Public Trustee v. Skoretz: The Onward March of Undue Influence

A legal system which permits those who are physically or economically strong to exploit the weakness and age of others appeals to nobody. The problem is how the law can best intervene to ensure a fair balance between unequal parties. The development of consumer protection is a welcome recent arrival onto the legal scene. A far older remedy, however, which is the subject matter of the present case note, is that of undue influence.

The issue arose in the recent decision of *Public Trustee* v. *Skoretz*.[1] Mr Roberts, aged 71, resided in a lodging house in circumstances of considerable squalor. His room was kept in a filthy condition, his personal physical condition was unkempt and unwholesome, and he was deaf and partially blind. His income from investments in bonds was in the region of $3,500 to $4,000 per annum. A social worker who visited him persuaded Roberts that he should be in a rest home. She got in touch with the defendant, who was the operator of Kay's Rest Home, and arranged for Roberts to enter the home.

On September 21, 1970, the defendant brought Roberts to the rest-home. Two days later, Roberts asked to be taken to a bank nearby, where he arranged for transfers of his bank accounts. He also signed a power of attorney appointing the defendant his attorney, and told him that "he wanted [him] to have access to the accounts and to handle the same".[2] The bank employee explained to Roberts the effect of such an appointment.

The next day, September 24, Roberts asked the defendant to drive him to another bank to arrange for the transfer of further accounts. On the way, he told the defendant that he was very happy at the rest-home and that the care there was the best he had ever received. He said, "You and your wife are very friendly — very good to me — I should have been here long before this". At the bank, Roberts stated that he wanted the defendant "to have my money". When the bank employee asked what he meant, the defendant suggested that he meant a power of attorney and Roberts agreed, stating: "Yes, the same as yesterday". He then told the defendant

[1] [1973] 2 W.W.R. 638, 32 D.L.R. (3d) 749 (B.C.S.C.).
[2] *Ibid.*, 640 and 751.

"I want you to have what's in the box". A form was signed, enabling the defendant to gain access to his safety deposit box.[3]

During the next forty-eight hours, a series of conversations occurred which were not witnessed by anyone other than the plaintiff and defendant. During the afternoon of the 24th, the defendant asked Roberts what was in the box. According to the defendant, Roberts responded by pulling a deposit box key out of his pocket and giving it to the defendant, stating: "Take it. It's all yours ... I'm happy that you are looking after me so well. All the money I have is yours."[4]

Later that day, Roberts instructed the defendant to withdraw the safety deposit box from the bank. The defendant complied with this request the next day and returned with the contents of the box, which comprised bonds having a face value of $25,000. Roberts endorsed the bonds,[5] allegedly stating: "It's all yours. You're giving me good care and I'm glad to be able to give this to you as a gift." He also supposedly added, "All the money I have in the bank is yours. You look after me as long as I live." The defendant replied that he would.[6]

The next day, September 26, Roberts fell and fractured his hip. He was taken to hospital and never again returned to Kay's Rest Home. For the remaining nine months of his life, he was "confused and disoriented and it was impossible to get any information from him".[7] His mental condition deteriorated in March, 1971, and the plaintiff, the Public Trustee, became the statutory committee of Roberts. The latter died on June 13, 1971.

Within one week of his client's fall, the defendant had transferred all of Roberts' bank accounts into his own name and had cashed in all the bonds, realizing in all the sum of $49,160: a princely figure for less than a week's attendance. The defendant did not disclose to anyone that he had received this sum of money.[8]

---

[3] *Ibid.*, 641 and 752.

[4] *Ibid.*

[5] The recitation by Anderson,J. of the facts does not specifically refer to such endorsement, but it is clear that it took place at this time, having regard to his Lordship's further comments: *ibid.*, 643 and 754.

[6] *Ibid.*, 641 and 752.

[7] *Ibid.*

[8] "Under these circumstances, a first-year-law student would predict that a court's nostrils would be quivering", Scane, *Case Comment*, (1973) 1 Estates and Trusts Q. 8, 9. The same defendant would appear to have come under judicial scrutiny in not grossly dissimilar circumstances (although the action realted to a *donatio mortis causa*) in *Public Trustee* v. *Skoretz* (*No.* 2), [1974] 2 W.W.R. 77 (B.C.S.C.).

The plaintiff sued for the return of the money and securities received by the defendant from Roberts, alleging that there had been no gift or gifts of such assets to the defendant, and that even if a gift had been intended, it could not prevail in the face of the doctrine of undue influence.

Not surprisingly, the plaintiff was successful. Anderson,J. held that the allegation of a gift could not be sustained in the absence of corroboration. The conversations at the banks, in his Lordship's view, were "not referable to a gift but to an agency relationship".[9] Moreover, the endorsement of the bonds was equivocal, being "equally referable to the relationship of principal and agent as it is to the relationship of donor and donee".[10] With respect to the defendant's evidence, his Lordship stated that while he was not prepared to say that he entirely disbelieved the defendant, he was not sufficiently convinced of the truth of his story as to accept his evidence without corroboration.[11]

Furthermore, having considered numerous facts of the case,[12] his Lordship concluded that:

> [t]he surrounding circumstances are such that a clear inference can and should be drawn from the facts that the relationship between the parties was such that the defendant did, on the balance of probabilities, exert a "dominating influence" over the deceased.[13]

His Lordship was satisfied that such an inference could be drawn even in the absence of any evidence of express undue influence.

The defendant relied heavily[14] on the decision of *Shaw* v. *Jancowski*.[15] This case involved an older man living in a "deplorable condition"[16] befriended by the defendant, a practical nurse. This relationship build up over four years, during which the old man

---

[9] *Supra*, f.n.1, 643 and 754.

[10] *Ibid.*

[11] *Ibid.*

[12] That the deceased was almost blind, very deaf, had no independent advice, was physically dependent on the defendant and had no logical reason for making a gift of such a size to the defendant; that the "gifts" had been made with undue haste, without full discussion between the parties; that the "gifts" were so large, and that the income from the fund far exceeded the cost of care (which was $175 per month); that the defendant had already become the agent of the deceased when the "gifts" were made and that the radical change of circumstances of the deceased may have caused him to believe that he owed a debt of gratitude to the defendant: *ibid.*, 643-4 and 754-5.

[13] *Ibid.*, 644 and 755.

[14] *Ibid.*

[15] (1942), 61 B.C.R. 148 (B.C.S.C., Robertson,J.).

[16] *Ibid.*, 151.

provided the nurse with presents of cash, bonds and a car, and also financed her acquisition of a boarding-house where the old man stayed for over a year, until his death. The allegation of undue influence in *Shaw* v. *Jancowski* failed, since no dominating influence was proved. Robertson,J. considered that "the only relationship established was one of affection and of the high regard in which Johnston held the defendant".[17]

Shaw v. *Jancowski* was distinguished by Anderson,J. in *Public Trustee* v. *Skoretz* on the ground that in the former case there had been convincing evidence of the donor's mental capacity, and that the gifts had been made after " 'full, free and informed thought' ".[18] With all due respect to his Lordship, the distinction is not so clearcut as to allow *Shaw* v. *Jancowski* to be dismissed in a sentence. There was no evidence in *Public Trustee* v. *Skoretz* of mental weakness prior to Roberts' fall; indeed, his conversation in the bank on September 24 confirms his grasp of financial matters. Further, the donor in *Shaw's* case was 94, over twenty years older than Roberts. Moreover, the continuance of a relationship for over four years surely provides more of an opportunity to create and consolidate a "dominating influence" than does four days, which is all the time that had passed in *Public Trustee* v. *Skoretz* before Roberts had fully displayed his munificence.

The most important aspect of *Public Trustee* v. *Skoretz*, however, lies in the finding by Anderson,J. that the relationship between the defendant and Roberts fell within the "protected classes" of relationships which, if proved, give rise without any further evidence to a presumption of undue influence.[19] Such protected classes represent the classic fiduciary relationships of parent and child, solicitor and client, doctor and patient, trustee and beneficiary,

---

[17] *Ibid.*, 158. See also *Re Estate of Henry Daniel Cleveland; Dixon* v. *Brand* (1940), 15 M.P.R. 368 (N.B.S.C. Harrison,J.), "[t]he facts [of which] are very similar to the facts in this case", *per* Robertson,J. *supra*, f.n.15, 159. The court also rejected the plaintiff's claim.

[18] *Supra*, f.n.1, 644 and 755, adopting this criterion from Lord Evershed, M.R., in *Zamet* v. *Hyman*, [1961] 1 W.L.R. 1442, 1444, [1961] 3 All E.R. 933, 936 (Eng. C.A.).

[19] See G. Keeton and L. Sheridan, *Equity* (1969), 338 *et seq.*; L. Sheridan, *Fraud in Equity* (1957), 71 *et seq.*; McCann, *The Setting Aside of Deeds and Gifts Inter Vivos Obtained by the Exercise of Undue Influence*, (1967) 2 Ir. Jur. (n.s.) 205, 209 *et seq.*; Sealy, *Fiduciary Relationships*, (1962) Camb.L.J. 69, 78-9; Winder, *Undue Influence and Fiduciary Relationship*, (1940) 4 Conv. and Property L. (n.s.) 274; R. Goff and G. Jones, *The Law of Restitution* (1966), 164-7.

guardian and ward, fiancé and fiancée[20] and spiritual adviser and layman. Anderson,J. stated:

> The categories of "protected classes" are not closed. The law does not stand still but moves in accord with social change. I am quite unable to accept the contention that the relationship between rest-home operators and elderly patients is different (to any substantial degree) from the relationship between parent and child, solicitor and client, etc. In fact, elderly patients in rest-homes probably need more protection than the above "protected classes". As a matter of policy, the Courts should protect these elderly and friendless persons by bringing them within the "protected classes". While I do not suggest that the defendant was guilty of fraud or anything of that nature, it is not difficult to imagine how an unscrupulous operator could garner unto himself the assets of many of his patients.[21]

It is very difficult to cavil with a judicial policy which is directed at improving the lot of "the elderly and friendless". One must, however, bear in mind that legal justice should be applied on a distributive basis, and that a potential injustice may be inflicted on recipients of gifts from the elderly simply out of indulgence to the general plight of the donor, which may well be irrelevant to the central issue. True, nobody would want to see an elderly and helpless person denuded of his property by an avaricious rest-home proprietor, but the law prior to *Public Trustee* v. *Skoretz* did not encourage such a possibility. For such a transaction to be set aside, all that was required was that the donor be able establish a "dominating influence",[22] and as *Public Trustee* v. *Skoretz* itself shows, the evidence necessary to establish such an influence may be entirely inferential. There would seem to be no need to shift the burden of proof onto the rest-home proprietor: there have not been scores of decisions permitting such persons to retain their ill-gotten gains. In those cases in which the defendant has been successful,[23]

---

[20] But not husband and wife: *Bank of Montreal* v. *Stuart,* [1911] A.C. 120 (Privy Council, *ex* Ont.); *Thomson* v. *Thomson* (1926), 59 O.L.R. 661 (App. Div.). In certain factual situations, of course, the presumption may arise easily: *Mundinger* v. *Mundinger* (1968), 3 D.L.R. (3d) 338, [1969] 1 O.R. 606 (C.A.).

[21] *Supra,* f.n.1, 648 and 758.

[22] See, for example, *Shaw* v. *Jancowski* and cases cited therein, *supra,* f.n.15. See also Winder, *Undue Influence and Coercion,* (1939) 3 M.L.R. 97, 103.

[23] *E.g. Shaw* v. *Jancowski, supra,* f.n.15; *Re Estate of Cleveland; Dixon* v. *Brand, supra,* f.n.17. See *Papesch* v. *D'Ancey* (1969), 67 W.W.R. 274 (Alta. S.C., Sinclair,J.) where a gift to the husband of an employee of a nursing home by an elderly patient was set aside not because the plaintiff came within one of the "protected classes" but because all the circumstances gave rise to the presumption of undue influence, which the defendant, by declining to call any evidence on his behalf, failed to rebut. A recent English decision,

it would have been an injustice to have placed the onus on him to establish no influence, since the circumstances clearly negated any such dominance on the part of the defendant. The fact that the defendant would probably have succeeded in any event does not justify the general imposition upon him of the duty to rebut.

Further, if one follows to its logical conclusion the path of Anderson,J. when he states that "[t]he categories of 'protected classes' are not closed",[24] one has opened the floodgates and no individual relationship can be safe from becoming such a category. Such has been the progress of negligence law, except that no onus shift takes place in the latter case.

Further criticism may be levelled against Anderson,J.'s findings with regard to the defendant. He stated: "In the result I find that the defendant was a trustee of the moneys and the bonds".[25] What a plaintiff in an action based on undue influence is seeking is that the transaction should be set aside, not that the defendant should be held to be a trustee. However, this finding could have given rise to an interesting result. Until recently, the distinction between American and Anglo-Canadian law in the context of constructive trusts was that in the United States the constructive trust was conceived as a broad remedial device,[26] whereas in England and Canada its remedial aspects were secondary to the finding of a fiduciary relationship.[27] This rather unadventurous process tended to defer to established fiduciary relationships rather than being disposed to discover new ones. In the past three years in England, the Court of Appeal[28] and more than one member of the House of Lords[29] have

---

In Re C.M.G., [1970] Ch. 574 (Ct. of Protection, Stamp,J.) establishes that the "protected classes" include the relationship between mental patients and those in charge of a mental hospital. Scottish jurisprudence is able to function quite adequately without adopting the concept of "protected classes": see Walker, 1 *Principles of Scottish Private Law* (1970), 542.

[24] *Supra*, f.n.21.

[25] *Supra*, f.n.1, 649 and 759.

[26] See Scott, *Constructive Trusts*, (1955) 71 L.Q.R. 39; D. Waters, *The Constructive Trust* (1964), Ch. 1.

[27] See Maudsley, *Proprietary Remedies for the Recovery of Money*, (1959) 75 L.Q.R. 234, 236; Goff and Jones, *supra*, f.n.19, 36.

[28] Two clear instances of such reorientation are *Cooke* v. *Head*, [1972] 2 All E.R. 38 (Eng. C.A.) and *Hussey* v. *Palmer*, [1972] 3 All E.R. 744 (Eng. C.A.); noted in (1973) 89 L.Q.R. 2, by Ridley in (1973) 36 Mod.L.R. 436 and by Fairest in (1973) Camb. L.J. 41.

[29] See Lord Diplock in *Gissing* v. *Gissing*, [1971] A.C. 886, 905, and Lord Morris, 898. In this context, see also Lesser, *The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot*, (1973) 23 U. of T. L.J. 148, 189-191, 202-203.

brought about a reorientation of their conceptual approach so that it is not unreasonable to contend that the English and American concepts of constructive trust are now cousins rather than strangers. In Canada, the majority of the Supreme Court displayed no enthusiasm for this change of orientation in the recent controversial decision of *Murdoch* v. *Murdoch*,[30] although Laskin,J. (as he then was) energetically endorsed the American position.[31]

While these developments are not directly relevant to *Public Trustee* v. *Skoretz*, one must consider the possibility that, if the plaintiff's case had been presented in terms of a constructive trust instead of, or in addition to, the question of undue influence, Anderson,J. might have listened with sympathy to argument based on recent English developments. To this extent, it is to be regretted that rest-home proprietors were singled out for the imposition of a particularly onerous responsibility in *Public Trustee* v. *Skoretz*, whereas the case might have introduced unequivocally into Canadian jurisprudence the more general and flexible concept of unjust enrichment through the mechanism of the constructive trust.

W. Binchy*

---

[30] (1973), 41 D.L.R. (3d) 367.

[31] His Lordship quoted with approval the classic "unjust enrichment" concept, enunciated by Scott in *The Law of Trusts* 8th ed. (1967), 3215 and 3413.

* Assistant Professor of Law, University of Ottawa, Common Law Section.