The Bank Manager Always Rings Twice: Stereotyping in Equity After Garcia

RICHARD HAIGH* AND SAMANTHA HEPBURN**

A INTRODUCTION

> No one could agree on anything. We lived in a mist of half-shared, unreliable perception, and our sense data came warped by a prism of desire and belief, which tilted our memories too. We saw and remembered in our own favour and we persuaded ourselves along the way. Pitiless objectivity, especially about ourselves, was always a doomed social strategy. We're descended from the indignant, passionate tellers of half truths who in order to convince others, simultaneously convinced themselves. Over generations success had winnowed us out, and with success came our defect, carved deep in the genes like ruts in a cart track — when it didn't suit us we couldn't agree on what was in front of us. Believing is seeing . . . And that was why metaphysics and science were such courageous enterprises, such startling inventions, bigger than the wheel, bigger than agriculture, human artifacts set right against the grain of human nature. Disinterested truth. But it couldn't save us from ourselves, the ruts were too deep. There could be no private redemption in objectivity.[1]

Stereotyping is an inevitable part of human interaction. Everyone is judged, to some extent, according to individual perception, with reference to such factors as physical appearance, social position, marital status, language facility and ethnicity. It is not possible to eradicate stereotyping because it is a natural, automatic — sometimes instinctive — human response. In a legal context, however, there is a need for some mechanisms to control the degree to which stereotyping influences judicial decision-making so as to ensure that justice is administered in as neutral and impartial a manner as possible.

Whether it be in the determination of facts by a trial judge or the development and expansion of legal principles within the appellate courts, legal decision-makers need to avoid using stereotypes in a discriminatory or prejudicial fashion. This may not always be easy because stereotyping can be an unconscious, indirect process — a judge may not even be aware that his or her assessment is prejudicial or impartial. Nevertheless, reducing the circumstances that are favourable to the perpetuation of discriminatory stereotyping

* Senior Lecturer, School of Law, Deakin University, Victoria.
** Senior Lecturer, School of Law, Deakin University, Victoria.
We wish to thank Danielle Tyson and Jacqueline Conquest, our research assistants; the School of Law at Deakin for providing a small research grant to help out with this paper; Michael Bryan for his, as always, most insightful and gracious comments and criticisms; Pauline Ridge, who provided some last minute comments and ideas; and the trenchant critiques of anonymous referees. A brief version of this paper was delivered at the 1999 ALTA Conference at Victoria University, Wellington, July 1999. All errors are ours alone.

1 Ian McEwan, *Enduring Love* (1997) 180–1.

is vital in an advanced system of justice. The more complex issue, however, is when to allow non-discriminatory stereotypes to be employed as an aid to decision-making.

The aim of this article is to outline the variety of forms in which stereotyping can manifest itself and distinguish discriminatory stereotyping against legally relevant stereotyping, especially in the context of equitable principle. To this end, we examine, in some detail, the High Court decision in *Garcia v National Australia Bank Limited*.[2] We present this decision as a situation where the majority confirmation of an old equitable doctrine aimed at the protection of a specific group of individuals provides a useful examination of the functional operation of stereotyping within the equitable jurisdiction. It is an approach that complements the fundamental methodology of equity. We illustrate some of how this process operates by examining different examples of stereotyping used throughout the *Garcia* case as it made its way through the court system. The decision is then compared with the case of *Louth v Diprose*,[3] where the creation of an equitable doctrine incorporating a large degree of subjectivity acts as a stimulus for discriminatory stereotyping.

One of the basic aims of the Aristotelian notion of equity is to provide specific relief to individuals not coming within the application of the 'universal' legal principle espoused by the common law.[4] Following this understanding of the nature of equity, in order to determine whether a particular unfairness against an individual should be protected in equity, consideration needs to be given to the wider social implications. If the individual comes from a social group that equity deems needful of specific protection in order to prevent or minimise further exploitation, relief may be granted. In a legal context, the modern equitable jurisdiction is very similar to that of the common law jurisdiction: it implements established principles and adopts a flexible approach in its application. Nevertheless, despite an apparent practical similarity between each jurisdiction, the distinctive feature of the equitable jurisdiction lies in the potentiality that it represents. Its methodology retains the capacity to radically adapt to the circumstances at hand to a greater extent than the common law. This capacity to adapt existing principles to a particular set of facts distinguishes the implementation of common law principles from those in equity. Hence, the discretionary methodology of the equitable jurisdiction offers a more fertile basis for detailed factual analysis.[5] The issue of stereotyping in this context becomes more of a concern. It will be argued that the use of equitable principle to specific target groups — whether the group be

2 (1998) 155 ALR 614 ('*Garcia*').

3 (1992) 175 CLR 621 ('*Louth*').

4 Aristotle, *Nicomathean Ethics* (Book VII, 1926) 10–iii. This approach to equity was also espoused by Coke CJ in *Oxford's Case (Earl of)* [1615] 21 ER 485.

5 For a detailed examination of the unique character of the equitable 'discretion' see Patricia Loughlan, 'The Historical Role of the Equitable Jurisdiction'in Patrick Parkinson (ed), *The Principles of Equity* (1996) 3. See also Patricia Laughlan, 'No Right to the Remedy: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies' (1989) 17 *Melbourne University Law Review* 132, 136; Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World: An Australian Perspective' (1994) 110 *Law Quarterly Review* 238, 239.

characterised according to gender, race, ethnicity or in some other way — can appropriately rely on stereotyping where it is statistically established that such groups are in need of special protection.

Removing the more extreme stereotypical assumptions is a critical part of the ongoing process of legal reform. In the context of the equitable jurisdiction, it would be better if factual assessment and legal principle are considered against some objectively quantifiable measure, thereby preventing the process from degenerating into a capricious and ad hoc appraisal. The broader the discretion of the judge and the subjective level of the analysis, the greater the potential for the perpetuation of stereotyping that can be prejudicial. On the other hand, it needs to be recognised that some stereotypical categorisation is necessary in order to sustain a functional equitable jurisdiction, capable of addressing specific forms of injustice and the needs of those groups in society that require protection. This need is particularly apparent in the broadly discretionary analysis required for the assessment of unconscionable dealing cases.

The paper is laid out as follows. Part B provides a brief background of some current psychological theories regarding stereotyping. In Part C, we delve into the issues that have arisen in the area of guarantees and sureties before examining in detail the *Garcia* decision and highlight some instances of stereotyping that may have occurred during its determination. Part D critically compares the High Court's handling of *Garcia* and *Louth* and analyses the need for a more complex and sensible approach to dealing with stereotyping in the equity jurisdiction. The paper concludes with a call for the use of legally relevant stereotyping in particular instances.

B A BRIEF REVIEW OF STEREOTYPING THEORY

Attributing generalised characteristics or motives to a certain segment of the population or a distinct group of people is called stereotyping.[6] It is the process of assigning identical characteristics to any group member by ignoring actual variation between individuals. Stereotyping is also one of the main ways in which distinctions between 'Us and Them', 'Internal and External' or 'Subject and Object' are created, because those within a group (in whatever form the group is constituted) are seen as highly individualistic and distinct, and therefore more deserving, whereas those outside a group are perceived as very homogeneous and less worthy.[7] It can also be positive, in the sense of an

[6] As noted in Sander Gilman, *Difference and Pathology: Stereotypes of Sexuality, Race and Madness* (1985) 15–6, the term 'stereotype' was first used in the 18th century as a technical designation for the casting of multiple papier maché copies of printing type from a papier maché mould. A simple standard definition used by cognitive psychologists is that stereotypes are the beliefs about the personal attributes of a group: see Richard Ashmore and Frances Del Boca, 'Conceptual approaches to stereotypes and Stereotyping' in David Hamilton (ed), *Cognitive Processes in Stereotyping and Intergroup Behavior* (1981) 35.

[7] See Elliot Aronson, *The Social Animal* (7th ed, 1995) 144–5; Sheri Levy and Steven Stroessner, 'Stereotype Formation and Endorsement: The Role of Implicit Theories' (1998) 74(6) *Journal of Personality and Social Psychology* 1421–36.

attribution of 'desirable' qualities; nevertheless, it is more often seen to be socially harmful because it robs a person of the right to be treated as an individual. That is not to say that stereotyping is necessarily intentional — as a way to simplify the world by attempting to attribute a cause to an event, it may occur at an unconscious level.[8] But that makes stereotyping inevitable. Its ubiquity, and more controversially, its *necessity*, makes some of the gendered analysis in guarantee cases (and academic commentary on them), at times overly simplistic.

1 Gendered Roles, Gendered Stereotypes and Prejudice

Individual attitudes towards the male and female genders, couched as stereotypes, are passed on through generations as part of accumulated knowledge and shared experience, and these form part of any cultural belief system.[9] These attitudes are constantly reaffirmed, through hearsay, through mass media images and through a kind of self-fulfilling prophecy in which those traits and characteristics that are expected are continually screened and reaffirmed. Behaviour conforming to type is more often directly and indirectly encouraged and rewarded, whereas non-corresponding behaviour is usually disparaged.

No person can grow up in a society without being exposed to, and thus learning, the prevailing attitudes concerning each gender. These well-learned sets of associations and traits are established at an early, pre-cognitive age. Five year old children, for example, have already developed clearly defined notions of male and female behaviour, and very often those early childhood beliefs translate into observed outcomes in later life — girls in a 'traditional' environment are more likely to conform to stereotypical gender roles by staying in the home and raising children than girls socialised in a non-traditional, progressive way.[10] Moreover, the background 'noise' of a society greatly affects individual perceptions, since much of what is presented through culture, media and relationships is internalised. For example, as recently as 15 years ago, it was shown that women generally had much lower career expectations than men, due largely to the prevalence of imagery based on stereotypes.[11] And since stereotyping exists largely as nonconscious ideology — beliefs accepted implicitly without genuine awareness — it affects everyone. As researchers have shown, even those who consider themselves feminists will make the same errors as nonfeminists by employing similar gender stereotyping.[12] This points out the insidious nature of stereotyping, as a failure to

[8] John Darley and Peter Gross, 'A Hypothesis-confirming Bias in Labeling Effects' (1980) 39 *Journal of Personality and Social Psychology* 832–45. The ability to control stereotyping is discussed in greater detail below – see Part B.3.

[9] See Charles Lawrence III, 'The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism' (1987) 39 *Stanford Law Review* 317, 322. Also, see Jody Armour, 'Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit' (1995) 83 *California Law Review* 733, 739.

[10] See Aronson, above n 7, 315. This cites studies conducted in the 1980s by Ruth Hartley and Jean Lipman-Blumen.

[11] See Aronson, above n 7, 312ff.

[12] Natalie Porter and Florence Geis, 'Women and Nonverbal Leadership Cues: When Seeing is Not Believing' in C Mayo and N Henley (eds), *Gender and nonverbal Behavior* (1981).

recognise its ubiquity may well lead to ignoring its effects, or assuming only prejudiced persons engage in it.[13]

Like our musculature, with its potential to lie dormant or become developed, however, stereotyping can be combated by a steady dose of positive role-modeling.[14] Although one may unconsciously carry stereotypes, or even have knowledge of them, conscious personal beliefs may or may not be congruent with the stereotype.[15] Thus, stereotyping does not necessarily manifest itself as a prejudice.[16] Cognitive psychologists now agree that responses derived from nonprejudiced personal beliefs can inhibit and replace responses that are based on stereotypical beliefs. The main determining factor in whether replacement will occur is whether an individual is low or high prejudiced. Strategies can be developed that will activate positive responses and inhibit stereotypical responses, but these strategies depend entirely on an individual recognising this complex layering of attitudes.[17] This is neatly summarised by Professor Jody Armour, contrasting gender stereotyping with that of gender prejudice:

> For example, although socializing forces undoubtedly have entrenched the cultural stereotype of women in the memory of feminists as well as every other American, feminists could be called "sexists" only in a Pickwickian sense. One reason it seems so anomalous to apply the value-laden term "sexist" to feminists is because feminists have both renounced the cultural stereotype about women and developed egalitarian personal beliefs about women. Thus, feminists have two distinct and conflicting cognitive structures concerning women: the cultural stereotype and their egalitarian personal beliefs.[18]

Armour, a law professor, argues that there is a need for a better understanding of the interaction between stereotyping and discrimination in law, so that evidentiary rules prohibiting most forms of stereotyping can be altered. He would allow stereotyping where it may be effective in achieving better outcomes and actually promote non-discrimination, but retain the proscription where stereotyping is used to promote discriminatory attitudes.

The difficulty for law reformers is to understand how to employ stereotyping beneficially. Making a conscious decision to renounce an established prejudicial stereotype is difficult, however, because of the prevalence of evidence validating the stereotype and the habitual responses that follow, and the consequent likelihood of defeating the useful aspects of stereotyping. In order

[13] R S Baron, M L Burgess and C F Kao, 'Detecting and Labeling Prejudice: Do Female Perpetrators Go Undetected?' (1991) 17 *Personality & Social Psychology Bulletin* 115–7; see also Levy and Stroessner, above no 7.

[14] See Florence Geis et al, 'TV Commercials as Achievement Scripts for Women' (1984) 10 *Sex Roles* 513–25. But like muscles in another way, stereotyped responses can be reactivated quickly even if they have been actively combated: see Eliot Smith and Jamie DeCoster, 'Knowledge Acquisition, Accessibility and Use in person Perception and Stereotyping: Simulation With a Recurrent Connectionist Network' (1998) 74(1) *Journal of Personality and Social Psychology* 21–35.

[15] Patricia Devine, 'Stereotypes and Prejudice: Their Automatic and Controlled Components' (1989) 56 *Journal of Personality and Social Psychology* 5, 5.

[16] See Gordon Allport, *The Nature of Prejudice* (1979) 12ff.

[17] Armour, above n 9, 745.

[18] Ibid 749.

to reject stereotype-congruent responses to women, for example, a person must intentionally inhibit the automatically activated stereotype response and expressly activate personal beliefs. This involves controlled processes and requires, as Patricia Devine starkly declares, 'intention, attention and effort'.[19] Devine has shown that unconscious stereotypes are liable to be exposed even in persons with a highly developed nonprejudicial belief system, as it is easy to slip into habitual beliefs, automatically activating long-established stereotypes across an entire range of behaviours.[20]

As well, the stereotyping process is continually and repeatedly altered and modified, so that categories of social groupings, such as men and women, or social occupations, such as police officers, bankers or lawyers, are constantly refined according to stereotypes.[21] This again makes controlling pernicious stereotyping elusive. Our brains instantly retrieve judgments about other humans from the category most readily accessible (usually the most immediately present), which has been 'primed' by recent activity. As Steven Neuberg comments:

> [A] moviegoer would have a greater than usual tendency to perceive the behaviour of a stranger who bumps into him or her as reflecting hostility or aggressiveness [after viewing a violent film depicting a preying mugger]. Alternatively, after viewing a comedy featuring the inept Inspector Clouseau, the moviegoer might be more likely to perceive the identical social interaction in terms of the stranger's clumsiness.[22]

In other words, the type of cognitive exposure preceding an interaction can prime specific cognitive categories that thereafter influence the interpretation of the incident. To take an example relevant to this article, a male bank manager who has just finished dealing with a competent and professional woman would have a greater tendency to assess the next female customer in a positive light, compared to the case where he has recently had a heated argument with

[19] Devine, above n 15, 6. See also Janet Ruscher and Laura Lawson Duval, 'Multiple Communicators with Unique Target Information Transmit Less Stereotypical Impressions' (1998) 74(2) *Journal of Personality and Social Psychology* 329–44. But cf, Ziva Kunda and Kathryn Oleson, 'Maintaining Stereotypes in the Face of Discomfiture: Constructing Grounds for Subtyping Deviants' (1995) 68(4) *Journal of Personality and Social Psychology* 565–79 (people may be immune to changing their stereotypes in daily social life), David Dunning and David Sherman, 'Stereotypes and Tacit Inference' (1997) 73(3) *Journal of Personality and Social Psychology* 459–71 (information about a person that is indeterminate or ambiguous will be filled in by using stereotypical cues about that person) and Yaacov Trope and Erik Thompson, 'Looking for Truth in all the Wrong Places? Asymmetric Search of Individuating Information about Stereotyped Group Members' (1997) 73(2) *Journal of Personality and Social Psychology* 229–41 (people are less likely to acquire individuating information about or from traditionally stereotyped persons than non-stereotyped).

[20] Devine, above n 15, 10–12. See also E Tory Higgins et al, 'Category Accessibility and Impression Formation' (1977) 13 *Journal of Experimental Social Psychology* 141, 141–5.

[21] See E Tory Higgins and Gillian Kin, 'Accessibility of Social Constructs: Information-Processing Consequences of Individual and Contextual Variability,' in Nancy Cantor and John Kihlstrom (eds), *Personality, Cognition and Social Interaction* (1981) 69, 71–2.

[22] Steven Neuberg, 'Behavioral Implications of Information Presented Outside of Conscious Awareness: The Effect of Subliminal Presentation of Trait Information on Behaviour in the Prisoner's Dilemma Game' (1988) 6 *Social Cognition* 207, 208.

a woman over some matter he considers trivial, or self-evident. Or a judge may draw upon an entire range of stereotypes where a witness testifies in a manner consistent with a well-known stereotype. These results carry enormous implications for evaluating judgments in disputes where traits and behaviours may predominate because the implementation of legal (or equitable) rules regarding stereotyping in the artificial arena of a courtroom will not accurately reflect the initial conditions (including stereotyping) that gave rise to the dispute in the first place. Legal and evidential principles that are not carefully crafted will likely be overbroad, and affect both beneficial and prejudicial stereotyping.[23] One of the concerns, as will be discussed in the context of the recent judgment of the High Court in *Garcia*, is to ensure courts avoid the use of simple representative and attitudinal heuristics like stereotyping where they can be grossly prejudicial, but accept that they may prove useful in other, more controlled conditions.

2 Gender Salience, Relevance and Stereotyping in Law

Higgins and King have demonstrated that traditional gender stereotyping occurs much more readily where the issue of gender is left ambiguous, or not expressly brought to the attention of subjects (made 'salient').[24] In cases where gender is rendered salient, traditional stereotypes faded, and personal beliefs became more determinative. This has important implications in a legal context as Armour notes that 'justice often will be better promoted in litigation if we consciously confront stereotypes, than if we take a colorblind, ostrich-in-the-sand approach.'[25]

Finally, the line between stereotyping and legitimate linking generalisations used to determine relevance is often blurred, particularly in the context of legal

[23] Armour, above n 9, 752.

[24] See Higgins and Kin, above n 21, n 125. Their study is worth outlining in detail. The relevance of the subjects' gender was manipulated by varying the sexual composition of the different experimental groups. For example, in one series of experiments, a female experimenter conducted 20 groups of subjects each composed of two or three females and one male, and a male experimenter conducted 20 groups of subjects each composed of two or three males and one female. The researchers reasoned that 'gender should be more salient for a group member whose gender is in the minority than for a group member whose gender is in the majority' (at 85). In Study 1, half of the subjects read a paragraph supposedly describing a female undergraduate (Barbara) and the other half read the same paragraph but as describing a male undergraduate (Bob). The paragraph was constructed to unambiguously exemplify the following eight traits: two evaluatively positive, stereotypically male traits, (active, ambitious) and two evaluatively negative, stereotypically male traits, (aggressive, selfish); two evaluatively positive, stereotypically female traits, (polite, sensitive) and two evaluatively negative, stereotypically female traits, (emotional, dependent). The subjects were then asked, as best they could, to reproduce the paragraph about Bob/Barbara. When the person described in the paragraph was ostensibly male (Bob), the subjects recalled less stereotypically male and more stereotypically female information about him when their gender was in the minority (i.e., high gender salience) than when their gender was in the majority (i.e., low gender salience). Similarly, when the person described in the paragraph was ostensibly female (Barbara), the subjects recalled less stereotypically female information about her when their gender was in the minority than when it was in the majority (results that seem to run counter to what might be expected by virtue of group dynamics).

[25] Armour, above n 9, 772.

decision-making. Many legal concepts rely on categorisation to define and sort human behaviour into discrete elements. A well-known example in the common law would be the objective reasonable person standard. In the equitable jurisdiction, the most common generalisation is that of fiduciary duty. Both are, in a fashion, attempts to create a general standard of behaviour out of a stereotyped notion of correctness.

In Australia, most of the law of civil obligations including equitable doctrines such as unconscionability and undue influence (and the attendant commentary), assumes that stereotyping is per se discriminatory or prejudicial. As will be discussed in Part D, there is a need to distinguish between the prejudice that arises out of stereotyping, and more benign forms that we refer to as legally-relevant stereotyping. In fact, stereotyping can be used to combat prejudice, so it can be useful to employ in certainly tightly controlled situations. This is as true in the area of equity as elsewhere. As the courtroom is one area where efforts to enlighten the population can be successful, judges, especially those at the highest appellate levels, can be more attuned to pronouncements on such matters as stereotyping and prejudice. This idea will be examined in more detail, taking the case of *Garcia* as our starting point.

C *GARCIA* AND THE ROLE OF STEREOTYPING

1 Gold, Physiotherapy and a Bank: *Garcia* and the new *Yerkey*

In *Garcia* the majority of the High Court confirmed the validity of what has become known as the 'special wives' equity, first enunciated by Dixon J in *Yerkey v Jones*.[26] Under the old *Yerkey* principle, where a married woman's consent to become a surety for her husband's debt is obtained by the husband and a creditor accepts this without dealing directly with her, and the wife does not properly understand its effect, she has a prima facie right to have the agreement set aside.[27] The decision by four justices of the High Court in *Garcia* is

[26] (1939) 63 CLR 649 ('*Yerkey*'). For academic discussion on the 'special wives equity' see: Dianne Otto, 'A Barren Future? Equity's Conscience and Women's Inequality' (1992) 18 *Melbourne University Law Review* 808; Belinda Fehlberg, 'The Husband, the Bank, the Wife and her Signature' (1994) 57 *Modern Law Review* 467; Nicola Howell, 'Sexually Transmitted Debt': A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1994) 4 *Australian Feminist Law Journal* 93; Belinda Fehlberg, 'The Husband, the Bank, the Wife and her Signature — The Sequel' (1996) 59 *Modern Law Review* 675; Anthony Duggan, 'Till Debt Us Do Part: A Note on *NAB v Garcia*' (1997) 19 *Sydney Law Review* 220; Pascoe, 'Wives, Business Debts and Guarantees' (1997) 9 *Bond Law Review* 58; Belinda Fehlberg, 'Women in "Family" Companies: English and Australian Experiences', (1997) 15 *Company and Securities Law Journal* 348; Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (1997); Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Discussion Paper No 69 Pt II) (1994) ('*Women's Equality*'); G F K Santow, 'Sex, Lies and Sureties – Touching the Conscience of the Creditor' (1999) 10 *Journal of Banking and Finance Law and Practice* 7; and Cretney, 'The Little Woman and the Big Bad Bank', (1992) 108 *Law Quarterly Review* 534.

[27] See the judgment of Cussen J in *Bank of Victoria v Mueller* [1925] VLR 642 which preceded *Yerkey*.

novel in its explication of the relational focus of the *Yerkey* principle; according to them, the rationale underlying the special wives equity is not based on traditional, stereotypical notions of women, but rather the unfairness that can flow from relationships of trust and confidence generally. In this respect, the judges have attempted to remove those negative stereotypes, and introduced a broader, more adaptable principle, better suited to modern relational dynamics.

Prior to *Garcia,* application of the *Yerkey* principle had come under increasing scrutiny, given societal changes affecting women. In particular, many courts had moved to extinguish, or at least ignore, the perceived stereotyping underlying the *Yerkey* principle and to recognise that the display of legal tenderness towards women in a marriage relationship is not necessarily an accurate response in a modern, domestic relationship.[28] In essence, it was the concept of the ignorant, subservient wife (or, more broadly, female) which was outmoded and offensive to equity's supposed progressivity.[29] Nevertheless, advocates for the retention of the *Yerkey* principle (or an equivalent) pointed to the need to provide specific protection to wives in joint financial situations, as many wives continue to rely on their husbands without being truly independent. Furthermore, the special circumstances covered under the *Yerkey* principle provided protection in cases that often did not fit within the terms of the unconscientious conduct principle developed by the High Court in *Commonwealth Bank v Amadio,*[30] thus acting as an additional brake on overzealous husbands.

This special wives equity in *Garcia* remains unique to Australia, having been specifically rejected recently in England,[31] New Zealand[32] and never been wholeheartedly adopted in Canada.[33] In *Barclays Bank plc v O'Brien,* the

[28] Responses ranged from rejecting the principle outright – see for example the English decisions in *O'Brien* (below n 31 and the cases following it at n 34) – to incorporating it under the umbrella of 'unconscionable dealing' – see, for example *Garcia v National Australia Bank* (1996) 39 NSWLR 577 (*'Garcia (1996)'*) and *Akins v National Australia Bank* (1994) 34 NSWLR 155 (*'Akins'*).

[29] See especially, Cretney, above n 26 and Otto, above n 26.

[30] (1983) 151 CLR 447 (*'Amadio'*). It has been argued that the *Amadio* principle rarely applies to protect vulnerable women in marriages because it is necessary to establish that the disability of the weaker party is sufficiently evident to the stronger party making it 'unconscientious' for the stronger party to proceed with the transaction. The *Yerkey* principle does not require this level of knowledge under either limb making it easier for a wife to have the transaction set aside – see articles by Pascoe, Fehlberg (1997) and Duggan, all above at note 26.

[31] *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL) (*'O'Brien'*).

[32] In its latest case, *Wilkinson v ASB Bank* (1998) 6 NZBLC 102,427, the Court of Appeal adopted a modified *O'Brien* approach.

[33] There is no uniform Canadian approach – it is only in British Columbia that the *Yerkey* principle has been followed – see *E&R Distributors v Atlas Drywall Ltd* (1980) 118 DLR (3d) 339, which has subsequently been qualified in *North West Life Assurance Co of Canada v Shannon Heights Developments Ltd* (1987) 12 BCLR (2d) 346, 349. The other provinces have rejected or ignored *Yerkey* – see, for example, *Bank of Montreal v Featherstone* (1989) 58 DLR (4th) 567 (Ont CA), *Royal Bank of Canada v Poisson* (1977) 103 DLR (3d) 735. See also Reuben Hasson, 'Darkness at Noon – A Comment on the Consumer Guarantee Law in Ontario' (1995) 11 *Banking and Financial Law Review* 141. Canada seems poised to follow the *O'Brien* approach given that its guidelines were applied in the different context of a 'knowing receipt' constructive trust in *Gold v Rosenberg* (1997) 152 DLR (4th) 385 (SCC).

House of Lords concluded that there was no need for a special wives equity because adequate protection could be afforded under ordinary equitable principles.[34] As Lord Browne-Wilkinson argued, the *Yerkey* principle was based upon unsure foundations, developed in an artificial way, and failed to reflect the current requirements and certainties of modern society.[35] Under the new English approach, a wife qua wife will not be able to set aside a transaction purely on the grounds that she did not understand it. There, the courts rely on ordinary undue influence principles, except in cases where undue influence is proven and the creditor knew of the marriage relationship. In this limited situation, the creditor will be unable to enforce the suretyship unless it can prove it was reasonably satisfied that the wife understood the transaction and entered it freely.[36] Furthermore, the English exception applies to a range of relationships outside of but analogous to marriage, based on the fact of cohabitation,[37] or even emotion.[38]

Faced with determining the continuing relevance of the *Yerkey* principle in light of English developments, the High Court judges in *Garcia* came up against a range of competing legal and policy considerations. First and foremost of these was the discrepancy between the perception of modern gender roles and domestic reality. Whilst Australian society today embraces equality between the sexes[39] and espouses the ideal of mutuality and balance between marriage partners, it was noted that a substantial number of women remain subservient to their husbands, and rarely, if ever, independently assess the suitability of their husband's financial transactions. On the other hand, overturning these security devices may have the effect of reducing the flow of private capital to businesses because of institutional cautiousness that would likely result.[40] A final concern is that over-reliance on the *Yerkey* principle may encourage husbands to escape their obligations by allowing them to challenge the very explanations they themselves gave their wives of the need to execute surety documents.[41]

The Court therefore had to examine whether a patently stereotyped principle is a valid component of the equitable jurisdiction, and if so, what implications this might have. What many of the High Court justices perhaps did not realise, however, is that the case provides a strong illustration of the role that stereotyping plays in resolving disputes. Although the High Court eventually takes what seems to be a fairly strong and principled stand against negative

[34] See also *CIBC Mortgages Plc. v Pitt,* [1994] 1 AC 201; *Royal Bank of Scotland v Etridge and others,* [1998] 4 All ER 705 (CA), following *O'Brien.*

[35] *O'Brien,* above n 31, 194–5.

[36] Ibid 198–9.

[37] Ibid 198.

[38] See the latest case, *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at 147.

[39] For example, see the *Sex Discrimination Act* 1984 (Cth) ss 5–6, 7D(1); and *The Equal Opportunity Act 1995* (Vic) ss 6–9.

[40] See *O'Brien,* above n 31, 188. This concern is strongly critiqued in Anna Lawson, *'O'Brien* and its Legacy: Principle, Equity and Certainty?' (1995) 54(2) *Cambridge Law Journal* 280.

[41] See Cretney, above n 26. See also Kirby J in *Garcia,* above n 2, 637.

gender stereotyping,[42] it does this without recognising the ever-present nature of stereotyping in the judicial process and how it shapes, both positively and negatively, the resolution of disputes. Because of its ubiquity, it will be suggested here that all the actors involved, from the solicitors at the initial deposition and affidavit stage, to the witnesses, barristers, trial judge and appellate judges, used various forms of stereotyping. What needs to be controlled, however, are the resultant negative prejudicial aspects. Unfortunately, as will be illustrated in part C.2 below, in a number of instances in this case, the courts seem to conflate the two forms of stereotyping, and correspondingly engage in an over-idealisation of their role as arbiters of society's norms.

The facts of the case are not particularly unusual, and have been commented upon in great detail.[43] Over a two year period, between 1985 and 1987, Jean Garcia signed four guarantees in favour of the bank for debts owed by her husband Fabio's company, Citizens Gold Bullion Exchange Pty Ltd, which had by then become involved in gold speculating. Jean was a director of this company also, but maintained little if any interest in the business. At trial, Young J found that Jean understood, in particular, the nature of the November 1987 guarantee at the time of signing and she knew it was to secure the overdraft of the company. Nevertheless, he found that she did not understand that that guarantee was secured by the previous mortgage she had entered into in August 1979. Young J also accepted that Jean believed that the guarantee was 'risk proof' because the company would at all times have either enough money in the bank or gold in a safety deposit box to support it. Part of the reason for so finding was due to Fabio's frequent practice of getting Jean to sign documents related to these guarantees at the door of their house, as she was rushing out the door to go to work.

Jean and Fabio Garcia subsequently separated. Jean advised the bank of this fact and requested that the bank account for her husband's company be kept within certain limits. On 13 October 1989, Fabio's company was wound up. Fabio was later arrested on fraud charges related to his business dealings.

Unlike many surety cases, Jean Garcia did exhibit a fairly sophisticated business knowledge. She knew about leasing agreements, mortgages and share capitalisation. But there were also many similarities with other cases. Jean deferred many decisions outside of her own business to Fabio. Fabio had complete control of the finances and bullied Jean in many respects — requiring her to sign documents on the run, and telling her she was not competent to comprehend the financial details. Jean fully trusted Fabio, and Fabio and the bank were found to abuse this trust.

[42] See *Garcia,* above n 2 – the majority judgment at 619–20 and Kirby J at 633–9, especially at 635–6. Callinan J finds himself in a distinct minority on this point, referring to changes in women's roles and opportunities in society as 'perhaps more apparent than real', 649.

[43] See, for example, Samantha Hepburn, 'The *Yerkey* Principle and Relationships of Trust and Confidence: *Garcia v National Australia Bank'* (1997/1998) 4(1) *Deakin Law Review* 99; Robyn Baxendale, *'Garcia v National Australia Bank Limited:* Ensuring Equity in Surety Transactions: A Legal Debt-End' (1999) 21 *Sydney Law Review* 313; and Su-King Hii, 'From *Yerkey to Garcia:* 60 Years on and Still as Confused as Ever!' (1999) 7 *Australian Property Law Journal* 3.

In June 1990, Jean Garcia commenced proceedings in the Supreme Court of New South Wales against the National Australia Bank seeking a declaration that the mortgage and guarantees she had given for the indebtedness of the company were void on the grounds of undue influence or alternatively, unconscionable conduct. The case eventually made its way up to the High Court.

In its decision, the High Court adopted three different approaches to the spousal surety problem in Australia: Gaudron, McHugh, Gummow and Hayne JJ chose, largely, to ignore previous criticisms and highlight instead the beneficial protective elements of the *Yerkey* principle. Their new *Garcia* principle, however, de-mystifies the old principle by highlighting its relational foundation. This in turn, dilutes the gendered, paternal nature of the *Yerkey* rule. They make it clear that the law is not simply protecting the weak and vulnerable wife, but rather, the trusting and confident partner in a close and dependent relationship — who so happens, in most instances, to be the wife. On the other hand, Kirby J reformulated the principle, indicating that *Yerkey* utilised outdated and prejudicial stereotypes, and therefore preferred to adopt a stance closely aligned with that of Lord Browne-Wilkinson in *O'Brien.* Kirby J appears to have been motivated by a strong desire to eradicate the old *Yerkey* principle, believing that it was based on discriminatory, biased and paternal attitudes. Finally, the wild card in the decision was Callinan J, who felt that Dixon J's principle in *Yerkey* has been accepted for so long as the law in Australia, and served the ends of justice so well, that it should remain. His position illustrates the nascent but growing doctrinal and ideological gulf on the High Court, separating those who see no need for the law to recognise or adapt to social inequities, and those who do.

2 Women, Barristers and Humour: *Garcia* and the Use of Stereotyping

While the High Court, particularly in the judgment of Kirby J, acknowledged the troubling effects of gender stereotyping, in doing so it adopted, in the main, a very strong stance against any form of stereotyping. Popular as this view is, it is also somewhat misconceived in that it fails to acknowledge that stereotyping is not only an entrenched form of human behaviour but also a necessary and inevitable one. Stereotyping shows itself in an almost limitless variety of situations in ways that are often outside the control of the actors involved. It cannot be rooted out by simple doctrinal alterations to legal or equitable principles, nor, we believe, should the nation's highest court pronounce on it without acknowledging its role in educating and eliminating prejudice.

In Part D of this paper, it is argued that the use of stereotypes is sometimes a necessary component of effective justice, particularly within the equitable jurisdiction. It is, therefore, revealing to use the *Garcia* case to highlight the variety of uses, in the legal process, to which stereotyping is put. Although contemporary judges are, for the most part, cognisant of the inflammatory effects of stereotyping and rarely employ blunt examples in their

judgments,[44] at the more basic level of courtroom drama, there is less control placed on stereotyping strategies.

As discussed previously, not all stereotyping is deliberate or malevolent. In the areas examined below, gender, competence and language, we hope to show how stereotyping is often used, be it consciously or unconsciously, strategically or carelessly. Our goal at this stage is to illustrate how the High Court's doctrinal position outlawing stereotyping in situations such as that found in *Garcia* is rather crude and unsophisticated. We then go on to show that distinctions need to be made between stereotyping that creates or promotes prejudice (which should be legally sanctioned) and stereotyping that, deontologically, can be useful in an imperfect world — what we refer to as legally-relevant stereotyping. In this way we hope to illustrate how fairer results in legal disputes may be achieved by a better understanding of stereotyping effects.

(a) Gender

Women have been the source of so many rich stereotypes that can often be contradictory. In sexual assault cases, for example, feminist legal analysis has emphasised how witness credibility is linked to a simplistic characterisation of women. A complainant may be cast in one of several roles often linked to the body — soul dichotomy, including whore, tease, vengeful liar, the madonna, black widow, fair maiden or someone who is mentally or emotionally unstable.

Does a parallel phenomenon occur in civil actions? Mary Joe Frug has shown how similar descriptions do form the basis of civil judgments.[45] By portraying women in equally simplistic terms, civil courts often ignore other competing facts — in Frug's example, a judge describing one party as a 'poor widow' allows all the stereotype imagery to pour forth (such as weak, needy, dependent). This ignores the possibility that she could be emotionally vigorous, a woman whose long-standing widowhood gave her strength, or who may never have been emotionally dependent at all. Without going into the details of a person's life, judges can pretend they are not using any discretion in their judgment. The same can be said about *Garcia* if one only reads the published judgments. But reading transcripts as well aids in giving a much fuller picture of the parties, and illustrates, sometimes, how lawyers, witnesses and judges — perhaps unconsciously — use stereotyping techniques to advance their cause.

The common law legal system accords great authority to findings of fact made by trial judges. Not only do they decide the outcome at first instance, but their findings form the basis for any subsequent appeal. This portrayal of

[44] See, however, the Senate Committee on gender bias: Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary,* Canberra, Senate Printing Unit, 1994 (Senator B Cooney, Chairman).

[45] Mary Joe Frug, 'Re-reading Contracts: A Feminist Analysis of a Contracts Casebook' (1985) 34 *American University Law Review* 1065, especially at 1085–6. See also Howell, above n 26.

reality, crucial to the legitimacy of the legal system, is very discretionary depends on the point of view and social perspective of trial judges and hc they choose to characterise litigants and witnesses. As most judges are dra from a limited and elite class of barristers, they are likely to have a mc narrowed view of the world, with their own specific stereotypes.

Garcia is ultimately a case that goes a small way towards eliminating a di criminatory double-standard; however, it is interesting to examine how stere typing may have been used strategically to depict both women and men There are a number of instances where this occurs. In the trial judgmer Young J refers to Jean Garcia as a 'divorced lady whom the evidence shows in her 52nd year, though she presents as younger than that'.[47] The two items fact that Young J conveys here, Jean Garcia's age and her marital status, a buried amongst other information that carries stereotyped associations. She a 'lady' as opposed to a woman, which hints at a certain bearing or stature respectability. She is not simply 52 years old, but someone whose look beli her age, and only through corroborative evidence is the truth of her a revealed. Is Young J unsure of her credibility? Is he flattering her? Or is h hinting that Jean Garcia relies on artificial means to combat age (why use th medical term 'presents' otherwise)? Would a 52 year old man be similarl described?

Young J's decision takes a similar tack regarding family and gender role Without any other evidence, he takes judicial notice of a stereotype:

> Despite women's liberation, there are still in the community a large numb of women who, especially when their husband is a Master of Busine Administration from Harvard and their talents lie in another field, still d trust their husbands to carry out the business from which the family wi receive benefit in the way in which the husband thinks best. Furthermor they will act as directors and sign pieces of paper on request.[48]

But stereotyping is not limited to attributions given to others. Psychologist have recognised that humans will self-stereotype, especially in order to preser a coherent picture of character, or even to gain advantage. In the cross exam nation of Jean Garcia by Mr Bruce Oslington QC for the National Bank, it i possible to see Jean Garcia portraying herself as the weaker sex, subject to man's overpowering nature:

> Mr Oslington: Did it cause you concern that [your husband] signed docu ments making you a director of a company when you reall didn't know about it?

[46] There are times where this is noted and reproved. Kirby J, in particular, during submission before the High Court makes the occasional specific admonishment (interestingly usuall against stereotyping men) – see for example, *Garcia v NAB,* Transcript of Proceedings, March 1998, "http://wwwlaustlii.edu.au" *http://wwwlaustlii.edu.au* ('High Cou Transcript') 22: 'I must not allow that. That sounds a rather sexist statement, some articu late and educated men are the objects of cads, or whatever is the version. I just think thi is – it makes me feel uncomfortable that we are slipping into stereotypes.' See also Kirb in the High Court Transcript at 18–19, 36, 41.

[47] *Garcia v National Australia Bank* (1993) 5 BPR 11,996 *('Garcia, (1993)).*

[48] Ibid 12,012. Only Kirby J, in *Garcia,* above n 2, attempts to move outside of the stereo typical view of marriage.

Jean Garcia: It caused me some concern [that my husband] would do that.

Oslington: Why did it cause you concern?

Garcia: Because my husband was a little forceful at times and I tended to do what he asked me to do.[49]

Of course, this does not discount the fact that there may have been a threatening or abusive atmosphere in the Garcia home. But Oslington's questions did not necessarily lead to such answers, and it is arguable that Jean was attempting to paint a picture consistent with a certain view of herself.

Jean Garcia's own view of marriage also sits comfortably within accepted stereotypes, as she states, 'when you are married you share things ... I ... would give my husband whatever he needed if he really needed it, being married.'[50] She also shows a demureness that could be construed as naivety simply by returning Oslington's questions:

Oslington: [D]o you have the guarantee in front of you?

Garcia: This large one?

Oslington: Just turn it to the first page.

Garcia: The first page?

Oslington: Yes. Do you see a number of headings in the guarantor items 1,2,3 and 4?

Garcia: National Australia Bank, Citizens –

Oslington: I am not asking you to read them, but do you see them there?

Garcia: Yes.[51]

Whether any of this is deliberate or not, it can be seen as a subtly effective way of gaining the sympathy of a judge. Of course, it could be read in a very different way, as being simply a literal response to the question asked. In the end, it is not really relevant, as it is the potential for stereotyping in the listener that is the real concern here, not the intention of the speaker.

In fact, listeners can employ their own stereotyping or accept another's self-stereotyping and both can be much more effective than a barrister's direct attempts to elicit character in cross-examination. This is because stereotyping effects operate automatically at an unconscious level, bypassing normal cognitive screening devices. Notice in the next example the barrister's attempt to portray Jean Garcia as a conniving woman, willing to go to any length to get what she wants. The bluntness of this approach is easily circumvented by the witness's direct rebuttal. Compared to the subtlety of the above interpretations reached via stereotyping, the direct approach seems clumsy:

[49] Cross-examination of Jean Garcia by BC Oslington QC, 15 March 1993, NSW Supreme Court, in High Court Appeal Book, vol 1 at 17 [all witness testimony in the NSW Supreme Court is hereafter referred to as the *Garcia* Testimony].

[50] Ibid 10.

[51] Ibid 112.

Oslington: What you are seeking to convey to his Honour, is it not, i certain naivety about business affairs and seeking to convey his Honour that you really conducted a very basic business'

Garcia: I did.

Oslington: And did not engage in borrowings, did not engage in leasi through family trusts and the like, that is the impression y were seeking to convey, weren't you?

Garcia: Well, that is actually the truth.[52]

Or another instance:

Oslington: And you were prepared to tell that lie, namely that your hu band contributed towards the purchase of the land, in order avoid having to pay stamp duty on the transfer to yo husband, didn't you?

Garcia: Well, that was really my husband's idea, but yes.

Oslington: On the other hand, it does not suit you in these proceedin to tell that lie because you want to convey to His Honour t you were really supporting your husband in the early yea don't you?

Garcia: I was...

Oslington: Can His Honour take it you were in the habit of swearing the truth of matters when all you have is an imagination th things have happened?

Garcia: It is very difficult to remember 10, 15 years previously.[53]

It is trite to say that in any cross-examination, barristers try to determine expose inconsistencies, contradictions and lies in witnesses statements. B part of Oslington's technique here, an attempt to directly establish Je Garcia's character, is more easily handled by Jean's simple demurrers to t questions. The earlier examples, in contrast, provide a much greater oppo tunity for hidden stereotyping effects because there is much less control plac on the interpretation — they show instances where it is much more difficult either accept or reject the answers without also using attribution to make sen of the situation.

These observations are not limited to women, as men can be the subject stereotyping effects as well. Where a man's character is in issue, it is usual seen as domineering and controlling, occasionally as effete and spineless. M are the ones who are bullies and have affairs, as Mr Oslington affirms, slippir into stereotype in forming a hypothetical by linking a generic term - guarantor — with a specific gender, and then drawing out negative attribut of the borrower: '[O]ne would not seriously expect a bank to be required to a

[52] Ibid 128.
[53] Ibid 22, 27.

a guarantor about the state of their marriage or whether the husband is bullying them and whether the husband has a mistress, and matters such as that.'[54] Or there is Fabio Garcia, whose criminal arrest, coupled with an uncontradicted statement like the one following, may well act to reinforce a judge's view of his unsavouriness:

> You have such a narrow parochial attitude Jean. You think the world revolves around physiotherapy. The world revolves around finance and world markets and that is what is really important ... Your family are just shopkeepers and have never even been out of Australia ... If I listened to you I would never make any money. You have just no idea so you have to let me make my decisions ... you don't know how money markets operate.[55]

Then there are the stereotypes formed of home and home life. Home is warm, comforting, secure, in contrast to the world of business, which is cut-throat and mean. During Jean Garcia's testimony, Mr Oslington again seems to acknowledge this, in his attempts to avoid a stereotype of the home life by concentrating on Mrs Garcia's execution of the document, but not the surrounding circumstances. He tries to downplay the association, concerned that a vision of home comforts would detract from a characterisation of Jean as a sophisticated businessperson. Jean, on the other hand, keeps on trying to reestablish the link with home:

Oslington:	... I understood you to say that you remembered signing [the first guarantee document]?
Garcia:	I believe I signed it at home.
Oslington:	I understood you to say this morning that you believed that that document was, in effect, the trigger for the first overdraft your husband got from the National Bank?
Garcia:	Yes.
Oslington:	So can His Honour take it that you can recall executing that document?
Garcia:	I recall executing it at home.
Oslington:	Can His Honour take it that you can recall executing that document.
Garcia:	Yes, sir.[56]

Thus, despite a generally high level of caution in avoiding gender stereotypes, the possibility of subtle self-stereotyping, and the insidious effects at other times, shows how difficult stereotypes are to expel or resist.

[54] High Court Transcript, above n 46, 57–8.
[55] From a statement of Jean Garcia's in the Supreme Court of NSW, dated 14 September 1992, at 8, 19, contained in High Court Appeal Book, vol 1.
[56] *Garcia* Testimony, above n 49, 43.

(b) Education, Professionalism and Competence

Each of the three courts attested to Jean Garcia's professional competenc
is commonplace in surety cases involving spouses to refer to the wom
competence in assessing the issue of undue influence or unconscionabi
There is a stereotype at work here, because using this qualifier more ofte
describe women implies that they are unusual descriptive characteristic
then becomes a simple matter to elide into associating educational compet
with financial savvy as Jean Garcia's counsel, Mr D F Jackson QC doe
argument before the High Court:

> [C]ould I just observe in passing that while some women may have bec
> better educated, so, too, have their husbands. One sees, in the present c
> that here the appellant had a Diploma in Physiotherapy, but her husband
> an MBA from Harvard . . . and in financial things, one would have tho
> the contest was a bit unequal.[57]

Does the level of education necessarily correlate with the ability to com
hend financial documents? It might seem to make sense intuitively (as m
stereotypes do) but where is the legal proof? Even an MBA degree (es
ially one from Harvard) may not delve into the unglamorous world of h
financing and suretyship.

A feeling about a person's competence can be brought out in many w
in the witness box. Oslington cleverly elicits ideas about Jean Garc
competence from seemingly off-hand questions:

Oslington:	You also leased your car from the trust company, didn't y
Garcia:	Yes.
Oslington:	What sort of car?
Garcia:	It was — I think it was a Datsun 180B.
Oslington:	Never a Porsche?
Garcia:	No.[58]

That Jean Garcia knows the model designation of her car runs counter to
stereotype of the woman who has no mechanical aptitude and who theret
must be competent (if she knows the make of the car, she must be an exc
tionally clever woman and ipso facto incapable of misunderstanding bank
documents). Then, by suggesting that Jean may have possessed a Porsche,
plays on the stereotype associated with luxury goods: frivolous, carefree, p
haps a little rash, but a constant living of the high life. The answer he obta
is really immaterial. If Jean Garcia answers yes, she is not only shown im
diately to contradict herself, but also becomes associated with the symbol
a Porsche owner. By answering no, she simply reinforced other stereotype
fiscally prudent, cautious and competent at managing financial affairs.

[57] High Court Transcript, above n 46, 24.
[58] *Garcia* Testimony, above n 49, 8.

Throughout the surety cases, competence in general, and in matters of business in particular, seems to mean that there will be an equivalent ability to understand complex legal documentation. Here is stereotyping in another guise, because it assumes that a single trait translates into a universal (the idea of competence as being a single identifiable 'thing' is quite pernicious). Where this causes problems is that judges are led to assume that any type of business competence, unrelated to mortgages, guarantees or other banking instruments, will suffice. This is the standard view, and unsurprisingly was that taken by the National Bank and its counsel in *Garcia.* Jean Garcia tries to counter this by making the point that some directors of public and private companies in Australia may do very little of substance and are inevitably unclear about their roles:

Oslington:	[Y]ou felt sufficiently competent to take upon yourself the directorship of that company, didn't you?
Garcia:	Well, the directorship involved housekeeping of the building, the lift, the colours, maintenance of the — we didn't do anything else except just discuss things like leaks and lights.
Oslington:	... And you understood, of course, that being a director of companies involved some obligations, didn't you?
Garcia:	Yes, I attended the meetings. [she goes on to explain that her husband wanted her to be a director because he needs two bodies, but little more than that.][59]

Mr DF Jackson QC, Jean Garcia's counsel at the High Court, also recognises the danger inherent in assumptions about competence, noting that persons branded as intelligent and articulate, and possessing any kind of professional skill, even if unrelated to finance, will frequently self-stereotype by thinking they would not be led into an improvident transaction.[60]

(c) Language

Like competence, a facility with language can also give rise to stereotypes. Although verbal skill is often associated with a general sense of cleverness, there is no necessary correlation with financial ability. (How many literary greats have died with their financial affairs in perfect order?) In all likelihood, Jean Garcia's use of humour, and her ability to grasp legalistic language, aided an interpretation that she was not likely to have misunderstood her financial situation.

(i) Wordplay, Humour and Intelligence

In the course of a trial, there are few occasions where humour is allowed to run free. But the occasional witty exchange does occur in some trials. A judicial mind that places even a slight degree of emphasis on humour, by relying on

[59] Ibid 102–3.
[60] See High Court Transcript, above n 46, 9.

stereotype attribution, could draw improper conclusions from examples s as the following (all favouring Jean Garcia). The first is the droll side humour:

Oslington: You knew that your husband, so far as his gold trading ac ities were concerned, bought and sold gold hoping to mak margin at the sales?

Garcia: He bought and sold gold, yes.

Oslington: And hoping to make a margin, a profit out of the sales?

Garcia: One would expect.[61]

Then there is self-deprecating humour:

Oslington: ... You have also told His Honour that the mortgage to GIO was discharged in August, 1984 —

Garcia: But I have said here — I might be really stupid — but I h said here 'At the time when the Respondent obtai facilities' meaning 1985.

Oslington: Please, paragraph 3 of your affidavit of 11 August reads ' the time when the Respondent obtained facilities through NAB over the security of our home at Woorongah the ot mortgage of $25,000 was discharged?

Garcia: Had been discharged.

Oslington: It reads 'was discharged.' Is that why you are saying it badly worded?

Garcia: Yes.

Oslington: And 'was' should be 'had been'?

Garcia: Yes.

Oslington: It took you a long time to come to that?

Garcia: I am not that clever.[62]

Finally, there is the humour found in the everyday, in a little vignette showi how words and actions both carry associations experientially (and in which derive the title of this article). In a sense, Jean Garcia uses the same cogniti process as that used in stereotyping by deriving a universal from a set particulars:

Oslington: And you specifically went to the bank for the purpose signing that guarantee, didn't you?

Garcia: The bank manager had rung and asked me to come.

Oslington: He didn't say you had to go, though, did he?

Garcia: He rang me several times.

[61] *Garcia* Testimony, above n 49, 10–11.
[62] Ibid 36.

Oslington: ... [Y]our opportunity to sign it would be lost if he sent it back the city, that is what you understood him to say, isn't it?

Garcia: I understood him to be putting pressure on me to come and do it.[63]

It is wrong to believe that quick-wittedness and wordplay have anything to do with an individual's competence to know and understand a legal document.[64] Although the effect of these scenarios on the minds of judges at the time of a trial is difficult if impossible to determine, their impact on us as readers could be assessed relatively easily through proper sociological surveys and tests. One fruitful area of cognitive research would be to formulate psychological models to assess what is going on inside the minds of decision-makers where humour or cleverness occurs and attempt to relate that to judicial determination of credibility.

(ii) Legalisms

The language of courts and of the law is often technical and abstruse. Having a familiarity with this legal language, and the confidence to use it, can be associated with competence in the same way as can humour. Again, Jean Garcia shows these characteristics, as she displays a fair degree of comfort with the technical language of law. It begins with Oslington's cross-examination where he asks her to define mortgage. Her answer is as clear as most upper year law or MBA students' would be:

> a mortgage is when you buy — when you want to buy property — when you want to build a house or buy a property you go to a bank or a building society and you ask to borrow money against that — the building that you want to buy, and if they agree you pay a certain amount back to them, which represents the interest to them every month or on a monthly basis until you have paid the amount of money that you borrowed.[65]

She also shows a remarkable ability to pick up on and mimic terms of phrase used by lawyers. In the cross-examination, Oslington often employed the phrase 'or words to that effect.' On one occasion, Jean returns this formulation:

Oslington: I suggest Mr Kennedy went on to say, "if the worst comes to the worst after demand is made on Citizens Gold and Citizens Gold has not paid, then a demand may be made on you and the supporting security for the guarantor"?

Garcia: Nobody has ever said words to that effect to me.[66]

[63] Ibid 97–8.

[64] A similar example is the 'reinvention' of Monica Lewinsky after a relentless media crusade against her. Jon Snow, a UK journalist, recently admitted that Monica was not the harridan many portrayed her to be when he watched videotapes of her wittily handling questions before the Senate Impeachment hearings. Other correspondents state, 'she was poised, she was frank and put her stumbling interrogators in their place with quick-witted ripostes ...', and 'Monica came across less a victim and far more as a confident, articulate, power-dressed victor' – see Kamal Ahned, 'Hello! Monica's back in black, and wearing the scent of victory' *The Age* (Melbourne) February 27 1999, 13.

[65] *Garcia* Testimony, above n 49, 4.

[66] Ibid 109 [emphasis added].

Another instance appears following Oslington's examination techniqu prefacing questions with the words, 'would it be fair to say...' Jean G returns this back on a few occasions, saying, 'it would be fair to say I w have been . . .'.[67] These are phrases or terms of art that may never appear in mal conversation, but in a court of law are commonplace. It would be diffi not to draw the conclusion that Jean Garcia was highly verbally compe Again, the net effect of this might be to perceive Jean Garcia as articulate sophisticated — dangerous ground when ultimately she is advancing defence that the guarantee documents were misunderstood. In the end, it probably crucial that she could fall back on two items: (i) the lack of op tunity afforded to read the documents given by Fabio, and (ii) the unstated palpable stereotyping of Fabio as a rogue.

3 *Garcia* and Stereotyping — A Conclusion

The *Garcia* case has had an impact, if slight, on the way in which suretys are obtained by banks (most bank procedures were altered to include meas to combat undue influence and unconscionability prior to the High Court ha ing down *Garcia*). The biggest change will likely occur in the context of sc relationships other than marriage, where both the majority and Kirby J w quite clear in opening up the old boundaries laid down in *Yerkey*. Whether will require litigation to resolve or not is another issue, as the Court was wholly clear on the functional criteria to apply in any relationship other t heterosexual marriage.

The strong positions outlined by the justices on stereotyping, however, n further refinement. This section has provided a glimpse into some of the m forms and techniques of stereotyping that can arise in the judicial proc There are strong arguments in favour of accepting stereotyping in certain l ited forms, in part pragmatically because of the impossibility of total eradi tion, but also in part because stereotyping can be used either to reinforce o combat prejudice. From a short review of the transcript evidence, it is q possible to see how stereotypes could be drawn to both favour and to against Jean Garcia's legal position. This is not to say that anyone can est lish whether or not Young J did rely on stereotypes, or if he did, whether t were in a same or similar form to those proposed. In making the ultimate det mination in favour of Jean Garcia, perhaps it was Jean Garcia's good fort in having Fabio act so callously, as opposed to judicial wisdom, that allow her to succeed.

What is known, however, is that using stereotypes in a self-conscious w as a method of combating prejudice, can be an effective tool. Armour provi a classic example of how combating prejudice through stereotyping can both useful for an advocate, but also ultimately provides hope for chang

[67] See, for example, ibid 10–3.

approaches to stereotyping and prejudice.[68] The case involved the famous American lawyer, Clarence Darrow. The Sweets, a black professional family, had moved into a middle-class white Detroit neighbourhood in 1925; two nights later a crowd of whites, estimated at several hundred, gathered around the house, throwing stones and crying 'niggers'. Police officers, present at the scene, simply stood by as one of the rocks crashed through the Sweet's window. Both Dr Sweet and his younger brother attempted to fire a warning shot, but one of these went astray and killed a member of the mob. Everyone in the house was arrested and charged with murder.

In his final address to the jury, Darrow challenged the jurors to confront their own racial biases by taking on their stereotypes directly:

> I haven't any doubt but that every one of you is prejudiced against colored people. I want you to guard against it. I want you to do all you can to be fair in this case, and I believe you will ... You need not tell me you are not prejudiced. I know better. We are not very much but a bundle of prejudices anyhow. We are prejudiced against other people's color. Prejudiced against other men's religions; prejudiced against other people's politics. Prejudiced against people's looks. Prejudiced about the way they dress. We are full of prejudices ... Here were eleven colored men, penned up in the house. Put yourselves in their place. Make yourselves colored for a little while. It won't hurt, you can wash it off. They can't, but you can; just make yourself black for a little while; long enough, gentlemen, to judge them ... They were black, and they knew the history of the black ... Supposing you had your choice, right here this minute, would you rather lose your eyesight or become colored? Would you rather lose your hearing or be a Negro? Would you rather go out there on the street and have your leg cut off by a streetcar, or have a black skin? ... Life is a hard game anyhow. But, when the cards are stacked against you, it is terribly hard. And they are stacked against a race for no reason but that they are black.

The jury found Dr Sweet not guilty. The case, in particular Darrow's rhetorical technique, provides an excellent example of how confronting prejudices directly can prevent a highly prejudiced listener (an all-white male jury in turn-of-the-century America) from succumbing to their discriminatory impulses. As Armour remarks:

> Darrow's feat was especially remarkable because it required Darrow to combat the influence of both stereotypes and prejudice on the fact-finders. In the 1920s, just as today, American culture was replete with derogatory images of blacks. Thus, negative black stereotypes that could be triggered automatically by the presence of a black person were well established in the fact-finders' memories ... Many of Dr. Sweet's jurors, therefore, probably also formed a conscious expectation for instances of trait categories stereotypically associated with blacks because automatic (stereotype-driven) and controlled (prejudice-driven) processes can operate simultaneously on the same underlying categories, the two processes likely were mutually reinforcing in many of these jurors; that is, both processes combined addictively to make the underlying negative categories about blacks more accessible. Confronting fact-finders whose personal beliefs and stereotypes about blacks overlapped, Darrow's strategy was based on the assumption

[68] Armour, above n 9. The account of Ossian Sweet's case is taken from pages 763ff.

that even high-prejudiced persons personally endorse general egalita beliefs.

The jury responded to Darrow's plea by activating their egalitarian respo and limiting their prejudicial responses that conform to their stereotypes. I strategy later became scientifically recognised as Rokeach's confronta technique.[69]

This brings us back to the greater difficulties faced by actors in the l arena today. Given that efforts have been made to confront certain prejud responses, legal judgments concerning genders and races may become e more distorted than in Darrow's time. Instead of the overt racism that exi then, prejudices today are more likely to result from automatic proces which can easily escape conscious detection, because of the intense eff over the last few decades to stigmatise prejudicial behaviour. This me however, that judges and lawyers alike need to be even more vigilant aware of strategies to encourage conscious replacement of prejudicial discr inatory stereotypes. Advocates who explicitly engage egalitarian respon and seek to consciously substitute them for the more habitual responses, as Darrow, can remove many of the tendencies towards discrimination, as sho through the current empirical research on discrimination reduction techniqu

For cases such as *Garcia,* involving fact patterns that are also prone stereotyping, this means both lawyers and judges should be more aware of problems faced by automatic stereotyping processes. It is often impossible determine what goes through the minds of judges, but when the nature of a d pute and the witnesses involved create the potential for discriminatory or p judicial behaviour based on stereotyping, lawyers could employ techniques avoid stereotype-congruent responses. Garcia leaves us with an outcome t *could* be explained by prejudicial stereotype, as Jean Garcia, a well-educat professional, businesswoman, was allowed to escape an obligation on groun related to her gender. This might devalue the decision for those with hig prejudice beliefs ('of course Jean Garcia got away with it — she convinc everyone she was the weak and ineffective woman'). If only the lawyers h like Darrow, at least forced the judges to confront the possibility of th employing prejudicial stereotypes, then that possible avenue of concern ov the result could have been closed.

Ultimately, as will be discussed in Part D, because of the High Court's rea praisal of the *Yerkey* principle in *Garcia,* it may have been irrelevant ho Young J assessed the witnesses, because the simplistic form of the new pri ciple provides its own internal controls over prejudicial stereotyping. As w be discussed, however, the use of these legally relevant stereotypes must carefully circumscribed. An enlightened view of stereotyping could aid resolving some of the seemingly intractable problems surrounding guarante and suretyship, unconscionable transactions and undue influence. While t arguments are centred on gender issues, such as those that arose in *Garci* they have broader application to any situation where issues of stereotypi occur.

[69] See Milton Rokeach, *The Nature of Human Values* (1973) 286. (following from Gunn Myrdal).

D STEREOTYPING IN EQUITY: A NEW DOCTRINE FOR SURETYSHIPS

Equitable intervention in domestic relational transactions is not a recent phenomenon; however, courts are increasingly adopting stereotypical language and assumptions as the basis for such intervention.[70] The use of such stereotypes in the formulation and application of equitable doctrine can range from mild, functional usage in order to structure facts and categorise particular parties, to more excessive applications. Where a judge has assumed that the parties to an equitable claim fit within a stereotypical mould, and that mould is used to develop and apply equitable relief, the 'polarised' result can be, but is not always, antagonistic to the basic aims of the equitable jurisdiction.

One of the concerns of equity as an ethical concept is to balance behavioural patterns to accord with fundamental standards of moral conduct, or as noted by Professor Robert Newman:

> Equity may be described as a way of adjusting the burdens of misfortune arising out of human encounters in accordance with standards of generous and honorable conduct that are commonplace facts of all systems of ethics, morals and religion.[71]

The underlying purpose of modern legal principles in the equitable jurisdiction is similar: the aim of modern equity, in the words of Roscoe Pound, is to make 'morals and law' coincide.[72] Inevitably, to achieve this moral adjustment, courts must determine whether an alleged unfairness within a particular transaction warrants the intervention of the equitable jurisdiction. Individual perception is the foundation of the equitable jurisdiction, providing it with the impetus to modify the rigours of the common law.[73] The difficulty has been to provide an effective and functional methodology capable of translating precepts of good faith, honesty and generosity into legal norms.

1 *Louth* versus *Garcia*: Good and Bad Stereotyping

Functional stereotypes, accurately reflecting current societal expressions, can provide a useful and effective tool in the implementation of basic equitable precepts. They assist the court in clarifying the complex realities of social

[70] The two primary examples considered in this section are *Louth*, above n 3, and *Garcia*, above n 2. But see also for example, *Gregg v Tasmanian Trustee Ltd* (1997) 143 ALR 328 in which *Louth* was followed. In *European Asian of Australia Ltd. v Kurland* (1985) 8 NSWLR 192, Rogers J has 'great difficulty in attempting to describe Mrs Kurland in a way which avoids giving offence', 197; Mrs Kurland is 'the archetype of a female with a total lack of interest in anything outside her household' who 'took no interest in the running of the business or in documents which she was asked to sign,' 197. There are also suggestions in *Kurland* that Mrs Kurland deliberately presented her evidence in such a way as to fit the stereotype *Yerkey v Jones* was thought to require (see the statements of Rogers J, 199).

[71] *Equity in the World's Legal Systems: A Comparative Study*, R A Newman (ed), Establissements Emile Bruylant, Brussels (1973) 27.

[72] Roscoe Pound, *The Philosophy of Law in the Nineteenth Century, The Spirit of the Common Law* (1921) 141–2.

[73] See T F T Plucknett and J L Barton (eds), *St German's Doctor and Student* (1974) 97.

existence, and can create a pathway through an often perplexing array domestic and relational facts. It is critical, however, to ensure that such use functional stereotypes in the formulation of equitable doctrine appropriate reflect contemporary attitudes and experiences within the broader communit The formulation of doctrines that draw upon non-prejudicial use of accura stereotypes, whilst incorporating individual analysis, is one of the challeng courts face in implementing equitable principles.

A good example of the application of unbalanced stereotypical assumptio that fails to use stereotyping progressively lies in the High Court decision *Louth*. In that case, Louis Diprose, a solicitor, followed his unreciprocated lov interest, Mary Louth, to Adelaide, where he began giving her financial assis tance by paying her childrens' school fees and helping out with domesti expenses. Eventually, Diprose bought the house in which Louth was living an had it transferred to her name. When things turned sour, Diprose subsequent ly sued Louth to have the house transferred back into his name. According t Diprose's testimony, he only made this purchase after Louth had informed hin that she was in severe financial difficulty. In his mind, she had 'emotionall manipulated' him into helping her purchase a home by manufacturing a atmosphere of crisis.

At trial, it was held that it would be unconscientious for Louth to retain th home. This finding was upheld by the High Court. Relying upon the finding of fact and the assessment of witnesses by King J at trial, the majority of th High Court held that the emotional disability of Diprose had been unconscien tiously taken advantage of by Louth and directed that the house be returned to Diprose. This decision has been criticised because of the subjective and imbalanced evaluation involved in the determination that it was Diprose who suffered an emotional infatuation and Louth who exploited this.[74]

But in reaching its conclusion, the Court almost certainly employed a certain set of implicit gendered stereotypes in assessing the relationship. Diprose had to be found to be honest and trustworthy, while he was subject to the whims of Louth, who was portrayed as a conniving temptress out for everything she could get. The use of colourful language helped to highlight the gender characterisation the court relied on in assessing the relationship: in phrases such as 'the respondent feeding the flames of the applicants passion' or in descriptions of Louis Diprose as a 'defenseless and susceptible but generous male'.

One of the possible reasons underlying the High Court's assumption of such polarised gender stereotypes was to rely on stereotyping to establish the 'emotive' behaviour of the parties. The court could not regard Diprose's manner as consistent with that of an educated male solicitor and so targeted Louth as the cause of this aberrant behaviour. This resulted in a particularly asymmetrical view of the entire relationship — Louth became the exploitative female character and Diprose the innocent, unsuspecting victim. The methodology

[74] See, for example, Lisa Sarmas, 'Storytelling and the Law: *Louth v. Diprose*' (1994) 19 *Melbourne University Law Review* 701 and Samantha Hepburn, 'Equity and Infatuation' (1993) 18(5) *Alternative Law Journal* 208.

underlying this determination is contrary to the basic aims of neutrality and impartiality underlying the equitable jurisdiction.[75]

The polarisation of emotional character and gender in *Louth* resulted in the High Court concluding that emotional infatuation may constitute a special disability, and where it is unfairly exploited in a relational context, unconscientious dealing may be raised. This doctrinal expansion to unconscionability has introduced a highly subjective area of judicial analysis: domestic relational dynamics.[76] Courts may now be required to determine the nature and validity of a particular individual's emotional state in order to determine whether or not he or she was sufficiently vulnerable to warrant equitable protection.

This creates a doctrine that cannot be properly, or at least easily, assessed. One party becomes the evil wrong-doer whilst the other is innocent. The only methodology courts can then employ is to use stereotypes in broad brush strokes; the truth of any personal relationship and the existence or otherwise of an emotional infatuation will obviously depend upon the individual perception of each party. Thus, the tendency will be to adopt prejudicial stereotypes to characterise an individual. As in any case of stereotyping, external attributes, including, for example, gender, race, marital status, health, appearance, religious convictions, cleverness, and language ability, become exceedingly important, when these, in themselves, should be irrelevant to the 'personal and emotional' nature of the doctrine. The broadening of equitable doctrine in this manner virtually requires courts to employ prejudicial stereotypes in order to rationalise the factual matrix of particular 'emotional' relationships.[77]

Equitable principles aim to displace common law doctrine where that doctrine is perceived to violate the subjective sense of justice to the individual.[78] In order to determine exactly when the 'subjective sense of justice of the individual' has been violated, courts must have some assessment criteria. Appropriately structured social stereotypes can be extremely useful tools in this balancing process. Equitable principles can only mitigate hardships where it is clear that such mitigation is necessary and desirable. In a practical sense, equity can only determine whether an existing legal rule needs to be corrected or supplemented by balancing that rule against the dictates of conscience.[79] Ethical considerations and the moral mileau of a society are constantly altering the dictates of conscience, so a court must accurately examine a cross-section of society and reconcile the ideals with conventional expectations. In this regard, whilst equity represents individual justice, it is individualised in a broad-based sense: '[i]t draws upon the facts and the social matrix in which the

[75] ibid 721–3.

[76] See Anthony Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 *Anglo-American Law Review* 1; Belinda Fehlberg 'Women in Family Companies: English and Australian Experiences' (1997) 15 *Company's and Security's Law Journal* 348.

[77] Sarmas, above n 74, 721–3. See also Alastair MacAdam and Roscoe Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) Ch. 10 generally.

[78] See R N Snyder 'Natural Law and Equity' in R A Newman (ed), Establissements Emile Bruylant, Brussels (1973) 33.

[79] See F Cohen, *Ethical Systems and Legal Ideals* (1933); Roscoe Pound, 'The Decadence of Equity' (1905) 5 *Columbia Law Review* 20, especially 29–35.

facts occur, looks to the law, and imparts the imprint of conscience both on the case at hand and in the formulation and coalescing of a new cultural identity.'[80]

With this aim in mind, the confirmation by the majority of the High Court in *Garcia* of the validity of the special wives equity is desirable not only for the form of protection it provides, but also, for the manner in which the equitable doctrine is applied. The type of analysis required in *Garcia* relies on stereotypes not to cement prejudice in place, but to critically reassess the nature of spousal guarantees and thereby balance gender ideals with practical realities. This process confirms the ethical significance of the *Yerkey* principle within contemporary society and the continuing significance of equity in our modern legal system, albeit in a new guise.

The old *Yerkey* principle, as outlined by Dixon J, is detailed and specific in application. It entitled wives who entered into a spousal guarantee, without a bank properly advising them as to its effects, to have that guarantee set aside. The early formulation of the principle was aimed specifically at protecting wives who were unaware of the true nature of the spousal guarantee and who were unfairly treated as banks took advantage of their 'reliant' nature in order to easily obtain a guarantor for their husband's loan.[81] The aim of equity in these cases was to protect wives against husbands unscrupulously using their position as financial controller of the relationship. In this respect, the purpose of the *Yerkey* doctrine was direct and succinct, requiring very little investigative analysis of the relationship or the emotional character of the parties. Indeed, the principle was so direct that all wives were assumed to be in need of such protection whatever the true nature of their relationship with their husband.

Not wishing to negate the need of many women for equitable protection against unscrupulous husbands and callous banks, many commentators, however, felt uncomfortable with an automatic assumption under the old *Yerkey* principle that all wives entering into a suretyship for their husbands were unduly influenced. It was partly a reflexive response — that such a principle perpetuated the image of women as uninformed and defenseless, used outdated stereotypes and was unrepresentative of the current position of women. The depth to which this criticism is felt is clearly echoed in the trenchant censure of the doctrine by Kirby J in *Garcia*. As he concludes:

> For this court to accept that principle is to accord legitimacy to a discriminatory rule expressed in terms which are unduly narrow, historically and socially out of date and unfairly discriminatory against those who may be more needful of the protection of a "special equity" but who do not fit within the category of married women.[82]

[80] Snyder, above n 78, 40.

[81] In argument before the High Court, it was noted that this was a fairly exclusive class of people, as those seeking guarantees in the early part of the twentieth century were entirely from the upper classes – even the wives were aristocratic and well-educated – see High Court Transcript, above n 46, 21.

[82] *Garcia*, above n 2, 636.

For Kirby J, the old approach is unprincipled, and implies that female married guarantors have no capacity to safeguard their own interests, whereas all male sureties and unmarried female sureties are capable. For him, it is based on gender sympathy.

In light of a more complex understanding of stereotyping, however, many of the objections to the old *Yerkey* principle do not completely bear up. As discussed in Part B, there is a difference between stereotyping that promotes discriminatory values and its use non-prejudicially. At the very least, the new *Garcia* stereotype does not automatically translate into prejudice for two reasons: (i) it may still represent the plight of a large proportion of women in society; and (ii) it allows individualised responses, incongruent with the stereotype, to be advanced.[83] As stereotyping goes, therefore, it is functional, pragmatic and utilitarian in effect. This is not to say that stereotyping should be the only tool of analysis in these cases, nor is it saying that there should be no recourse to counter-evidence. But it acts as a useful starting point in protecting certain vulnerable parties.[84] Would the concern over this kind of stereotyping be as great if it was used to protect a rash of guarantees being signed by children under 17? By analogy, it too would perpetuate images of all children as unsophisticated and incapable of thinking for themselves, based on generalised data. Protection of vulnerable groups in society necessitates some stereotyping in order to identify them and characterise the exploitation.

The crux of the concern over the old *Yerkey* doctrine, however, relies on a presumption that women are now able to manage finances in a post-industrialised world. Although many of the recent cases in this area have alluded to the *notion* that modern women are capable of being involved in financial matters to the same extent as men, most of the judgments also point out that many women still place trust and confidence in their husbands when making financial decisions for the family. And in none of the cases has statistically relevant data comparing different surety groups been supplied. The current evidence is simply too sketchy. Lord Browne-Wilkinson simply states in *O'Brien* that it is evident from the 'large number of cases ... coming before the courts in recent years' without providing more.[85] In *Garcia,* the majority are silent on the matter, while throughout his decision, Kirby J relies heavily on the statements of Lord Browne-Wilkinson's unattributed statements and on the Law Reform Commission's report, *Equality Before the Law: Women's Equality.* Neither are overly accurate sources for data relating to women and guarantees, relying mainly on Belinda Fehlberg's powerful but limited survey[86]

[83] See text below n 87–92 and Part D.2 for further discussion on these points.

[84] There is also a fundamental difference, we believe, between stereotyping in a criminal context (eg rape trials) where it can be devastating to the complainant and her credibility, leading to an implicit condoning of sexual aggressiveness by the courts, and the situation here, where a deontological use of stereotyping is used to provide relief from financial hardship.

[85] *O'Brien,* above n 31, 188.

[86] Fehlberg, above n 26. Her survey consisted of qualitative research involving 49 personal interviews with 20 female and 2 male sureties, 5 debtors (unknown gender), 9 lenders and 13 lawyers, plus documentary materials. Most of the interviewees were between the ages of 40–59 (19 out of 22), most (18 out of 22) were married to the debtor at the time of the security, most had children and were 'high to moderately well-educated.' This survey is

and a Banking Industry Ombudsman report.[87] Nicola Howell refers to a 'dea of quantitative research'.[88] Mr D F Jackson QC in argument before the Hi Court in *Garcia* states that women's positions have improved, without kno ing the actual percentage, but with little to suggest that the percentage is v large.[89] McHugh J, also in *Garcia,* points out that social material shows ma women falling within the *Yerkey* principle are in need of protection.[90] Kirby despite his caution about stereotyping, notes that it is often the husband w has actual control of funds and it can be very difficult for the wife to get acc to joint funds. He contrasts this with Professor Cretney's position, who sc modern marriage as a partnership, where spouses are protected by current leg structures, making it less appropriate to give special equitable protection wives.[91] Noteworthy for a slightly different view, Gummow J in *Garcia* hin that spending a couple of days in the Family Court would give one enou evidence to show that men are as often the weaker party as women.[92]

informative, but only as a first step – it has its limitations. For example, it is a UK surve so may be only partially relevant. More important, however, is that there is only a slig perspective on actual gender disparities. Questions that remain unanswered include, f example: How many consumer guarantees were granted in the UK during this period (t survey may only reflect a miniscule proportion of suretyships)? What percentage of t total number of guarantees are held by women? What percentage are held by men? Wh percentage of each of these are actually called or determined by banks? What percenta are litigated? Is there a variation between those litigated by women as compared with m (self-stereotyping effects may lead to one gender avoiding litigation)? Do busine guarantees present a similar picture (for example, if many male guarantors were bein exploited by business partners, the overall view of the situation may change)? Her boo demonstrates the difficulties in obtaining evidence that could answer questions such these; granted, her objectives were to explore qualitative, rather than quantitative evidenc (see, for eg, 12), but again, these are limitations that courts should be aware of when fo mulating decisions. *Garcia* also completes a loop by relying on the *Women's Equali* report, above n 41, which in turn cites Lord Browne-Wilkinson in *O'Brien* who notes th the UK Court of Appeal, as having to decide 8 of these guarantee cases in 11 years, prove the existence of a serious problem.

87 Cited in *Women's Equality,* above n 26. From 1990 to 1994 the Australian Bankin Industry Ombudsman received 675 written complaints relating to guarantees – 'over half of these involved women. Again, more information is required: What were the complaint about? What are the exact percentages? Were the women's complaints related to vulnera bility over signing? What about the men's complaints? It is unfortunate that a report of suc moment as the *Women's Equality* report leaves so much out; again, it may be difficult t obtain further information due to issues of confidentiality, etc. but for courts to rely on i as proof of a state of facts, they need to realise these same limitations.

88 Nicola Howell, 'Sexually Transmitted Debt': A Feminist Analysis of Laws Regulatin Guarantors and Co-Borrowers' (1994) 4 *Australian Feminist Law Journal* 93 95. Anothe study by Supriya Singh, *For Love Not Money,* Consumer Advocacy and Financia Counselling Association of Victoria, Melbourne (1995), attempts to find out the situation of women's roles in business prior to defaulting on financial agreements. It surveys 160 women and interviews 15 more, the majority whose income is less than $30,000 per annum. Again, it gives a reasonable picture as far as it goes – indicating that many women are satisfied with their business relationships. But no one really knows that the male partners are any more informed or wise, the most that can be said is they assert such a knowledge.

89 High Court Transcript, above n 46, 38.

90 Ibid 55.

91 Ibid 56–7. Kirby J is referring to Cretney, 'The Little Woman and the Big Bad Bank', (1992) 108 *Law Quarterly Review* 534, 537 (in which Cretney argues that, rather than married wives, it is women in unmarried partnerships that the law could single out for special protection).

92 High Court Transcript, above n 46, 19.

It is apparent that further studies need to be made of women's status regarding access to finances in the home, and a comparison made between women and men guarantors. Maybe it is necessary for banks to begin keeping better and more fulsome data. As a start, we need to know how many transactions involve women as guarantors of their male partner's business. What percentage are subsequently challenged? How many transactions involve men guarantors of women's businesses? In the end, by relying on deficient evidence, decision-makers are engaging in a form of quasi-stereotyping that does not do justice to equity, nor to the women involved.[93]

Although there is a great desire to liberate such gendered roles, this does not necessarily mean that the law, in particular the equitable jurisdiction, should automatically assume the existence of complete gender equality. As an ideal, the equitable jurisdiction is concerned with the implementation of individual justice — to achieve this end it should concern itself with a tangible, concrete approach to relational dynamics. Individual justice concerns, however, need to be tempered by the broader societal implications that would result if many instruments of suretyship were rendered vulnerable. This requires an appropriate balance between individual and community justice concerns.

2 Legally-Relevant Stereotyping — or — Why the Bank Manager Need Only Ring Once, but the Unrequited Lawyer Should Spend His Money Wisely

The central thesis of this article is that the principle outlined by the majority in *Garcia* provides an excellent example of the advantageous use of stereotyping in the development and application of equitable doctrine. The basic premise of *Garcia* is that protection for married women against unscrupulous creditors who fail to fully explain the terms and conditions of financial agreements they may enter into must be sustained. The reason for this continued protection is simple: a significant number of married women in Australia are in relationships 'marked by disparities of economic and other power.'[94] While the continuation of such specific protection undoubtedly perpetuates the stereotype of wives as vulnerable, weak or disempowered, the Court concluded that it was vital to retain the *Yerkey* principle because the social reality was that many wives would be at risk if the protection were removed. Hence, the stereotype is used to trigger non-congruent associations, thereby complementing the sense of justice underpinning the equitable jurisdiction. If, in time, better and more complete evidence emerges that refutes this basic premise, the principle may be adapted to reflect changed circumstances.

To fully appreciate the functioning of this type of positive stereotyping, a more complete examination of the *Garcia* principle is required. The four majority judges in *Garcia* held that, in any transaction involving a bank, a husband and his wife, four crucial elements are required to prove a *Yerkey*

[93] Designing appropriate tests will be difficult, of course, because one needs to be mindful of ensuring that evidence does not simply provide a measure of the very stereotyping that has been the basis of the existing problem.

[94] *Garcia*, above n 2, 619.

defence, namely that (i) a surety does not understand the transaction's purpo and effect; (ii) the transaction must be voluntary (in the sense that the sure obtained no gain from it); (iii) a lender is to be taken to have understood th a surety may repose trust and confidence in her husband in matters of busine and therefore that a husband may not fully and accurately explain the purpo and effect of the transaction; and (iv) despite this knowledge, a lender does n take steps to explain the transaction to the wife or establish that a third pa had explained it to her.[95] The decision acknowledges that wives often trust the husbands. If a bank, or an appropriate third party, does not take steps to expla the transaction to the wife, it may be set aside.

The legal basis of *Garcia* is founded upon the second tier of the origin *Yerkey* principle. Like the original, the specific focus of this new principle the protection of wives — not women generally, nor women in relationship akin to marriage, but specifically married women. The reason for this simple enough. The case involved Jean Garcia, a married woma Nevertheless, the judgment of the majority opened up the possibility of pro tecting couples in a de facto relationship or in same sex relationships. Clearly this represents a less arbitrary and discriminatory approach than that adopte in *Yerkey*.

One of the most significant questions arising from the majority determina tion is why they retain the specific gender focus in the formulation of the ne principle despite clear indications that a broader formulation may be mor appropriate in future circumstances. In juxtaposing these two points, th majority seem determined to ensure that the current social reality reflected i married relationships and apparent upon the facts of *Garcia,* is not over whelmed by a possibly different future. The majority make it very clear that i today's society, a number of married women still trust a husband's ability t handle financial affairs and consequently, there is a continuing need for equi table protection. In a real sense, some form of positive stereotyping was ver likely to have been used to reach this conclusion, perhaps along the lines a suggested in Part C.2.

The majority noted that whilst women's roles have progressed since th original Yerkey principle was introduced in 1939, many things remai unchanged. This conclusion forms the heart of the *Garcia* decision. On the on hand, it recognises that a principle which assumes that all married women ar vulnerable to exploitation in financial matters constitutes a stereotype which may be untrue for certain particular women, but on the other hand, it justifies the perpetuation of such a principle on the grounds that it is essential to ensure continuing and adequate protection for the remaining proportion of women who are susceptible. In this way, the stereotype is used as an aid to trigger non-congruent associations, thereby complementing the sense of justice that the equitable jurisdiction aims to secure.

The legal principle emerging from *Garcia* is broader, containing a more structured and reasoned approach to the adoption of specific gender protection than existed in the original *Yerkey* decision. The Court specifically

[95] Ibid 650.

acknowledges the mutable nature of relationships and the role of women in contemporary society, making it clear that change is possible. Nevertheless, the fact remains that, at this stage, the new principle applies exclusively to married women. In this sense, the High Court has confirmed the validity of a principle that, although it may be less offensive than *Yerkey,* still seems discriminatory and retrograde.[96]

A closer analysis of the meaning and purpose of discrimination in this context, however, must be considered. Whilst it is more commonly believed that discriminatory principles are by definition unjust, it is also accepted that discrimination can sometimes have positive repercussions. This is exactly the basis behind some forms of anti-discriminatory legislation such as the equal opportunity legislation, which notes that discrimination does not exist if a specific group is singled out for attention when it is clearly established that such protection is needed in order to reverse historical discrimination or to ensure justice and equality.[97] The legislation is effectively reversing the negative implications of direct discrimination in order to promote the positive benefits flowing from the specific and exclusive singling out of a particular social group.

In *Garcia,* the benefits of the discrimination flowing from the new *Yerkey* principle are encapsulated in what we have described as 'positive stereotyping'. The new doctrine allows for a healthier form of stereotyping to be used in order to uphold the sense of individual justice upon which the equitable jurisdiction is founded. The fact that the *Garcia* principle provides specific protection to married women entering into guarantees on behalf of their husbands does not necessarily mean that protection to other groups, such as unmarried females, or males, or persons in de facto relationships, cannot be protected by the equitable jurisdiction. If subsequent evidence comes to light showing that there is legal justification for aiding other groups, then the equitable jurisdiction can change the doctrine. It is this inherent flexibility that should prevent the perpetuation of prejudicial discrimination. Stereotyping in this way is, as was also demonstrated by Clarence Darrow almost 80 years ago, an effective tool against discrimination.

It is only possible to achieve a better, more progressive society, where equitable doctrines are not formulated on the assumption that the ideal society already exists. The aim of the equitable jurisdiction is to implement a 'better' justice to individual circumstances not already covered by the universal application of statute or common law. To achieve this, it must immerse itself in existing social realities, as a way, one hopes, to bring about a slow and

[96] See discussion at part D.1.

[97] For example, see the *Equal Opportunity Act,* 1995 (Vic) s 82, which is designed to allow activities done to meet special needs or prevent disadvantage to those who require it, not to be characterised as discriminatory. Canada has constitutionalised such a provision in the Charter of Rights and Freedoms s 15(2): 'Subsection (1) [the anti-discrimination clause] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability' – *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

gradual social evolution. The desire to achieve new cultural identities and abandon the atavisms of a previous generation does not always coincide with actuality. In a sense, the equitable jurisdiction provides the impetus for change, or as noted by Snyder, 'equity creates just law and just law is the touchstone of social evolution'.[98]

Finally, the broader societal implications of *Garcia* need to be examined. The restriction of the special equity to wives, or at least, the failure of the Court to expand its application beyond wives, does ignore the real difficulties faced by other groups, vulnerable to relational exploitation and therefore, undoubtedly, worthy of legal recognition. This article does not deny this fact. The biased, paternal attitudes that this failure can promote is clearly and cogently highlighted in the judgment of Kirby J. Unfortunately, it was impossible in *Garcia* to direct specific attention to one group without, inevitably, ignoring the needs of others. In this sense, the positive benefits that *Garcia* represents for married women needing equitable protection are also, unfortunately, the source of its failure for other worthy social groups. The point is not that *Garcia* has provided all the answers but rather, that it has addressed itself through directed, functional stereotyping to the problems of at least one group. This, in turn, may help to activate re-assessment of different types of relationships and, in turn, generate new functional stereotypes to promote new special equities.

Of course, the factual basis of the *Garcia* decision is influential in this regard. Despite her professional appearance, Jean Garcia was a 'lady' running her own physiotherapy practice — in relational terms, she was a woman 'at risk'. Jean allowed her husband, Fabio, to assume complete control of the finances. In this respect, Jean was a woman who fitted squarely into the 'married woman' stereotype. The reasons for such relational disparity are never objectively clear: perhaps she was intimidated, or, alternatively, perhaps she wanted to try and keep the peace and support her husband in the belief that this would ultimately benefit her marriage. Whatever the reason, she, along with many other married women in similar circumstances are in clear and definite need of equitable protection.

In order to ensure that adequate protection is provided to such groups, courts implementing equitable principles need to specifically target and address these groups.[99] In this respect, the specific endorsement of a stereotype is an important element of the overall process.

On the other hand, where it can be clearly established that a stereotype reinforces or contributes to prejudice then it should be abandoned — and the equitable jurisdiction should not be seen to legitimise such a discriminatory practice. Judges employing equitable doctrines should be extremely wary of prejudicial stereotyping effects. For example, the expansion of unconscionable

[98] Snyder, above n 78, 43.

[99] For example, the nearly automatic adoption of fiduciary obligations in certain relationships such as lawyer/client and director/company, but not in other trusting relationships such as doctor/patient or teacher/student – see, for example, *Breen v. Williams* (1996) 138 ALR 259.

dealing to include the exploitation of emotional dependence, as in *Louth,* encourages courts, with little evidence, to make prejudicial stereotypical assumptions about the relational and gendered dynamics of particular relationships. In other words, it means adopting stereotypes that cannot be quantifiably assessed and will therefore much more likely reinforce prejudices, or at least be more difficult to control. Are men likely to give houses or other gifts to women they lust after? Is a specific gender more likely to be 'emotionally dependent'? Does emotional dependence depend on seduction, folly, heartache, desire, excess, flattery, tragedy, farce or, dare it be said, love (even the unrequited kind)? The questions quickly become limitless. No test or survey could be designed to adequately answer this. In contrast, the new principle developed in *Garcia* does not encourage such assumptions because its application is specific and definite. Its aim is to protect married women against the unfair exploitation of their relationships of trust and confidence; the direct application of the principle avoids the need for the court to individually examine and assess subjective and manipulable characteristics of each party to the relationship.

It is accepted that this new principle does treat other groups differently, and may not give them the same protection as married women. This relies, however, on a form of stereotyping that is much more likely to be positive, and that can be quantifiably assessed — it is direct, defined and focuses upon a specific group, rather than a subjective evaluation. It is more in keeping with the latest psychological theories about the ubiquity of stereotyping. Moreover, other groups can be added as evidence becomes available showing the need to extend the protection.

The fundamental point underlying the *Garcia* decision is not that it provides, or was intended to provide, universal protection to a broad range of social groups in need. Rather, it has properly addressed itself through directed, functional stereotyping to the problems of one vulnerable social group. This approach may, in future decisions where the facts raise it, activate a reassessment of different types of relationships and generate new functional and positive stereotyping for others.

E CONCLUSION

Once upon a time, you decided to represent women in the legal system with respect to issues of special importance to women by drawing attention to the fact that women are less like men — or more like men — than people in the legal system had been acknowledging or realizing. And this was having negative effects on women, in terms of self-concept, physical safety, wealth, personal self-determination — all of the things that women saw being allocated to the advantage of men and to the disadvantage of women. So you developed a feminist strategy. This strategy sought to communicate women's experiences within the legal process, and it involved communicating the fact that women are actually more like men — or less like men — than the legal system had previously seemed to acknowledge.

> You then struggled to implement this strategy, and to use it in the legal process in a feminist way, that is, in a way that would improve women's positions, options and so on, in this culture. And then you, or maybe someone else, discovered that even though your strategy grew out of your desire to help women, it was actually hurting or might hurt other women, or maybe even hurt the women that you thought you were helping. So now you revise your strategy: you decide to develop a new strategy in which you stress that women are less like men — or more like men — than you had initially believed; you begin to figure out how to build on the successful part of your earlier strategy while simultaneously solving the problems that you, or someone else, had discovered that you had caused with your first strategy.[100]

Humans, as intelligent beings, cannot treat every object as a unique entity unlike anything else in the universe. The need to put objects, including people, in categories is essential, so that hard won knowledge about similar objects, encountered in the past, can be applied to the object at hand. It would be impossible to record separately the trillions of facts encountered and the necessary inferences deduced from these. For example, it is not necessary to always think through the possibility that if one turns on a light, will the room size or paint colour change; or whether someone going to church could do so without their head; or if opening a jar of vegemite will vapourise the house. Categorisation helps humans deduce the implications, but only the relevant implications, of what they know.[101]

Categories are useful because they mesh with the way the world works. Creatures with round, white, small tails tend to hop and have long ears; those with fins tend to have scales and gills and live in the water. We form stereotypes based on these characteristics, and automatically assume rabbits and fish. Many social and cognitive scientists believe this eagerness to form stereotypes is a bug in our cognitive circuitry, leading to racist and gendered stereotyping based on imaginary, bad or non-existent statistics. But like the rabbit and fish, some human stereotypes are based on good statistics about real people.[102] These can be useful in aiding legal decision-making, as long as it is understood that there may be moral implications in judging an individual using the statistics of a group and that there are many occasions, in law, when stereotyping should be prohibited.

Thus, stereotypes are created partly through a kind of collective experience grounded in a skewed but quasi-reality — we do not, for example, characterise men as being attracted to lights, or women as having an inability to walk on the right hand side of the road. These examples seem absurd. But, to paraphrase Murphy J in *Calverley v. Green,*[103] if common experience showed that men were attracted to light, then the first fact, attraction to light, could sensibly give rise in law to the second, that the person attracted is male. Would

[100] Kathleen Lahey, 'Until Women Themselves Have Told All That They Have to Tell' (1985) 23 *Osgoode Hall Law Journal* 519, 538–9.

[101] See Steven Pinker, *How the Mind Works,* (1997) 13–5. The ensuing examples are taken or adapted from this book.

[102] Ibid 308, 312–3.

[103] (1984) 155 CLR 242, 264.

this presumption also be a stereotype? Yes, if not every, or nearly every male was attracted to light. But it would be legally relevant, and useful. If it was later shown that these behaviours changed, then a properly functioning system of justice should alter the presumption as it would no longer be sustainable on its original rationale.

In this article, we have argued that the rationale for the *Garcia* principle exists in Australia because, although it relies on stereotyping, it does so in a manner that is safe and legally relevant. The continuing paucity of data in the area of third party sureties means that there is no way of knowing whether married women guarantors are generally financially exploited wives or not. The only thing we have to go on in is cases brought to court. Employing a stereotype in such cases as *Garcia* — one that says that wives are in need of equitable protection because husbands consider them unequal in dealing with financial matters — seems an imperfect solution. But it is a reasonable response to an almost intractable problem.[104] It is also in keeping with the aims of the equitable jurisdiction. When it is clear that wives as a group do not suffer from exploitation at the hands of their husbands, or, that husband guarantors also suffer in similar numbers, equity should abandon or alter the presumption.[105]

In contrast, the reasoning employed to create the principle of emotional dependency, as evidenced in *Louth,* applies without any control, and relies on stereotyping that is congruent with prejudice; moreover, it is a presumption that is, as scientists would say, unfalsifiable. It is this kind of pernicious stereotyping that the law needs to be more protective against.

Garcia creates a presumption based on a stereotype, but allows individual variation to hold sway. To base legal judgment and the creation of doctrine on the understanding that women and men can or should or will be treated equitably ignores the very real inequalities that exist for women. As far as is currently known, the suretyship burdens women face are burdens that few men share. And as long as this is not disputed, then in the same way that women today should have laws particularised to the fact that domestic and sexual violence are overwhelmingly committed against them, employing stereotypes to aid in determining equitable principles is necessary. The only constant — the struggle to find the right balance — depends, somewhat ironically, on the continually evolving knowledge of whether women are more like or less like men.

[104] Hasson, above n 33 proposes banning all third party consumer guarantees. Given the overwhelming value placed on these guarantees to a functioning economic system (see *O'Brien,* above n 31, 188) this is highly unlikely to occur.

[105] The High Court seems to prefer extending stereotyped presumptions when faced with new evidence, rather than retracting them – see *Nelson v. Nelson* (1995) 132 ALR 133 (the original presumption of advancement, between a father and a child was extended to include a mother and child).