, depending upon whether the undertaking was made: *inter vivos* or by will; for value or by way of gift; and in a personal or commercial context. It may be that the model will change, or that more than one model is required, depending upon the relational and/or transactional context.

4. Responsibility and human dignity

So strong is the association between personal dignity and notions of autonomy (encompassing both freedom of choice and responsibility for that which has been chosen) that attempts to accommodate the vulnerable are sometimes met with an indignant protest that to do so would infantilise the individual or class that it is sought to assist. This

19 See, for instance, Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with the Law and Subjectivity* (Routledge, 2007).

is understandable; such efforts have sometimes been paternalistic.[20] However, legal responsibility should be disentangled from personal worth and human dignity. It must be possible to delimit personal responsibility without condescension. For instance, surely it would not demean persons who have received a diagnosis of dementia to be relieved of the onus of proving incapacity.

5. Avoid paternalism

As matters stand, those who seek to disclaim liability by challenging consent are usually obliged to cast themselves as incapable or dependant. In renovating these laws, we should not settle for paternalistic 'solutions', which deal with the matter by providing 'protection' for those perceived to be weak or deficient. Disability is not deficiency and vulnerability is not weakness. Dependence is a natural consequence of living in the connected and interdependent way that we are supposed to live. We should rather aim to craft laws that support disability and safeguard the capacity to be vulnerable.

B. Suggestions for change

More specific suggestions for change are as follows.

1. Enabling consent

The legal mechanism by which consent is entrenched as a prerequisite for responsibility should do more than merely withhold support where consent was absent. It should include strategies for creating an environment which facilitates and supports the making of consensual undertakings and transactions.[21] These might include mandating the provision of access to assistance and support appropriate to the nature of the vulnerability, such as:

- assistive technologies to augment communication and cognition;
- assisted decision-making[22] where impaired cognition is the relevant source of vulnerability;

20 For example, see *Garcia v National Australia Bank Ltd* (1998) 195 CLR 395, 424 (Kirby J).

21 Property and contract lawyers would do well to look to the scholarship of disability law and policy scholars for assistance with this project. See, for example, Dr Anna Arstein-Kerslake, 'An Empowering Dependency: Exploring Support for the Exercise of Legal Capacity' (2016) 18 *Scandinavian Journal of Disability Research* 77.

22 Whereby the subject may appoint someone to assist or represent her in making the decision in question.

- information and explanation where these are needed; and
- independent advice where vulnerability arises from dependence or difficulty in discerning one's own interests.

2. Relief from responsibility where consent was impaired

Both the law with respect to capacity and the defences going to consent might be enhanced by making relief on the basis of vitiated consent easier to access. However, insofar as these accommodations would be made to enhance autonomy by delimiting the ambit of personal responsibility, they ought only to be available to the subject personally.[23]

(a) Capacity

There are circumstances (such as where the subject had been diagnosed with dementia or mental illness causing serious cognitive disturbance) in which it is appropriate to dispense with the presumption of capacity.

(b) Consent

The law should offer a defence grounded solely on the fact that consent was so badly impaired that the state will not lend its assistance to enforce/endorse the undertaking or conveyance in question. This would *not* require:

- the other party to have behaved reprehensibly or to have breached any duty;[24] or
- that consent was wholly absent.

Equitable doctrine provides an ideal vehicle for this. Indeed, it is arguable that, in Australia, the doctrine of undue influence[25] and the second limb of *Yerkey v Jones* already go some of the way towards performing this function.[26]

23 And not, for instance, to the executor/administrator of her estate. This might go some way towards assuaging the concern described in n 4.

24 It is suggested that this objective would be more cleanly accomplished by means of an action located in unjust enrichment, rather than by casting it as a 'wrong'.

25 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 and *Bridgewater v Leahy* (1998) 194 CLR 471, 478–79.

26 *Yerkey v Jones* 63 CLR 649, 685–86, and affirmed in *Garcia v National Australia Bank Ltd* (1998) 195 CLR 395, 405 and 409.

IV. Conclusion

If consent truly is critical to legal responsibility, then it should not be reduced to a formality or a foregone conclusion. In the absence of a model of consent to guide their development, property and contract law have been too greatly influenced by concerns about proof and fear of uncertainty. This has made relief on the basis of vitiated consent too difficult to access. The state frequently lends its support to the enforcement of undertakings and the endorsement of conveyances notwithstanding that there is a serious danger that the subject's capacity to understand the decision or to exercise a free choice was badly impaired. In such cases, it is clear that the laws of capacity and consent do not serve to promote autonomy. The urgent need to reform the laws about consent presents an opportunity to reassess the relationship between responsibility and consent and to construct a more accurate and effectual model of consent. This model can be used to drive changes in property and contract law that will facilitate the attainment of effective consent and provide better access to relief in cases of vitiated consent. Thus renovated, consent will be better placed to fulfil its purpose of promoting autonomy.

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