De Facto Relationships and *Yerkey v Jones*

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INTRODUCTION

For an equitable rule which has been described as 'anomalous, anachronistic and inappropriate',[1] the rule in *Yerkey v Jones*[2] appears to be surviving, if not exactly flourishing. The reason for its resilience is that it is a rule concerning Sexually Transmitted Debt (STD), which like the commonly known form of the acronym appeared to produce more malevolent forms during the 1980s. The rule presently applies only for the benefit of female partners who are legally married to the male principal debtor. The result is there is a 'species of guarantor to which the law accords special privilege — a married woman who guarantees her husband's debt. Provided certain circumstance exist, the law will reverse the onus a guarantor normally has of proving a guarantee was unfairly or improperly obtained.'[3] In accordance with the nature of equity on which this rule is based, the rule has been applied and extended to accommodate changing circumstances. The issue of whether the rule in *Yerkey v Jones* can be taken to extend to a *de facto* has not yet been considered by the High Court of Australia, nor apparently in any reported Australian decision.

If a fact situation involving a guarantee or surety provided by a *de facto* wife to secure the repayment of her partner's debts were to come

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1 *Warburton v Whiteley & Ors* (1989) NSW Conv R 55-453 per Kirby P as subsequently quoted by Heerey J in *Re Halstead & Anor; Ex parte Westpac Banking Corp.* (1991) 31 FCR 337, 352.

2 (1939) 63 CLR 649.

3 Greg Walker, 'Inter-spouse Guarantees — Limits on the Liability of a Wife for Her Husband's Debts', 6(4) *Commercial Law Quarterly*, December 1992, 6.

before the High Court, there appear to be a number of matters, including recent decisions, which presumably will influence the court in reaching its decision. These issues include the subsequent development and application of the rule in *Yerkey v Jones* in the 50 years since the decision was handed down, and other relevant equitable principles and doctrines which have developed in that time. One fundamental problem is whether the High Court will be prepared to equate *'de facto* wives' with married women, at least for the purposes of the rule. There has been criticism of the rule in *Yerkey v Jones* as being an exclusive sanctuary for married women — ripe for reconsideration and overruling. Whatever decision the High Court makes with respect to the rule in *Yerkey v Jones* and *de facto* wives, it is suggested that thereafter the rule in *Yerkey v Jones* will no longer have its current status or application.

THE RULE IN *YERKEY v JONES*

To describe the law considered and articulated in the case of *Yerkey v Jones* as the rule in *Yerkey v Jones* is probably a misdescription. In that decision, there does not appear to be any comprehensive proposition or definitive statement of a single rule; but rather the collection, consideration and restatement of the rules of equity governing the voidability of instruments of suretyship entered into by married women for the debts of their husbands. The rule(s) in *Yerkey v Jones* is therefore the result of a combination of a number of equitable principles applicable to the circumstances where a husband procures his wife to act as a guarantor to provide security for the debts of the husband to third parties. It was the opinion of Dixon J, who delivered the principal judgment, that the development of these rules of equity has 'left the state of the law as somewhat indefinite, if not uncertain'.[4] Being expressed in terms of general equitable principles, the precise limits of the doctrine of *Yerkey v Jones* are not clearly delineated, as subsequent applications of the rule demonstrate.[5]

The historical underpinnings of these propositions originate in the law relating to the property rights of married women both at common law and equity.[6] The result was that even after the passage of the Married Women's Property Acts,[7] the equitable doctrines relating to the disposition of property by a married woman in favour of her husband continue

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4 (1939) 63 CLR 649, 683.

5 See cases discussed *infra* where the principle has been applied.

6 See, generally, Lee Holcombe, *Wives and Property* (Oxford: Martin Robertson, 1983), Chapters 2, 3, 9 and 10.

7 The Married Women's Property Acts cover a series of Acts enacted in the latter half of the 19th century by the UK Parliament concerning the provision of property rights to married women. Among these Acts were the 1870 *Married Women's Property Act* (33 & 34 Vict., c 93), the 1882 *Married Women's Property Act* (45 & 46 Vict., c 75) and the 1908 *Married Women's Property Act* (8 Edw. VII, c 27). For more detail on this legislation, see Holcombe, *supra* n. 6.

to be considered. The position was 'that whilst a married woman might bestow her separate property upon her husband, courts of equity examine every such transaction with anxious watchfulness and caution and dread of undue influence; and that whilst there is no presumption of undue influence, the relation of a husband to his wife had never been divested completely of what might be called equitable presumptions of an invalidating tendency'.[8] It is against this background that the rule in *Yerkey v Jones* and the earlier pre-existing propositions in this area of law developed.

A reasonably straightforward version of the rule in *Yerkey v Jones* has been stated in the headnote of the decision:[9]

> [I]f a husband procures his wife to become surety for his debt and it appears that circumstances existed which, if they alone had been parties to the transaction, would make it liable to be set aside against the husband, the guarantee or the security may be invalidated also against the creditor if he relied upon the husband to obtain it from his wife and had no independent ground for reasonably believing that she fully comprehended the transaction and freely entered into it.

In the course of his judgment, Dixon J identified and considered three matters (presumptions)[10] which apply when the transaction is 'one of suretyship and the wife without any recompense, except the advantage of her husband, saddles herself or her separate property with a liability for his debt or debts'.[11]

The first presumption, which has been described as a rule of evidence, provides that: Once circumstances are shown raising any doubt or suspicion of any impropriety concerning a voluntary disposition by the wife in favour of the husband, the onus is on the husband to show that the disposition was not unfairly or improperly obtained. The proposition reflects the view 'that the opportunities which a wife's confidence in her husband gives him of unfairly or improperly procuring her to become a surety for his debts or to confer some other benefit upon him is recognised as a matter of fact and taken into account with other facts as a reason for calling upon him to explain or justify a given transaction'.[12]

The second proposition is based on the rule established in cases of relational influence and states:[13]

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[8] Per Brownie J in summarising parts of the judgment of Dixon J in *Yerkey v Jones* (1939) 63 CLR 649 in *Peters v Commonwealth Bank of Australia* (1992) ASC 56-135, 57,363–4.

[9] (1939) 63 CLR 649. This statement does not cover all the subtleties of the equitable principles considered in the judgment.

[10] So described by Brownie J in *Peters v Commonwealth Bank of Australia* (1992) ASC 56-135, 57,364. Dixon J also uses the expressions 'presumptions', 'propositions' and 'rules' to describe the statements at pp. 676 and 677.

[11] *Yerkey v Jones* (1939) 63 CLR 649, 676 per Dixon J.

[12] *Id.* 677 per Dixon J.

[13] *Ibid.*

> Where there is a relation of influence and the dominant party is the person by or through whom an instrument operating to his advantage is obtained from the other, the instrument is voidable even as against strangers who have become parties to the instrument for value if they had notice of the existence of the relation of influence or the circumstances giving rise to it.

Placed in the context of husband and wife, Dixon J expressed the rule in these terms:[14]

> [T]he position of strangers who deal through the husband with the wife in a transaction operating to the husband's advantage may, by that fact alone, be affected by any equity which as between the husband and wife might arise because of his conduct.

In a synthesis of these two presumptions, Dixon J attempted to reconcile the fact that, by itself, the relation of husband and wife was not recognised as one of influence with the statement that:[15]

> Although the relation of husband and wife is not one of influence, yet the opportunities it gives are such that if the husband procures his wife to become surety for his debt a creditor who accepts her suretyship obtained through her husband has been treated as taking it subject to any invalidating conduct on the part of her husband even if the creditor be not actually privy to such conduct.

The third presumption focuses on circumstances when the transaction is not rendered voidable. This outcome is assessed in terms of the extent of the adequacy of the wife's understanding of the nature and consequences of the transaction.[16] The difficulty lies in attempting to identify conduct or unfairness which amounts to an invalidating cause, particularly when a creditor is involved as an innocent third party.[17] Dixon J distinguished between the case where the wife understood the nature and extent of the obligation she was undertaking as her husband's surety but did so as a result of her husband's exertion or undue influence, affirmatively established, and those where the wife did not understand the effect of the document or the nature of the transaction of suretyship.[18] The following summary is based on one commentator's analysis of the various aspects of the third proposition.[19]

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[14] *Id.* 676 per Dixon J.

[15] *Id.* 678 per Dixon J.

[16] This is based on the proposition of Cussen J in *Bank of Victoria v Mueller* [1925] VLR 642, 651 concerning the necessity for fully understanding the transaction. *Yerkey v Jones* (1939) 63 CLR 649, 680–6 per Dixon J.

[17] *Yerkey v Jones* (1939) 63 CLR 649, 684.

[18] *Ibid.*

[19] Mark Sneddon, 'Unfair Conduct in Taking Guarantees and the Role of Independent Advice', (1990) 13(2) *UNSW Law Journal* 302, 312–14.

1. Undue Influence[20]

In the case where the wife is acting because of undue influence:

- If the creditor has left it to the husband to obtain the wife's consent to become a surety and no more is done independently of the husband other than to ascertain she knows what she is doing, then
- it does not matter that the creditor deals directly with the wife and explains the effect of the document to her, as
- nothing but independent advice of relief from the ascendancy of the husband over her judgment would suffice to prevent the surety from being avoided.

2. Does Not Understand[21]

In the case where the wife agrees to become surety at the insistence of her husband and she does not understand the effect of the document or the nature of the transaction:[22]

- If the creditor takes adequate steps[23] to inform the wife and reasonably believes that she understands the obligations and effect of the transaction (even though she may not), it cannot be set aside whether or not the creditor relied upon the husband to obtain the wife's consent.
- The test is also articulated as to whether the grounds on which the creditor believed the document was fairly obtained and executed by a woman sufficiently understanding its purport and effect were such that it would be improper to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife.

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[20] *Id.* 312.

[21] *Ibid.*

[22] In an elaboration of the wife's lack of understanding, Dixon J added the following comment: 'Her failure to do so may be the result of the husband's actually misleading her, but in any case it could hardly occur without some impropriety on his part even if that impropriety consisted in his neglect to inform her of the exact nature of that to which she is willingly, blindly, ignorantly or mistakenly to assent.' *Yerkey v Jones* (1939) CLR 649, 685. This leaves the door open for a ground of impropriety to justify equitable intervention, though that particular point was not considered further in the judgment.

[23] The adequacy of the steps taken by the creditor depend on the circumstances, including the ramifications and complexities of the transaction, the amount of deception practised by the husband upon his wife, and the intelligence and business understanding of the woman. But if the wife has been in receipt of the advice of a stranger whom the creditor believes on reasonable grounds to be competent, independent and disinterested, then the circumstances would need to be very exceptional before the creditor could be held bound by any equity which otherwise might arise from the husband's conduct and his wife's actual failure to understand the transaction.

3. Conduct Less Than Undue Influence[24]

In the case where the wife is induced to become a surety by the husband making some fraudulent or even innocent material misrepresentation which does not go to the nature and effect of the transaction, it was not clear to what extent the same principle (concerning undue influence) could still be applied; however, misrepresentation as well as undue influence is a means of abusing the confidence that may arise out of the relation (of husband and wife).[25] However, Dixon J subsequently decided that for conduct not amounting to undue influence the question is whether the creditor had reasonable grounds for believing that the document was:[26]

(i) fairly obtained; and/or
(ii) executed by a surety who sufficiently understood the purport and effect of the document.[27]

It is then for the lender to establish that this was the case. The facts in *Yerkey v Jones* correspond to this situation, perhaps the most common of the three situations.[28]

Although any summary of the principles would not be a completely faithful encapsulation of all the law canvassed in this multifaceted judgment, the summary provided in Lyn Gerathy's article, 'Yerkey v Jones Revisited',[29] certainly provides a more than adequate working synopsis. This summary provides:

> [I]f a wife gives a guarantee of her husband's debts as a result of pressure applied by or other conduct on the part of her husband (falling short of undue influence) then she has a prima facie right to have the guarantee set aside notwithstanding that the creditor had no knowledge of the husband's conduct nor grounds to make enquiries into it. To prevent the guarantee being set aside the creditor must prove (the onus being on it) that it had reasonable grounds to believe that the wife comprehended the transaction and freely entered into it. It will usually be necessary to prove that an adequate explanation was given to her at the time of the execution and she appeared to understand it.

It is the reversal of the onus of proving that the guarantee was unfairly or improperly obtained in the case of a wife who guarantees her husband's debts,[30] which gives the rule in *Yerkey v Jones* its distinctive flavour.

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[24] Sneddon, *supra* n. 19 at 312.
[25] This is based on the comments of Dixon J at 684 and 685.
[26] (1939) 63 CLR 649, 686.
[27] Sneddon, *supra* n. 19 at 312, taken from Dixon J at 686.
[28] *Id.* 312.
[29] Lyn Gerathy, 'Yerkey v Jones Revisited', 7(2) *Commercial Law Quarterly*, June 1993, 16–21.
[30] Walker, *supra* n. 3.

THE EQUITABLE DOCTRINES

The rule in *Yerkey v Jones* has been subject to criticism both from the judiciary and other commentators.[31] It is argued that the rule should be subsumed by the general equitable principles,[32] but being a child of the High Court of Australia it continues to be treated with respect and deference[33] until disavowed by its parent or negatived by statute. The view that there now currently exist adequate remedies in the existing law[34] for guarantors without the need to provide the additional protection for married women seems to underlie a number of these criticisms.[35]

Although there are a number of grounds on which the validity of a guarantee may be challenged, including statute,[36] it is intended to consider only those non-statutory grounds which may also be applicable to circumstances where it appears that the rule in *Yerkey v Jones* might operate. In *The Modern Contract of Guarantee* (2nd ed.), Phillips and O'Donovan identify three doctrines which may lead to a guarantee being set aside on the ground that 'the creditor has in some way or another taken advantage of the guarantor'.[37] These doctrines are duress, undue influence and unconscionable dealing. Duress is a common law remedy, but it is suggested that the boundary between duress and the equitable doctrine of actual undue influence has become blurred[38] so that in practical terms there is little if any difference.[39]

The two equitable doctrines of undue influence and unconscionable conduct are in some ways similar.[40] Both doctrines have the effect of providing a remedy for an imprudent guarantor, although the doctrines apply in different circumstances. As Brennan J observed in *Louth v Diprose*:[41]

> Although the two jurisdictions are distinct, they both depend upon the effect of influence (presumed or actual) improperly brought to bear by one party to a relationship on the mind of the other whereby the other disposes of his property.

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[31] See, generally, Kirby P in *Warburton v Whiteley & Ors* (1989) NSW Con R 55–453; Rogers J in *European Asian of Australia v Kurland* (1985) 8 NSWLR 192, 200; Gerathy, *supra* n. 29 at 21.

[32] Gerathy, *supra* n. 29 at 21; Kirby P in *Warburton v Whiteley & Ors* (1989) NSW Con R 55-453; Young J in *Garcia v National Australia Bank Ltd*, NSW (unreported, 7 April 1993).

[33] See the dicta of Kirby P and Clarke JA in *Warburton v Whiteley & Ors* (1989) Conv R 55-453 considered in text *infra*.

[34] The issue of the statutory remedies is not considered in this article as the focus is on the extension of the rule in *Yerkey v Jones* to *de facto* wives.

[35] Another criticism is based on the fact that *Yerkey v Jones* is sexist and not appropriate in contemporary society. See also the discussion by S.M. Cretney in 'The Little Woman and the Big Bad Bank', (1992) 109 *Law Quarterly Review* 537.

[36] The *Contracts Review Act 1980* (NSW) and the *Trade Practices Act 1974* (Cth).

[37] John Phillips and James O'Donovan, *The Modern Contract of Guarantee* (2nd ed., Sydney: The Law Book Co., 1992), 143 ff.

[38] I.J. Hardingham, 'Unconscionable Dealing', in P. Finn (ed.), *Essays in Equity* (Sydney: The Law Book Co., 1985), 19.

[39] *Id.* 24.

[40] *Id.* 18, where the parallels are drawn between presumed unconscionable conduct and presumed undue influence.

[41] (1993) 67 ALJR 95, 97.

The existence of undue influence may be presumed either from the particular class of relationship[42] between the parties or because of a 'special relationship' between the parties.[43]

In such circumstances where there is a relationship of special disadvantage, Brennan J held:[44]

> [W]here it is proved that a donor stood in a specially disadvantageous relationship with a donee, that the donee exploited the disadvantage and that the donor thereafter made a substantial gift to the donee, an inference may, and often should, be drawn that the exploitation was the effective cause of the gift. The drawing of that inference, however, depends on the whole of the circumstances.

Having raised the presumption of undue influence, the stronger party then has the onus of proving that the weaker party did not enter the transaction as a result of the influence. The dominant party can discharge this onus by showing that the transaction was the voluntary act of the subservient party, usually through independent advice.[45]

If no presumption of undue influence is raised, the facts may nevertheless demonstrate that there was actual undue influence. Unlike cases of presumed undue influence, the onus is on the subservient party to establish that the transaction was entered into as a result of the undue influence of the dominant party.[46] There is no presumption of undue influence arising between husband and wife,[47] although in situations involving a husband and wife, cases of actual undue influence can be demonstrated to exist.[48] It is perhaps because of the lack of the presumption of undue influence in the relationship between husband and wife that the rule in *Yerkey v Jones* arose. From one perspective, the rule in *Yerkey v Jones* may be conceptualised as a special case, dependent on specific circumstances, where the presumption of undue influence and its attendant consequences operate in respect of the husband–wife relationship.

The decision in *Louth v Diprose*[49] considered, *inter alia*, the doctrines of unconscionable conduct, undue influence and relational dependence in the case of a non-marital relationship. The initial finding of an unconscionable conduct was not disturbed by the High Court, although the

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[42] For a list of relationships that attract the presumption, see Phillips and O'Donovan, *supra* n. 37 at 146–7.

[43] See Phillips and O'Donovan, *supra* n. 37 at 146–8 and Sneddon, *supra* n. 19 at 305. See also the judgment of Brennan J in *Louth v Diprose* (1993) 67 ALJR 95, 97–101.

[44] (1993) 67 ALJR 95, 100.

[45] Phillips and O'Donovan, *supra* n. 37 at 148–50.

[46] Sneddon, *supra* n. 19 at 305.

[47] In *Yerkey v Jones* (1939) 63 CLR 649, Dixon J says at 675:

> 'But while the relation of a husband to his wife is not one of influence, and no presumption exists of undue influence, it has never been divested completely of what may be called equitable presumptions of an invalidating tendency.'

[48] *Broadlands International Finance Ltd v Sly* (1987) 4 BPR 9420.

[49] (1993) 67 ALJR 95.

judgment of Brennan J indicates that the facts would also support a decision on the basis of presumed undue influence arising from the special relationship between the parties. This decision is arguably significant in establishing contemporary recognition that an emotional attachment or infatuation by one person (the besotted) with another person (the beloved) may place the besotted at a special disadvantage in relation to dealings with the beloved.[50] As Brennan J commented:[51]

> It may no longer be right to presume that a substantial gift made by a woman to her fiance has been procured by undue influence but the cases in which such a presumption has been made demonstrate that the relationship which places a donor at a special disadvantage may have its origin in an emotional attachment of a donor to a donee.

Deane J concluded:[52]

> The case was one in which the appellant deliberately used that love or infatuation and her own deceit to create a situation in which she could unconscientiously manipulate the respondent to part with a large portion of his property. The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimisation.

The doctrine of (procedural)[53] unconscionable dealing was recognised by the High Court of Australia in *Commercial Bank of Australia Ltd v Amadio*.[54] A statement of the law regarding the jurisdiction of courts of equity to relieve against unconscionable conduct was enunciated by Deane J in the following terms:[55]

> The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of a reasonable degree of equality between them and (ii) the disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned

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[50] Toohey J (dissenting) recognised this, but said at 113–14:
> 'But the important thing is that the respondent failed to make good the proposition that his relationship with the appellant placed him in some special situation of disadvantage. ... The relationship was one which might be thought to have little to offer him but it was one in which he was content to persist and which the appellant in no way misrepresented or disguised.'

[51] (1993) 67 ALJR 95, 99.

[52] *Id.* 104.

[53] See Sneddon, *supra* n. 19 at 317. The author draws a distinction between the two types of unconscionability: procedural and substantive. 'The classic equitable doctrine as described in *Blomley v Ryan* (1956) 99 CLR 362 and *Amadio* is concerned with procedural unconscionability: the methods used to make the contract.'

[54] (1983) 151 CLR 447.

[55] *Id.* 474.

> transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.

In a situation of inherent disadvantage with one party, it is the view of the law that the will of the innocent party is taken to be actuated by the dependent position in which he or she is placed and the unconscientious advantage taken by the stronger party of that position.

This broader principle can also apply in cases involving husbands and wives. In *Broadlands International Finance Ltd v Sly*,[56] a case involving the execution of a mortgage over the wife's property by her husband under a power of attorney, the court found that there was both undue influence and unconscionable dealing. It was there not necessary for the court to consider application of the rule in *Yerkey v Jones*. In *Borg-Warner Acceptance Corp. (Australia) Ltd v Diprose*,[57] the unconscionable nature of the transaction enabled the guarantee given by a wife to secure her husband's business debts to be set aside.[58] Not unnaturally, it is the effect of decisions such as these which contributes to the view that the current state of development of the equitable doctrines of undue influence and unconscionable conduct renders the rule in *Yerkey v Jones* unnecessary. There were certainly statements by two of the appeal judges in *Warburton v Whiteley & Ors* along those lines. Kirby P stated:[59]

> It is possible that the High Court with a fresh opportunity to review Yerkey, would refine the principle there stated. It might subsume it within what I respectfully consider to be the more appropriate modern and satisfactory general principle elaborated in Amadio.

Clarke JA also stated:[60]

> On the other hand it may be that the principles applied in Amadio which clearly extend to guarantees, provide sufficient protection and there is now no case for retaining the separate doctrine under discussion. However the doctrine (Yerkey) has been applied by the High Court and until that Court indicates that it is no longer good law I consider that I should continue to apply it.

Irrespective of the continuing contemporary developments in the doctrines of undue influence and unconscionable conduct, the present position seems to be that, apart from the restriction to married women, the

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[56] (1987) 4 BPR 97280.

[57] (1987) 4 BPR 97279.

[58] Sneddon, *supra* n. 19 at 318, cites these two cases as examples where the lender was held liable for the unconscionable conduct of the debtor. This is perhaps unusual for, as Sneddon points out at 306, the lender is usually penalised for its own unconscionable conduct and not that of the debtor. See discussion on the 'agency' principle, *infra*.

[59] (1989) NSW Conv R 55-453, 58,287.

[60] *Id.* 58,293.

rule in *Yerkey v Jones* is more extensive in application than the conventional equity doctrines even coupled with the (now impugned) 'agency' approach.[61]

THE CONTEMPORARY APPLICATION OF *YERKEY v JONES*

Although the rule appears to be expanding rather than being distinguished,[62] there are certain limitations. Cases involving guarantees made to secure debts of companies, as opposed to the debts of the husband,[63] appear to be an area where the law is becoming more refined in application. In *European Asian of Australia Ltd v Kurland*,[64] Rogers J held that the rule was not applicable to a mortgage and guarantee to secure an advance to a company in which both the husband and wife had an equal interest. Where the wife is a director of the debtor company, the rule in *Yerkey v Jones* may not be available, especially if the guarantee is also, albeit indirectly, for the benefit of the wife.[65] The distinction between a wife consenting to be a surety for her husband and a wife consenting to be a surety for a company with which her husband was associated was considered further in *Warburton v Whiteley*,[66] where one issue considered was the extent of the benefit to the wife required to displace the operation of the rule in *Yerkey v Jones*. McHugh JA said:[67]

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[61] See discussion *infra* on the 'agency' approach and the cases *Barclays Bank Plc v O'Brien* [1992] 3 WLR 593; [1992] 4 All ER 983 and *Barclays Bank Plc v O'Brien* [1993] 4 All ER 417.

[62] Gerathy, *supra* n. 29 at 21. See also *Williams v State Bank of New South Wales* (unreported, NSW Sup Ct, Young J, 7 April 1993) where it was held that the principle in *Yerkey v Jones* applied to a mortgage given by the wife. In that case the husband had extended the mortgage without consulting the wife. Young J held that: 'It does not matter at all whether the wife is to sign a new guarantee of whether a guarantee previously given by her is to be extended. If the wife gets no substantial benefit under the guarantee, then the evidentiary onus is moved to the bank to show why the transaction should be enforced against her.'

[63] Gerathy, *supra* n. 29 at 20.

[64] (1985) 8 NSWLR 192, 200.

[65] *Commonwealth Bank of Australia v Cohen* (1988) ASC 55-681, 58,160 and *'Partnership Pacific Ltd v Smith* (unreported, NSW Sup Ct, 5 April 1991) where Brownie J appeared to take the view that the rule would not apply if the wife received an indirect benefit from the loan in that part of the money advanced was used by the borrower to pay off the debts of another company, of which the wife was a director', as cited in Phillips and O'Donovan, *supra* n. 37 at 166 note 12. The rule may also be displaced if the securities provided engender a benefit to the wife: *Carrington Confirmers Pty Ltd v Akins* (unreported, NSW Sup Ct, Giles J, 23 April 1991). In *Warburton v Whiteley* (1989) NSW Conv R 55-453, Clarke JA thought the wife would only be entitled to relief if her guarantee was voluntary in the sense that it was solely, or at least substantially, for the benefit of the creditor and her husband (as cited in *Carrington*). See also Young J in *Garcia v National Australia Bank Ltd* (unreported, NSW Sup Ct, 7 April 1993).

[66] (1989) NSW Conv R 55-453.

[67] *Id.* 58,288.

> If the evidence had established that Mrs Warburton had a shareholding in the company sufficiently substantial to warrant a finding that she had a beneficial interest in the company's debt, the prima facie application of the *Yerkey & Anor v Jones* principle would have been displaced.

Clarke JA said:[68]

> There would appear to me no reason in principle why the doctrine should not apply in respect of loans to, for instance, a company which was the alter ego of the husband or even to organisations in which the husband had, but the wife had not, a substantial interest. Nor do I see any reason why the doctrine should be limited to the guaranteeing of past indebtedness. If the wife undertakes an obligation to guarantee a proposed loan, and possible future loans to her husband or to organisations in which he has a significant interest it is hard to see why in principle she should not be entitled to the same relief as a wife who is guaranteeing past loans.

And further in the judgment:

> If in fact the guarantee was executed to secure the past or future debts of a company in which she was substantially interested then it would be difficult to find a basis on which to grant relief.

In *Peters v Commonwealth Bank of Australia*, after considering the dicta in *Warburton v Whitely*, Brownie J found:[69]

> Here the plaintiff had no interest at all in any of the companies associated with her husband. Her only possible 'interest' lay in her hope or expectation of receiving maintenance from him in the future. In those circumstances, I do not think it can be said she had a sufficient interest to enable the prima facie rule in *Yerkey* to be displaced.

The extent of the operation and effect of the rule in *Yerkey v Jones* can be seen in decisions where there would not have been any relief available under the equitable doctrines of undue influence and unconscionable dealings.[70] The example of *Warburton v Whiteley*[71] enabled the plaintiff to obtain relief under *Yerkey v Jones* because the creditor did not discharge the onus of showing that she had a substantial interest in the debtor company.[72] There was no remedy under the *Amadio* principles, as even though there it was found Mrs Warburton was in a position of special disadvantage (under the *Amadio* principles), the evidence did not show that the respondent took unfair advantage of her. Remedies under the *Contracts*

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[68] *Id.* 58,291 and 58,293.
[69] (1992) ASC 56-135, 57,364.
[70] *Peters v Commonwealth Bank of Australia* (1992) ASC 56-135, 57,355 and 57,363–4.
[71] (1989) NSW Conv R 55-453.
[72] This was the majority view of McHugh JA and Kirby P. Clarke JA held that the onus was not on the company to prove that she did have an interest: at 58,293–4.

Review Act 1980 (NSW) were unavailable as she had not shown that she lacked a significant interest in the debtor company. In *Garcia v National Australia Bank Ltd*,[73] the plaintiff was unsuccessful under the *Amadio* principle as the bank did not know she had been pressured by her husband to sign the document and there was nothing to put in on inquiry. However, applying *Yerkey v Jones*, the wife had a *prima facie* right to set the transaction aside as the bank was unable to satisfy the evidentiary onus placed on it.[74] Under the reverse onus placed on the bank, it was for the bank to prove that the plaintiff wife had a substantial interest in the company and that the guarantee had been explained to her.

Yerkey v Jones is a binding precedent of the High Court; however, in *Warburton v Whiteley*[75] the NSW Court of Appeal had the opportunity to distinguish *Yerkey v Jones* and limit it to guarantees for the husband's debts only. Also, the court extended the rule to situations where the principal debtor is a company in which the husband is interested. Lyn Gerathy suggests that the extension of *Yerkey v Jones* to these situations 'is a legally logical extension of *Yerkey v Jones* or at least would be if the extension were made in the 1940s or in a social vacuum' but is inappropriate nowadays.[76] Despite this view, there are arguments which possibly justify this extension of the rule in *Yerkey v Jones*.

As it is now common for husbands and wives to be directors and shareholders of family companies (where most likely practically all of the day work is done by the husband), courts may be reluctant to distinguish *Yerkey v Jones*, as it is in the context of corporate operations that the non-participating spouse is particularly susceptible to unadvisedly entering transactions involving the company. Despite the changes in society, not all women are necessarily as educated or as commercially aware as their male partners. Opportunities for the exercise of improper conduct, especially in relation to family companies, are probably more prevalent than at the time of the original decision. Without the rule in *Yerkey v Jones* being extended to cover these situations, such persons would be considerably more vulnerable.

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[73] Unreported, NSW Sup Ct, Young J, 7 April 1993.

[74] Gerathy, *supra* n. 29 at 21: 'This was because of the finding that the bank had failed to discharge its onus of proving she had a substantial interest in the company, that no one explained the guarantee to her, that she signed it because of the assurance of her husband that it was perfectly safe because either the gold was there or the money was there and that the bank failed to prove that it explained to Mrs Garcia that the safety net was not there.'

[75] (1989) NSW Conv R 55-453.

[76] Gerathy, *supra* n. 29 at 20. The substance of this argument is based on the changed social conditions where 'having regard to the social changes in education and experience of women that it is now common for husbands and wives to be directors and shareholders of family companies (even if most of the routine work is undertaken by the husband)' and the adequacy of the protection afforded to wives giving guarantees under the *Amadio* principles and the NSW *Contracts Review Act 1980*.

Other advantages provided by the rule in *Yerkey v Jones* are examined in Phillips and O'Donovan,[77] where the authors distinguish the rule from the concept of agency which could also be relied upon in circumstances where the husband has been entrusted by the creditor to obtain a wife's signature. Apart from the requirement to establish the existence of an agency relationship between the husband and the creditor,[78] the wife is required to establish specific substantive grounds such as misrepresentation, duress or undue influence on the part of the husband.[79] Under the principle of unconscionable dealing, the wife has to establish that she is in a position of serious disadvantage and that the creditor was at least aware of this. In contrast to these requirements, the evidentiary burden of proof on the wife under *Yerkey v Jones* is simply to show that she does not understand the effect of the guarantee; this alone engenders a *prima facie* right to have the transaction set aside. This right can be displaced by the creditor showing that adequate steps were taken to inform the wife and that the creditor reasonably supposed she had an adequate comprehension of the rights and obligations arising under the transaction.[80]

The conventional wisdom has illustrated that the rule in *Yerkey v Jones* goes further than *Amadio*, which focuses on the two-stage process involved in unconscionable conduct. However, there is dicta in *Amadio* by Deane J which leaves the door open for the rule in *Yerkey v Jones* to apply to parties other than husbands and wives. In *Amadio*, Deane J quoted from Cussen J in *Mueller*:[81]

> In the first place it is obvious that a large benefit is conferred both on the creditor and the debtor, which, so far as any advantage to the guarantor is concerned is voluntary, though no doubt 'consideration' exists so far as the creditor is concerned, so soon as forbearance is in fact given or advances are in fact made. It is I think, to some extent by reference to that rule or to an extension of that rule that, in the case of a large voluntary donation, a gift may be set aside in equity if it appears that the donor did not really understand the transaction that such a guarantee may be treated as voidable between husband and wife.

Deane J then said:[82]

> Cussen J's above analysis was made in the context of a guarantee procured by a husband from his wife in favour of the husband's bank. There is, however, no basis in principle or policy for confining the process of reasoning therein contained to cases of female spouses. It is appropriate to the circumstances of the present case.

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[77] *Supra* n. 37 at 166.
[78] See discussion on this issue *infra*.
[79] Phillips and O'Donovan, *supra* n. 37 at 166.
[80] The paragraph is essentially a summary of the ideas in Phillips and O'Donovan.
[81] (1983) 151 CLR 447, 475, citing *Bank of Victoria Ltd v Mueller* [1925] VLR 642, 649.
[82] *Id.* 475.

These passages were quoted with approval by Clarke JA in *Warburton v Whiteley*[83] but do not appear to have been considered further, as the decision of Clarke JA was based on the principles in *Yerkey v Jones*. In *Amadio*, Deane J did not develop this issue further but based his decision on unconscionable conduct. It would seem more than likely that this dicta will be considered by the High Court in any proceedings involving a *de facto* spouse.

THE AGENCY APPROACH

The central feature of cases involving impropriety by the principal debtor in obtaining the consent of the surety has been that the improper conduct by the debtor has been attributed to the creditor enabling the guarantor to avoid liability on the guarantee. If the creditor has actual or constructive notice of the improper conduct, usually undue influence, the creditor cannot enforce the guarantee.[84] In cases where the creditor has entrusted the principal debtor with obtaining the guarantor's signature, the liability of the creditor for the improper acts of the principal debtor in securing the guarantee is established on different grounds.[85] The differing views as to which grounds are applicable has been the subject of academic investigation,[86] although the significance of that question is much reduced by recent developments. The 'agency' approach has been found in the dicta of certain English decisions where it was held that any improper conduct by the principal debtor in relation to the obtaining of the surety was sheeted home to the creditor. The origins of this approach appear in the cases of *Turnbull & Co v Duval*[87] and *Chaplin & Co Ltd v Brammall.*[88]

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[83] (1989) NSW Conv R 55-453, 58,293.

[84] Phillips and O'Donovan, *supra* n. 37 at 167; Sneddon, *supra* n. 19 at 308–9.

[85] Phillips and O'Donovan, *supra* n. 37 at 162–7; Sneddon, *supra* n. 19 at 306–8.

[86] Sneddon, *supra* n. 19 at 308–16; N.Y. Chin, 'Undue Influence and Third Parties', (1992) 5 / *Journal of Contract Law* 108, 110–21.

[87] [1902] AC 429, 435 per Lord Lindley.

[88] [1908] 1 KB 233. These decisions were cited as authority for the proposition that:

> '... if a creditor, or potential creditor, of a husband desires to obtain, by way of security for the husband's indebtedness, a guarantee from his wife or a charge on property of his wife and if the creditor entrusts to the husband himself the task of obtaining the execution of the relevant document by the wife, then the creditor can be in no better position than the husband himself, and the creditor cannot enforce the guarantee or security against the wife if it is established that the execution of the document by the wife was procured by undue influence by the husband and the wife had no independent advice.'

Per Dillon LJ in *Kings North Trust Ltd v Bell & Ors* [1986] 1 WLR 119, 123.

In *Kings North Trust Ltd v Bell & Ors*, Dillon LJ stated:[89]

> On the general law of principal and agent, the principal (the creditor), however personally innocent, who instructs an agent (the husband), to achieve a particular end (the signing of the document by the wife) is liable for any fraudulent misrepresentation made by the agent in achieving that end, including any continuing misrepresentation made earlier by the agent and not corrected.

The so-called agency rule operated in English decisions based on an acknowledgment that it was not in fact a true agency but nevertheless a fertile ground for the basis of decisions in this area.[90] Through various decisions, the parameters for the operation of this principle had been defined and it appeared as if the way was clear for the rule to extend to relationships other than husbands and wives.[91]

The decision of the Court of Appeal in *Barclays Bank Plc v O'Brien*[92] provided an opportunity to reassess the agency principle.[93] The principal judgment in the case was delivered by Scott LJ which helped to clarify and re-evaluate the law on this topic. In a comprehensive review of the authorities prior to *Avon Finance Co Ltd v Bridger*, Scott LJ concluded:[94]

> The cases to which I have so far referred do not, in my opinion, establish any principle that depends on the concepts of agency. In some cases the creditor was unable to enforce the security against the wife notwithstanding that no positive impropriety such as undue influence or misrepresentation had been committed by the husband. A coherent explanation of the cases must be placed on some other basis than agency.

A similar conclusion was reached by Purchas LJ, who rejected the concept of agency as necessary for supporting earlier decisions on this issue.[95] Whatever the standing of *Yerkey v Jones* in Australia, the judgment

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[89] [1986] 1 WLR 119, 123.

[90] See Phillips and O'Donovan, *supra* n. 37 at 162–5; Chin, *supra* n. 86 at 110–15; Sneddon, *supra* n. 19 at 309–11.

[91] Chin, *supra* n. 86 at 112–13.

[92] [1992] 3 WLR 593; [1992] 4 All ER 983.

[93] Lee Aitken, 'Equity, Third-Party Guarantees and Wife as Guarantor: Recent English Developments', (1992) 3 *Journal of Banking and Finance Law Practice* 261, 267 where he states: '*O'Brien* is to be welcomed for reconciling the English "agency" cases and indicating in detail how lenders may protect themselves.'

[94] [1992] 3 WLR 593, 605.

[95] *Barclays Bank Plc v O'Brien* [1992] 3 WLR 593. On the issue of agency, Purchas LJ at 624 observed:

> '[T]he distinction between the meaning of the word "agent" in the common law sense of "special agent" and its meaning in what for want of a better expression I will call its "equitable sense" was not expressly pointed out until the judgment of the court was delivered by Slade LJ in *Bank of Commerce and Credit International SA v Aboody* [1990] 1 QB 923.'

After discussing the results of other decisions and the relevant equitable principle, Purchas LJ continued:

> 'I believe that the results, if not all the specific ratios decidendi, can be reconciled if this equitable principle is observed and the artificial concept of agency is abandoned in all cases save those where contractual or ostensible agency is clearly established.'

of Dixon J was readily embraced by the English Court of Appeal. After discussing the decision of Dixon J in *Yerkey v Jones*, Scott LJ stated:[96]

> The approach which Dixon J suggested does not depend upon the debtor husband being treated as agent of the creditor. It proposes a much more flexible basis of decision than the so called 'agency' approach.

After further consideration of other authorities and Dixon J's analysis, Scott LJ concluded:[97]

> I would adopt this summation. In my judgment it explains the authorities that precede *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281. They do not depend upon endowing the husband with the status of agent for the creditor. They demonstrate equitable intervention in favour of married women where the conditions to which I have earlier referred are found to be present. Married women who provide security for their husband's debts are treated as a special protected class of sureties.

In a review of the cases since *Avon Finance Co Ltd v Bridger*,[98] Scott LJ admitted that the cases are not easy to reconcile with one another and observed that there appeared to be two divergent views as to whether there should continue to be special protection in equity for married women who provide security for their husband's debts.[99] After explaining that *Avon Finance Co Ltd v Bridger* had extended the protected class, Scott LJ continued:[100]

> [I]f a protected class is to continue to be recognised, the class ought logically to include all cases in which the relationship between the surety and the debtor is one in which influence by the debtor over the surety and reliance by the surety on the debtor are natural and probable features of the relationship. In cases falling within the protected class, security given by the surety would in certain circumstances be unenforceable notwithstanding that the creditor might have had no knowledge of and not have been responsible for the vitiating feature of the transaction.[101]

On the question of a protected class, Purchas LJ took the view that:[102]

> Nor do I consider that the principle is advanced by identifying specific categories such as husband and wife or elderly parents and adult children; the principle applies whenever a creditor knows or ought to have known that the relationship between debtor and surety gives rise to a real risk that the surety

[96] [1992] 3 WLR 593, 607.
[97] *Id.* 610.
[98] [1985] 2 All ER 281.
[99] [1992] 3 WLR 593, 618–19.
[100] *Id.* 619.
[101] The details of the law concerning the protected class are extracted from Scott LJ in *Barclays Bank Plc v O'Brien* [1992] 3 WLR 593, 619.
[102] *Id.* 624.

> may not contract freely and with a full appreciation of the nature of the obligation being assumed. Depending upon the existing context surrounding the relationship between the debtor and the surety, the question to be asked is whether the conduct of the creditor has fallen short in any respect which would amount to unconscionable disregard for the predictable vulnerability of the surety to the misfeasance or influence of the debtor.

These remarks of Purchas LJ suggest a test of unconscionable conduct along the lines of *Amadio*, even though the law in England with respect to unconscionable conduct has not yet developed to the same extent as it has in Australia.[103] The decision of the Court of Appeal in *Barclays Bank Plc v O'Brien* arguably moved the law in Australia and England closer in this area. The 'agency' doctrine, which was the hallmark of the more recent English decisions,[104] appeared to have been rejected by the Court of Appeal in *Barclays Bank Plc v O'Brien* and the principles in *Yerkey v Jones*, particularly the approach adopted by Dixon J, endorsed as the preferred basis for the development of the law.

Based on the premise that 'equity affords special protection to a protected class of surety where the relationship between the debtor and the surety is such that the influence by the debtor over the surety and reliance by the surety on the debtor are natural features of the relationship',[105] the Court of Appeal held that the security given by the surety would be unenforceable by the creditor if:[106]

(i) the relationship between the debtor and the surety and the consequent likelihood of influence was known to the creditor; and
(ii) the surety's consent to the transaction was procured by undue influence or material misrepresentation on the part of the debtor, or the surety lacked an adequate understanding of the nature and effect of the transaction; and
(iii) the creditor, whether by leaving it to the debtor to deal with the surety or otherwise, had failed to take reasonable steps to try and ensure that the surety entered into the transaction with an adequate understanding of the nature and effect of the transaction and that the surety's consent was an informed one.

The case then went on appeal to the House of Lords[107] where the appeal was dismissed.

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[103] Rt Hon. Lord Oliver of Aylmerton, 'Requiem for the Common Law?', (1993) 67 ALJ 675, 686. 'Again the concept of unconscionable conduct has been taken in *Commercial Bank of Australia v Amadio* further than has been the case in England.'

[104] See, generally, Chin, *supra* n. 86 at 108; Sneddon, *supra* n. 19 at 308–15.

[105] The judgment of Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* [1993] 4 All ER 417, 421–2 when the case went to the House of Lords identified this as the underlying reasoning by the Court of Appeal.

[106] Per Scott LJ in *Barclays Bank Plc v O'Brien* [1992] 3 WLR 593, 619. The other members of the Court of Appeal agreed with these principles.

[107] [1993] 4 All ER 417.

THE DOCTRINE OF NOTICE

The House of Lords[108] rejected the idea of a special equity theory (which had been applied by the Court of Appeal) and held that the doctrine of notice properly applied would be appropriate in this sort of case.[109] The problem was to identify circumstances in which the creditor will be taken to have notice of the wife's equity to set aside the transaction. It was the decision of the House of Lords that where one cohabitee has entered into an obligation to stand as surety for the debts of the other cohabitee and the creditor is aware that they are cohabitees:[110]

(1) the surety's obligation will be valid and enforceable by the creditor unless the suretyship was produced by undue influence, misrepresentation or other legal wrong of the principal debtor;
(2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy herself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction;
(3) unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent advice.

It is suggested that apart from the specific requirement of a husband and wife relationship, the principles enunciated in the decisions in *Barclays Bank Plc v O'Brien* are consistent with those in *Yerkey v Jones*. The essential difference between the Court of Appeal's decision in *Barclays Bank Plc v O'Brien* and *Yerkey v Jones* is that a relation of influence needs to be established whether by reference to a pre-existing relationship or by reference to the facts of the case. It would seem that once guarantors are able to bring themselves within the 'protected class' the consequences are the same. The House of Lords' decision was not restricted to applying these principles to a 'protected class'[111] of persons but extended to include cohabitees. Lord Browne-Wilkinson indicated that the principles were applicable to all other cases where there is an emotional relationship between cohabitees:[112]

[108] Lord Browne-Wilkinson delivered the unanimous principal judgment.
[109] [1993] 4 All ER 417, 428.
[110] *Id.* 431–2.
[111] *Id.* 431.
[112] *Ibid.*

> The tenderness shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of another. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society the law should recognise this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation.

The approach of establishing membership of an acknowledged 'vulnerable group of persons' by either virtue of a particular type of relationship, or establishing cohabitation with the principal debtor, and subsequently utilising the acknowledged equitable relief seems less onerous for the guarantor than the attempting to establish unconscionable conduct under the *Amadio* principles. Whereas it has been previously suggested that *Yerkey v Jones* ought to be subsumed under the *Amadio* principles,[113] which so far appear to be more restrictive, the more logical approach would now be to have *Yerkey v Jones* subsumed under the principles of the decisions in *Barclays Bank Plc v O'Brien* as these principles, unlike those of *Yerkey v Jones*, now extend to afford relief to *de facto* partners.[114]

THE *DE FACTO* RELATIONSHIP

It has been suggested by one commentator that the principle in *Yerkey v Jones* presumably already extends to *de facto* wives who act as sureties for the benefit of their husbands.[115] Although there is no reasoning advanced to support this conclusion, that statement is nevertheless useful in providing an indication of community attitudes reflecting a perception of homogeneity in respect of female partners in a heterosexual relationship. The number of couples living in *de facto* relationships has been increasing[116] and the degree of social disapproval of such relationships has diminished, to a point nearing acceptability,[117] although perhaps not yet equated by society with a formal marriage.[118] It could be argued that in contemporary Australia the distinction between those females who are legally married and those who are in a *de facto* relationship is for many

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[113] Per Kirby P in *Warburton v Whiteley & Ors* (1989) NSW Conv R 55-453, 58,287.

[114] The decision of the House of Lords [1993] 4 All ER 417, 431 extends the principles to cover cohabitees.

[115] Chin, *supra* n. 86 at 123.

[116] In 1986 there were 204,946 *de facto* couples (5.8 per cent of all couples) living in Australia, whereas in 1991 there were 292,208 *de facto* couples (8.1 per cent of all couples). Queensland Law Reform Commission Report 44 (QLRCR 44), De Facto Relationships, June 1993, (i) note 6.

[117] Queensland Law Reform Commission Working Paper No. 40, De Facto Relationships, September 1992, 29 note 47; hereafter cited as QLRCWP 40.

[118] *Id.* 33.

purposes removed.[119] A particular example is found in the *Social Security Act 1991* (Cth) which for purposes of determining criteria for the receipt of benefits does not in practical terms distinguish between married persons and those in *de facto* relationships with a partner of the opposite sex. The test used is whether a person is a member of a couple, and s. 4(3) of the Act enumerates the criteria for deciding whether or not there is a marriage-like relationship.

This is not to suggest that in all matters *de facto* relationships correspond with *de jure* marriages. There are similarities and differences, and the courts have cautioned against attempting to equate the two different forms of liaison. The absence of the formal marriage ceremony means that, despite the nature, extent and duration of the relationship, a *'de facto* wife' is regarded as a *femme sole*, whereas a married woman or legal wife is a *femme covert*; a distinction perhaps of mainly historical significance but nevertheless a real one in legal terms. However, one contemporary view is: 'No distinction should be drawn between marriage and de facto relationships at least in the property and maintenance fields.'[120] If this philosophy is accepted as a reflection of contemporary attitudes, it is a strong argument to have the rule in *Yerkey v Jones* extend to *de facto* wives. Married women are afforded the benefit of the rule in *Yerkey v Jones* which relates to their property and property dealings, so by analogy the rule should extend to *de facto* wives.

These days, quite a number of engaged couples live together, in what would presumably be described as a *de facto* relationship, prior to marriage. In *Louth v Diprose*,[121] Brennan J, after having considered the relationship of a woman and her fiancé, continued:

> It may no longer be right to presume that a substantial gift made by a woman to her fiancé has been procured by undue influence but the cases in which such a presumption has been made demonstrate that the relationship which places a donor at a special disadvantage may have its origin in an emotional attachment of a donor to a donee.

One implication which arises from the presumption of undue influence in the case of engaged couples is whether an analogy ought to be drawn between the engaged couple and persons living in a *de facto* relationship. It would seem that despite the doubts of Brennan J, the presumption of undue influence still exists in favour of fiancées. It would also seem an odd consequence if the presumption were to apply in favour of an (engaged) female partner in a *de facto* relationship but not to

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[119] George Cho, 'The De Facto Relationships Act 1984 (NSW): Blurring the Distinction between De Jure Marriages and De Facto Relationships', (1991) 5 *Australian Journal of Family Law* 19, 35.

[120] H.A. Findlay and R. Bailey Harris, *Family Law in Australia* (Sydney: Butterworths, 1989), 388 as cited in Cho, *id.* 25 note 34.

[121] (1993) 67 ALJR 95, 99.

one who is not engaged. However, to apply the presumption to all female partners in *de facto* relationships would place them at an advantage over married women, because there is no presumption of undue influence arising from the relationship of husband and wife.

The preceding example demonstrates, *inter alia*, that probably one of the main difficulties in seeking to extend the rule in *Yerkey v Jones* to cover *de facto* wives is the degree of uncertainty in determining whether or not there is a *de facto* relationship. It is easy to establish that a female is the (legal) wife of a particular male, but the existence of a *de facto* relationship is not necessarily so clear cut.[122] A *de facto* relationship is not recognised at common law, and no legal criteria have been established to determine the existence or otherwise of the relationship.[123] Wade[124] provides a general description of a *de facto* marriage as 'an unsecretive relationship between a man and a woman which actually lasts for more than a short time, and in which some, or most of the traditional western functions of marriage are performed but which lacks the formality or ceremony prescribed by the dominant legal system'. This description does not answer the question of what degree of cohabitation and the nature of cohabitation is required to say that a couple live together on such a basis.[125] Is the relationship to be exclusive of other relationships?[126] In *Calvery v Green*,[127] Mason and Brennan JJ were of the view that the expression *'de facto* husband and wife' is 'obfuscatory of any legal principle except in distinguishing the relationship from that of husband and wife.'[128]

In reality, however, the prevalence of *de facto* relationships has required that the issue be addressed in statutory form.[129] It is nevertheless argued that the statutory definitions are given subtly different interpretations according to the policies presumed to underlie the different legislative enactments.[130] In the different jurisdictions which have enacted legislation dealing with *de facto* relationships, the legislation defines a *de facto* relationship (for the purposes of the Act). Although the legislation is state legislation,[131] the definitions are essentially similar.[132] The question for the

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[122] QLRCWP 40, *supra* n. 117 at 33. See also John H. Wade, *Australian De Facto Relationships Law* (Sydney: CCH Australia Ltd, 1985, looseleaf service), 2-100 to 2-400.

[123] Anthony Dickey, *Family Law* (2nd ed., Sydney: The Law Book Co., 1990), 195.

[124] Wade, *supra* n. 122 at 2-100.

[125] Dickey, *supra* n. 123 at 195.

[126] Wade, *supra* n. 122 at 2-630.

[127] (1984) 155 CLR 242.

[128] *Id.* 260 as cited in Dickey, *supra* n. 123 at 203.

[129] Wade, *supra* n. 122 at 2-150, lists different statutes where the concept is used.

[130] *Id.* 2-200.

[131] The Commonwealth is only able to make legislation on matters relating to marriage, divorce and matrimonial causes: s. 51(xxi), (xxii) of the Constitution.

[132] The *De Facto Relationships Act 1984* (NSW) defines a *de facto* relationship as the relationship between *de facto* partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other. The Queensland Law Reform Commission Report 44, De Facto Relationships, has attached a De Facto Relationships Bill 1993 in Appendix B of the Report. Clause 5 of this proposed Queensland *De Facto Relationships Act 1993* defines a *de facto* relationship as

High Court would be whether to apply the definition of a *de facto* relationship as set out in the legislation of the relevant jurisdiction,[133] or whether to adopt or formulate a common law test of both a *de facto* relationship and a *de facto* partner (wife). Provision exists in some of that legislation for a court to make a declaration that a *de facto* relationship exists between particular parties.[134] With the exception of the proposed Queensland definition, it is submitted that there would be congruence between the definitions in the legislation and the common law description.[135] However, there may be problems in adopting a definition from state legislation, especially as not all jurisdictions have legislation in this area. The problems inherent in dealing with the concept of a *de facto* relationship and that of a *de facto* partner suggest that it is more than likely that the High Court would avoid providing the *de facto* relationship with any 'official status' so that the female partner would automatically be treated as a married woman for purposes of the rule in *Yerkey v Jones*. Certainly the evidence of a relationship between the parties would enable the questions of undue influence and dependence to be raised, perhaps even more sympathetically since the result of *Louth v Diprose*.[136] However, just as the relationship between husband and wife does not raise a presumption of undue influence, it is suggested that the finding of a *de facto* relationship would not necessarily raise a presumption of undue influence. Nevertheless, it is another question whether a *de facto* relationship would place a party into a protected class as described in the decision of the Court of Appeal in *Barclays Bank Plc v O'Brien*, although the subsequent decision by the House of Lords on appeal endorses that view that the principles of *Yerkey v Jones* should apply to all cohabitees.[137] If the High Court were to adopt the reasoning of the House of Lords in respect of cohabitees, then by default the principle in *Yerkey v Jones* would extend to *de facto* wives. The ultimate irony is that *Yerkey v Jones* currently applies to a married woman separated from her husband, but not to female partners in long-term *de facto* relationships. If the rule is applied only to married women these days, it could be argued that the original purpose is, in part, defeated.

'the relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple'.

[133] The following legislation provides definitions of a *de facto* relationship: *De Facto Relationships Act 1984* (NSW), s. 3(1); *Property Law Act 1958* (Vic), s. 275; *Family Relationships Act 1975* (SA), s. 11(1); *De Facto Relationships Act 1991* (NT), s. 3(1); Proposed *De Facto Relationships Act 1993* (Qld), s. 5.

[134] *De Facto Relationships Act 1984* (NSW), s. 56; *Family Relationships Act 1975* (SA), s. 11(2) provides that a person may apply to the court for a declaration that he or she was the putative spouse of another person; *De Facto Relationships Act 1991* (NT), s. 10; Proposed *De Facto Relationships Act 1993* (Qld), ss. 109–118.

[135] See *supra* n. 132.

[136] (1993) 67 ALJR 95.

[137] [1993] 4 All ER 417, 431 per Lord Browne-Wilkinson.

CRITICISMS OF *YERKEY v JONES*

The criticisms of the rule in *Yerkey v Jones* seem to be based on three interrelated propositions:

- the existing equitable doctrines provide adequate protection for all guarantors;
- the rule applies exclusively for the benefit of married women; and
- (consequently) it creates additional rules in relation to guarantees; making compliance more onerous for prospective lenders who may (inadvertently) fail to comply with these rules and thus lose the benefit of the guarantee.

The Adequacy of Existing Equitable Remedies

It has been demonstrated that relief under the rule in *Yerkey v Jones* is available when remedies under *Amadio* or undue influence were held to be unavailable.[138] It would therefore seem that those who argue the adequacy of existing equitable remedies implicitly adopt the position that remedies available through the more extensive operation of *Yerkey v Jones* ought not, in those particular circumstances, be available to guarantors. This becomes a philosophical issue of who (of the two 'innocent' parties) ought to bear the loss in a given situation. A more charitable interpretation of the position can be considered in suggesting that the supporters of this proposition believe that the existing equitable doctrines have the potential to develop, as in the case of *Amadio*; or have developed sufficiently as a result of decisions such as *Louth v Diprose* and the English decisions of the Court of Appeal and the House of Lords in *Barclays Bank Plc v O'Brien* that there are remedies now available in all situations where previously only *Yerkey v Jones* would apply. Consequently, a special rule for the protection of married women is unnecessary.

Application to Married Women Only

The rule in *Yerkey v Jones* is restricted in its application to a particular section of the community: married women. Where criticism has been made of the rule in *Yerkey v Jones*, it is often directed at this aspect of the rule, rather than against the existence and operation of the actual rule. The restricted application of the rule to the benefit of the female spouse is a

[138] See the extended operation of *Yerkey v Jones, supra,* p 28. This view has been reiterated by Justice P.W. Young in 'Yerkey v Jones: Does the Principle Actually Exist?', (1994) 68 ALJ 837, 838.

product of the jurisprudence of the times. As Chin observes:[139]

> Dixon J's religious definition of the proposition in its original historical and social context doomed it to an anomalous survival. ... The proposition could have been put on a rationale beyond that of the perceived dependence of married women.

In this respect the rule has not escaped comment from the bench. Dawson J in *Commercial Bank of Australia Ltd v Amadio* was content to side-step the whole issue when he commented:[140]

> Special considerations apply in cases where a husband procures his wife to become surety for his debt and the cases dealing with these circumstances can be put to one side.

However, in some cases where the facts have suggested the rule could apply, the response has not been so circumspect. This is demonstrated by Rogers J in *European Asian of Australia Ltd v Kurland* who, in response to a submission that simply being a female spouse gave rise to a special disadvantage, stated:[141]

> I feel compelled to say that in the year 1985 it seems anachronistic to be told that being female and a wife is, by itself, a sufficient qualification to enrol in the class of persons suffering a special disadvantage. ... Were this to be correct, it would affix a badge of shame to this branch of the law. ... That being a female spouse should place a person shoulder to shoulder with the sick, the ignorant and the impaired is not to be tolerated.

In *Warburton v Whiteley & Ors*, Kirby P 'described a rule giving special consideration to married women as "anomalous and anachronistic and inappropriate" in the light of modern advances in the status and education of women'.[142] Nevertheless, it is possible to find dicta to justify the protection extended to married women. Clarke JA in *Warburton v Whiteley & Ors* made the following comments:[143]

> Notwithstanding that it may no longer be appropriate to regard married women as being under a special disability it is, I think, proper to point out that the invalidating presumptions of which Dixon J spoke reflect a response to the fact that there have been many cases in which wives have been overborne by their husbands and thus have been shown to be in need of special protection. No doubt the powers of the court to grant relief in cases of the

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[139] Chin, *supra* n. 86 at 124.
[140] (1983) 151 CLR 447, 486. The other justices did not consider the issue apart from the reference of Deane J discussed *infra*.
[141] (1985) 8 NSWLR 193, 200.
[142] As cited by Heerey J in *Re Halstead; Ex parte Westpac Banking Corp.* (1991) 31 FCR 337, 352.
[143] (1989) NSW Conv R 55-453, 58,293.

> exercise of undue influence have provided an adequate remedy in some of these cases. Nonetheless there have been cases in which undue influence could not have been shown but in which the dominance of the husband placed his wife at a disadvantage. While it may be true to say that the need to recognise the disadvantaged position of a wife would appear less frequently today there are still to be found in the community women who are overborne by their husbands. The need for protection of those women is as great as ever.

In *Barclays Bank Plc v O'Brien*, when considering whether the law ought to provide special protection for married women who provide security for their husband's debts, Scott LJ said:[144]

> Many women, it is true, do not. But the tendency in households for business decisions to be left to the husband and for the wife, whether or not she is joint owner of the matrimonial home and whether or not she has a separate job, to have the main domestic responsibilities still persists. And in the culturally and ethnically mixed community in which we live, the degree of emancipation of women is uneven. The likelihood of influence by a husband over his wife and of reliance by a wife on her husband to make the business decisions for the family was the justification in the first place for the tenderness of equity towards married women who gave their property as security for their husband's debts. In my opinion the justification is still present.

These comments, while acknowledging that in some circumstances it is probably still more just and fair to afford this degree of protection to married women, do not suggest that this protection should be the exclusive preserve of the married female spouse. Two objections to protection depending exclusively on married status are: (1) the immediate exclusion of those involved in *de facto* relationships; and (2) failure to acknowledge the increasing social, domestic and economic equality of parties entering marriage today.[145] To these objections it seems necessary to add the sex discrimination inherent in the rule in *Yerkey v Jones*.[146] Although, at the time of its formulation, the social attitudes and values were such that it would have been unthinkable that at some time in the future it would be extended by being reformulated in gender neutral language.[147]

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[144] *Supra* n. 101 at 620.

[145] Cretney, *supra* n. 35 at 536–7.

[146] Walker, *supra* n. 3 at 6. It is pointed out that the rule does not apply in the case of a husband who guarantees his wife's debts.

[147] Gender neutral language would extend the protection to husbands who give security for the debts of their wives. It is an academic point at this stage whether *Yerkey v Jones* cast in gender neutral language would ever extend to single sex relationships.

More Onerous Obligations on Creditors

A criticism of the rule in *Yerkey v Jones* is that it places more onerous obligations on creditors seeking to validate a security.[148] This view is based on the statement by Dixon J where his Honour indicates that if a creditor, in dealing with the wife, has 'taken adequate steps to inform her and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction', there is no equity for her to have the transaction set aside.[149] However, as Phillips and O'Donovan indicate, this is a less onerous burden than that required to rebut the presumption of undue influence.[150] There are a number of different situations identified by Dixon J in *Yerkey v Jones* where the wife may be entitled to have the transaction set aside for varying degrees of improper conduct on the part of her husband. Arguably, because of these situations it is incumbent on creditors to adopt adequate procedures to establish and preserve the integrity of the transaction. However, there appear to be other situations which extend the 'protected class of guarantors' to include persons other than husband and wife.[151] It is submitted that lenders who adopt appropriate procedures in all transactions will be in a better position to protect guarantees. The extension of the 'protected class', even to include all cohabitees, would probably go some distance to removing a unique anomaly in the law of guarantees and thus make the law more certain for both guarantors and credit providers. It would also make this particular criticism of *Yerkey v Jones* irrelevant.

CONCLUSION

Should a fact situation come before the High Court of Australia where a *de facto* female partner is seeking to invoke the rule in *Yerkey v Jones* (because there is no other way she would be entitled to relief[152]), the problem for the High Court is how to address the issue of *de facto* relationships. Will the High Court extend the principle in *Yerkey v Jones* to cover females living in a 'marriage-like relationship'? Arguably, in the interests of justice, it would be relatively easy to do. Such a decision could be justified in terms of the changing social conditions, the legislative recognition of *de facto* relationships, and the decision of the House of Lords in *Barclays Bank*

[148] Gerathy, *supra* n. 29 at 21.
[149] *Supra* n. 2 at 685 per Dixon J.
[150] Phillips and O'Donovan, *supra* n. 37 at 166.
[151] *Supra* n. 101.
[152] The facts are similar with *Warburton v Whiteley & Ors* (1989) NSW Conv R 55-453 or *Garcia v National Australia Bank Ltd* (unreported, NSW Sup Ct, Young J, 7 April 1993), except that the person is not legally married to the male debtor.

Plc v O'Brien. The preliminary question for the court to determine is how to decide whether there is a marriage-like relationship. Will the court accept a declaration made under the relevant state legislation, or will it adopt or formulate another test?[153]

It is suggested that it would be highly unusual for the High Court to preserve the rule in *Yerkey v Jones* as the *status quo* in its present form, even if the court was to couch a decision in terms of that rule. The decisions in *Barclays Bank Plc v O'Brien* suggest that the High Court could easily widen the protected class of guarantors to persons other than married women, reasoning that the decision in *Barclays Bank Plc v O'Brien* in respect of those who are afforded protection reflects the state of the law today. It is suggested that the only way that the principles of *Yerkey v Jones* could remain confined to their particular facts is if the court were able to provide relief in the form of a remedy on some other equitable ground. This would probably involve a more tortuous route of following and extending the dicta in the embryonic principles in *The Bank of Victoria v Mueller* and *Amadio*.[154]

For a *de facto* wife seeking to invoke the rule in *Yerkey v Jones* it would seem that, given the recent developments, such a person would be able to obtain relief but not necessarily under the rule in *Yerkey v Jones*. It seems more probable that, for a favourable outcome, the person would need to establish that there was influence or the likelihood of influence and reliance (based on cohabitation) by her male partner. The existence of a *de facto* relationship may be grounds for raising the issue, but as the law currently stands it would not raise a presumption of influence or the likelihood of influence. Despite the apparent significance that may be attached to cohabitation on the basis of *Barclays Bank Plc v O'Brien*, it is not certain that the High Court would make a blanket extension of the rule in *Yerkey v Jones* to all *de facto* wives. Although unlikely, there may be distinguishing differences between a cohabitee and a *de facto* wife. The court may, instead, couch any decision, in respect of a particular individual, in terms of the extension of equitable doctrines to relations of emotional influence once certain evidence is adduced.

[153] See issues raised in 'The *De Facto* Relationship', *supra*.

[154] See the comments in 'The Equitable Doctrines', *supra*, where it is suggested that the comments of Deane J in *Amadio* with reference to Cussen J's remarks in *Mueller* certainly leave the way open for this approach.