HANNES ROßLER
Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law

MARCO B. M. LOOS
The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization

ALDO BERLINGUER
The Italian Road to Trusts

ANDREW P. BELL
Abuse of a Relationship: Undue Influence in English Law and French Law

SARA MARTÍN SALAMANCA
Cour de Cassation - Ass. plén., arrêt No. 519 du 29 oct 2004 - Une cause contraire aux bonnes moeurs

PEDRO DEL OLMO
Cour de Cassation, 1ère civ. 3 février 2004 - Un prêt à usage à durée indéterminée consenti pour un usage permanent, le prêteur pouvait y mettre fin à tout moment, et si oui sous quelle(s) condition(s)?

Index 2006

List of Contributors
Subscription Information
Volume 15 (6 issues) will be published in 2007. Institutions subscription price EURO 506,— / USD 632,— / GBP 372,— (including postage and handling). This journal is also available online. Online and individual subscription prices are available on request. Please contact our sales department for more information at +31 (0)703801562 or at sales@kluwerlaw.com.

Subscriptions orders and requests for sample copies should be sent to:
Kluwer Law International
c/o Turpin Distribution Services Ltd
Riggleswade, Bedfordshire
SG18 8TQ, United Kingdom

Individual subscriptions originating from North Central and South America should be sent to:
Kluwer Law International
7251 McInney Circle
Frederick MD 21704
United States of America

For advertisement rates, prices of back volumes, and other information, apply to Kluwer Law International, Marketing Department, 316, 2400 AH Alphen aan den Rijn, The Netherlands.

Aims and Scope
The European Review of Private Law aims to stress the strong practical as well as academic importance of national private laws in integrating Europe, in the face of the current overwhelming emphasis placed on European Community Law. Cross border research will become increasingly important as cross border legal work develops. There is a need for a law review which focuses on legal developments within a broad European perspective, and which provides a platform for debate on the desirability of a unified private law in Europe, as a complement to economic, monetary and political union.

The European Review of Private Law will have an appeal across the academic/practitioner divide. By providing accessible and comparative surveys of legal developments in a number of countries, with summaries of articles and case notes in French, German and English, the Review will provide a valuable source of information for lawyers wishing to look for new ideas with which to tempt their courts to innovate in private law. The impact of European Community law has made national courts more receptive to importing new conceptual devices and legal techniques directly from foreign case law, not always waiting for the legislature to act.

The European Review of Private Law is indexed/abstracted in the European Legal Journals.

Style Guide
A style guide for contributors can be found in volume 11, issue No. 1 (2003), pages 103-108, and online at http://www.kluwerlawonline.com/europeanreviewofprivatelaw.

Index
An annual index will be published in issue No. 6 of each volume.
EUROPEAN REVIEW OF PRIVATE LAW

VOLUME 15 NO. 4 - 2007

Articles

483-513  HANNES RÖSLER
Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law

515-531  MARCO B.M. LOOS
The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization

533-553  ALDO BERLINGUER
The Italian Road to Trusts

555-599  ANDREW P. BELL
Abuse of a Relationship: Undue Influence in English Law and French Law

Case notes

601-616  SARA MARTÍN SALAMANCA
Cour de Cassation - Ass. plén., arrêt No. 519 du 29 oct 2004 - Une cause contraire aux bonnes moeurs

617-628  PEDRO DEL OLMO
Cour de Cassation, 1ère civ. 3 février 2004 - Un prêt à usage à durée indéterminée consenti pour un usage permanent, le prêteur pouvait y mettre fin à tout moment, et si oui sous quelle(s) condition(s)?

629-633  Index 2006

635  List of Contributors
Abuse of a Relationship: Undue Influence in English Law and French Law

ANDREW P. BELL *

Keywords: Contract, Gifts, Wills, Consent, Undue influence, Captation

Abstract: This article compares the protection provided by English law and French law against the abuse of relationships where one party places trust and confidence in the other or is subject to the other’s authority. It focuses on the English law of undue influence as it applies to contracts, gifts inter vivos and testamentary gifts, and it identifies the functionally equivalent French rules, in particular those based on presumptions of suggestion and captation. The first part of the article looks at the problem at a general level, while the second concentrates on the treatment of particular relationships (parent and child and analogous cases, sexual relationships and religious relationships). The study notes some common ground and common heritage, but sheds light equally on the distinctive strategies of the two legal systems and highlights the impact of the different social contexts.

Résumé: Cet article étudie de façon comparative la protection que fournissent le droit anglais et le droit français contre l’abus des relations où l’une des parties met confiance en l’autre ou est soumise à son autorité. L’étude traite de undue influence en droit anglais dans son application aux contrats et aux libéralités, et elle découvre les règles en droit français qui y sont équivalentes du point de vue fonctionel, notamment celles qui se reposent sur une présomption de suggestion et de captation. La première partie de l’article envisage la matière sur le plan général, alors que la deuxième partie considère des relations spécifiques (parent et enfant et cas semblables, relations sexuelles et relations religieuses). L’étude note des traits et un héritage communs, mais elle éclaire également les stratégies distinctives des deux droits et souligne l’influence des contextes sociaux différents.


I. Introduction

Personal relationships lie at the heart of our lives, and protecting against exploitation and abuse of such relationships is an important task for private law. To that end,

* Senior Lecturer, School of Law, University of Manchester (England).
English law, for example, provides extensive remedies based on undue influence. However, it is apparent that the nature and extent of the protection provided may vary from one legal system to another. This article sets out to compare the English approach with that of French law, noting some common ground (and indeed, common heritage), but shedding light equally on the distinctive strategies of the two systems and highlighting the impact of the different social contexts.

Nevertheless, there are difficulties. The perils of defining the subject matter of a comparative study in terms of a concept found in one legal system are well recognized, and this is certainly borne out in relation to undue influence. To begin with, in English law undue influence means different things in different contexts. While contracts and gifts *inter vivos* are subject to a broad ground of relief evolved by the courts of equity, wills are governed by a narrower version of undue influence developed by the ecclesiastical courts and, after 1857, by the secular courts of probate. In effect, therefore, in the field of what will be referred to here, for want of a better word, as transactions, English law has two distinct doctrines of undue influence. Moreover, the equitable doctrine, at least, is ill-defined in scope, for the courts have consistently refused to fetter their discretion by rigid rules. In the 19th century, Lindley LJ observed that ‘no Court has ever attempted to define influence’, and in the same vein, in the twenty-first century, Lord Nicholls has cautioned that ‘there is no single touchstone for determining whether the principle is applicable’. These difficulties in ascribing a single, clear meaning to the English ‘undue influence’ naturally impede the search for functionally equivalent rules in French law. The problem is compounded by the fact that undue influence is an unhelpfully diverse doctrine: although it is typically applied in cases of personal relationships, it is also capable of applying in other contexts, providing a remedy for threats not dealt with by the historically limited common law of duress. In the interests of clarity and coherence, this study will therefore focus, not on undue influence as such, but on the abuse of relationships of trust and confidence and relationships of authority (referred to here collectively as ‘special relationships’), two overlapping categories which happen to form the central preoccupation of the equitable doctrine. But the analysis will not be confined simply to transactions *inter

---

1 So much is clear even within the common law world: in Malaysia it has been said that those in non-marital sexual relationships should not be given the same degree of protection as in English law, reflecting the ‘entirely different set of moral standards’ of Malaysian society (Tengku Abdullah Ibni Sultan Abu Bakar & Ors. v. Mohd Latiff Bin Shah Mohd & Ors. [1996] 2 Malayan LJ 265, CA, at 310 (Gopal Sri Ram JCA)).

2 English sadly lacks a commonly used equivalent of the elegant French *acte*.

3 Other, distinct uses of ‘undue influence’ can also be found outside the law relating to transactions: e.g. in medical law relating to consent to treatment (*Re T* [1993] Fam 95, CA) and in electoral law relating to corrupt practices (Representation of the People Act 1983, sec. 115).


vivos: as the comparison with French law will show, the different treatment afforded to wills is a significant and distinctive feature of English law, one which merits close attention.

The study falls into two parts. The first attempts to paint a general picture of how English law and French law approach the relationships in question and looks both at basic relief founded on proven improper conduct and, more importantly, at enhanced protection where intervention is made without proof of any such conduct, typically acting simply on the basis of a presumption that it has occurred. The second part of the study turns from the general and focuses on the treatment given to particular relationships, at which level the influence of social context is most marked. It runs through a series of familiar relationships, some of which English law and French law treat in similar fashion, but others of which are approached in significantly different ways.

II. The General Picture

1. English Law

1.1 Transactions Inter Vivos

A claimant may succeed in having a contract or gift inter vivos set aside on the ground of undue influence either by proving that it was obtained by improper conduct (‘actual undue influence’) or by showing that the relationship between the claimant and the instigator of the transaction and the nature of the transaction itself were such as to raise a presumption that improper conduct had taken place (‘presumed undue influence’). Presumed undue influence is the type specifically designed to deal with the sorts of relationship on which this study seeks to focus. Actual undue influence, on the other hand, applies to a broader range of relationships and indeed can be relied on where there is no established relationship between the parties at all. Much of what follows will therefore concentrate on presumed undue influence, but something must be said first about actual undue influence, and not simply because it is difficult to explain a presumption coherently without indicating what is being presumed. In practice even a party to a recognized special relationship may be forced to prove misconduct, for undue influence will only be presumed if there is something unusual about the impugned transaction, but no such question arises in the case of proven misconduct.

---

7 The locus classicus for this distinction is the leading case of Allcard v. Skinner (1887) 36 ChD 145, CA, at 181 (Lindley LJ).
1.1.1 Proven Improper Conduct

Actual undue influence may take the form of threats. There is clearly an overlap here with the common law of duress, which historically was of restricted scope, but which in modern times has been developing into a more general basis for relief against coercion. But undue influence comes into its own in the context of special relationships, where equity will provide a remedy when pressure is used that falls short of what would be required in the arm’s length dealings where duress is invoked. This is justifiable: a person already predisposed to comply, will, after all, require less ‘leaning on’. The degree of pressure required will inevitably depend on the nature of the relationship, taking into account ‘[t]he vulnerability of one party . . . [and] the forcefulness of the personality of the other’. The improper conduct may involve ‘excessive pressure, emotional blackmail or bullying’ or a sustained campaign of ‘insistence and badgering’.

While most discussion of actual undue influence focuses on improper pressure, it can also include deliberate misrepresentation. This can, of course, be relied on as an independent ground for impeaching a transaction and parties commonly plead both misrepresentation and undue influence. But undue influence is invoked in relation to false statements where they have been used together with the application of pressure as part of a concerted attempt at securing compliance, or where they are made in the context of a special relationship and therefore constitute an abuse of it, or where they are used to create such a relationship which can then be

---


10 G.H. TREITEL, (n. 6), pp. 405–408; Cheshire, Fifoot and Furmston’s Law of Contract (n. 6), pp. 383–384, 386–390; Goff and Jones on Restitution (n. 6), ch. 10.


19 Cf. Royal Bank of Scotland v. Etridge (No. 2) [2002] 2 AC 773, HL, at paras. 33 (Lord Nicholls) and 160 (Lord Scott).
exploited.\textsuperscript{20} That undue influence and misrepresentation are therefore overlapping concepts is clearly not elegant, but it reflects the long-standing view that both are merely specific instances of the over-arching category of fraud,\textsuperscript{21} coupled with equity’s traditional avoidance of formalism.\textsuperscript{22}

The bulk of actual undue influence cases involve the use of hostile acts (pressure or lies) to secure consent. In some older cases, however, it is also indicated, in the context of a special relationship, that it would be wrong to obtain consent by flattery or even by ‘good usage unfairly meant’.\textsuperscript{23} Certainly, such ‘softening up’ would make a victim more amenable, more susceptible to even slight pressure, but it is not clear how far conduct of this kind will suffice on its own to constitute improper means.\textsuperscript{24}

\subsection*{1.1.2 Presumptions of Improper Conduct}

Although providing a remedy upon proof of reprehensible conduct has been a significant aspect of the doctrine of undue influence, from its origins in the 18th century it has been concerned above all with situations where such proof is not required. Presumed undue influence has been examined in many leading cases, from \textit{Huguenin v. Baseley}\textsuperscript{25} and \textit{Allcard v. Skinner}\textsuperscript{26} in the 19th century and \textit{National Westminster Bank v. Morgan}\textsuperscript{27} and \textit{Barclays Bank v. O’Brien}\textsuperscript{28} in the 20th century through to the latest House of Lords authority, \textit{Royal Bank of Scotland v. Etridge (No 2)}\textsuperscript{29} (referred to hereafter simply as ‘Etridge’). As this last case makes clear, where parties are in a special relationship which puts one party in a position to influence the other, a transaction entered into by the latter can be set aside if it is proved that it was against his or her interests, without the need for proof of specific acts of coercion, misrepresentation or other improper conduct. This basic presumption of undue influence is, however, rebuttable; but it is reinforced by a second, irrebuttable presumption that certain key relationships are special.

\begin{itemize}
\item \textsuperscript{20} \textit{Nottidge v. Prince} (1860) 2 Giff 246, 66 ER 103; \textit{Lyon v. Home} (1868) LR Eq 655.
\item \textsuperscript{21} \textit{Allcard v. Skinner} (1887) 36 ChD 145, CA, at 183 (Lindley LJ).
\item \textsuperscript{22} And cf. the concern expressed in cases on presumed undue influence that decisions should be made ‘as a result of full, free and informed thought’: \textit{Zamet v. Hyman} [1961] 1 WLR 1442, CA, at 1444 (Lord Evershed MR).
\item \textsuperscript{24} There are certainly dicta in the leading cases that focus on deliberate and dishonest manipulation rather than the precise means by which that is achieved \textit{Allcard v. Skinner} (1887) 36 ChD 145, CA, at 183 (Lindley LJ); \textit{Royal Bank of Scotland v. Etridge (No. 2)} (2002) 2 AC 773, HL, at para. 7 (Lord Nicholls).
\item \textsuperscript{25} (1807) 14 Ves 273, 33 ER 526.
\item \textsuperscript{26} (1887) 36 ChD 145, CA.
\item \textsuperscript{27} [1985] AC 686, HL.
\item \textsuperscript{28} [1994] 1 AC 180, HL.
\item \textsuperscript{29} [2002] 2 AC 773, HL.
\end{itemize}
The protected relationships In the vast majority of cases, the courts look to see if a relationship is one of ‘trust and confidence’. This is not, however, the only type of relationship regarded as special. Protection is also given, for example, where one person exercises authority over another. This can be seen in the recent (but slightly inconclusive) case of Attorney-General v. R, where a member of the Special Air Service (SAS) signed a confidentiality agreement at the behest of his commanding officer. Although the majority of the Privy Council was simply willing to assume the point without deciding it, Lord Scott accepted that the relationship between a soldier and his senior officers was a protected one. In practice these categories overlap and some protected relationships can be looked at from both angles. For example, the parent-child relationship has long been treated as special and is usually regarded as involving trust and confidence placed by the child in the parent; but older cases stressed parental authority rather than trust, and even today the leading case on that relationship mentions ‘the filial obedience which a child owes to his parent’.

While in general the person seeking to have the transaction set aside must prove that the relationship between the parties was a special one, certain relationships are irrebuttably presumed to involve trust and confidence. These relationships have been at the heart of the development of the doctrine of undue influence and its application to them remains its most significant aspect. The list of relationships presumed to be of trust and confidence evolved in the course of the 18th and 19th centuries. Early cases focused particularly on transactions made by a person in favour of someone managing his or her property or financial affairs, dealing with cases involving trustee and beneficiary, guardian and ward, attorney and client.
However, following *Huguenin v. Baseley* in 1807, it was applied more broadly to relationships of a more personal character. In this case, a widow who had been befriended by the defendant, a clergyman, entrusted the management of her property to him and later executed a deed settling a manor on him and his family. Lord Eldon LC held that the deed must be set aside, following the earlier cases and emphasizing the defendant’s role in managing her affairs. But a broader approach had been advocated by the Solicitor General, Sir Samuel Romilly, who appeared for the widow, and his highly regarded submissions proved influential for the subsequent development of the law. Seizing on the defendant’s character as a clergyman, he argued that the deed could be set aside because of the religious influence the defendant had over the widow. Relief was not limited to the few cases previously recognized, but “[stood] upon a general principle, applying to all the variety of relations, in which dominion may be exercised by one person over another”. Subsequent cases adopted this more liberal approach and extended the list of relationships to include a number of examples suggested by Sir Samuel: doctor and patient, spiritual adviser or superior and disciple. In addition, the relationship of parent and child, which had tended to be discussed separately, but which Sir Samuel had treated as similar to that of guardian and ward, was integrated into the mainstream of the doctrine and added to the list.

While these relationships are irrebuttally presumed to be special, there are many others which in particular cases may have this character, but as has been said this must be proven. Some relationships falling within this category have clear affinities with those where the special character is presumed: for example, uncle and niece (akin to parent and child). But equity casts its net wider than this and recognizes many other, unrelated relationships as capable of being special, including bank manager and customer, manager and popular music performer, and secretary-companion and employer. Of particular importance in this category is the relationship of husband and wife, which has dominated the modern case law.
The unusual character of the transaction Whether the relationship is presumed or proven to be special, there is no presumption of undue influence unless the transaction itself is an unusual one, one calling for an explanation. Thus, as Lord Nicholls explained in *Etridge*, the presumption does not apply to ‘every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or patient agrees to be responsible for the reasonable fees of his legal or medical adviser’.

The nature of the presumption Where the transaction is shown to be unusual, the exercise of undue influence will be presumed. In *Etridge* all members of the House of Lords were at pains to draw a sharp distinction between this rebuttable presumption and the irrebuttable presumption that certain relationships are of trust and confidence. The latter is a legal presumption, deeming something to be the case that is not necessarily true. The presumption of undue influence, on the other hand, is simply an inference of fact: if the transaction is unusual and the relationship is a special one, that points to the transaction being in fact the result of actual undue influence.

Although their Lordships therefore played down the significance of the presumption of undue influence, it nevertheless remains of importance. The fact that the courts are prepared to draw this inference makes it much easier in practice to establish a claim of undue influence and (and, as will be seen, this flexibility is a significant point of difference between English law and French law). Moreover, although this presumption is rebuttable, it would appear that the grounds on which it can be rebutted are limited. In the years since *Etridge*, the Court of Appeal has made it clear that the presumption cannot be defeated simply by proving that the dominant party committed no improper acts. The central question, it is said, is not what the dominant party did or did not do, but whether the weaker party gave full, informed consent. Invariably, the question asked is whether the latter had the benefit of independent advice. The ideal is advice from a solicitor or other lawyer, but in appropriate cases advice from other sources, such as a friend or relative, will suffice.

Much will turn on the facts of the case: the standard of advice that is required will vary depending on how strong the influence is and how unusual the transaction is. However, in some cases (for example, gifts made by a member of a cult to its leader) the influence may be so strong that it cannot be shaken even by independent legal advice, and here the presumption will in practice be irrebuttable.

---

49 At paras. 13–18 (Lord Nicholls), 93 (Lord Clyde), 104–107 (Lord Hobhouse), 155 and 161 (Lord Scott).
51 *Inche Noriah v. Shaik Allie bin Omar* [1929] AC 127 (PC), at 135 (Lord Hailsham LC).
1.1.3 Third Parties

The obvious situation where a remedy may be sought is where A has influence over B and as a result B makes a gift to A or enters into a contract with A which is to the latter’s advantage. But in many cases the transaction will involve a third party: for example, B may be induced to make a gift to a member of A’s family or (commonly) to agree to provide security for a bank loan to A. Undue influence can sometimes be relied on against such a third party, but not always: it is now settled that the position of the third party is to be governed in general by the standard rules governing ‘equities’, which take into account whether the third party gave value and had notice of any wrongdoing.

It was made clear in the 18th century that a third party could not keep the benefit of a gift obtained as a result of undue influence, even if he or she had no involvement in the wrongdoing or any notice of it. From the 19th century contracts with third parties also came under fire, as cases came before the courts involving the giving of security (young adults providing security for the debts of their fathers or other close relatives, wives doing the same for their husbands). It was recognized that these contracts could be set aside, but in the latter part of the 20th century there was some debate as to when that was appropriate. Some cases favoured the narrower view that contracts could only be avoided where the person with influence was acting as agent for the third party. However, this approach was ultimately rejected in favour of the broader test of whether the third party had actual or constructive notice of wrongdoing. The third party will be deemed to have constructive notice if, knowing that the transaction is to B’s disadvantage and that the relationship between A and B is one where there is a heightened risk of undue influence, he or she fails to take appropriate steps to counter the possibility of wrongdoing. In general, those steps would include alerting B to the risks the contract entails and the need to obtain independent advice. This broad test can clearly catch many contracts with third parties, all the more so because a third party will be taken to know that there is a heightened risk of undue influence not only where he or she knows that the relationship between A and B is in fact special or where it is presumed to be such, but also where the third party knows that the relationship might be special. Precautions should therefore be taken wherever A and B’s relationship is not commercial.

---

54 Bridgeman v. Green (1757) Wilm 58, at 65; 97 ER 22, at 25 (Wilmot CJ). See also Huguenin v. Baseley (1807) 14 Ves 273, at 289; 33 ER 526, at 532 (Lord Eldon LC).
55 E.g. Berdoe v. Dawson (1865) 34 Beav 603, 55 ER 768; Bainbrigge v. Browne (1881) 18 ChD 188.
56 E.g. Archer v. Hudson (1844) 7 Beav 551 (uncle).
60 Etridge [2002] 2 AC 773, HL, at paras. 84-89 (Lord Nicholls).
61 Etridge, at para. 87 (Lord Nicholls).
1.2 Wills

As noted earlier, the probate version of the doctrine of undue influence is less extensive than its equitable counterpart. There are two key differences: the concept of undue influence is defined more narrowly, being confined to cases of coercion, and no presumption arises simply because the relationship between the parties is special.

1.2.1 Proven Improper Conduct

A will, or part of one, may be challenged on the ground of undue influence if the testator was coerced. ‘Coercion’ in this context, it has been said, is to be interpreted with some latitude. As Sir James Wilde explained in *Hall v. Hall*:

Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator’s judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened.

On the other hand, improper pressure has to be distinguished from simple persuasion, which is acceptable: a testator ‘may be led but not driven’.

Although such attempts to explain the scope of undue influence would suggest considerable flexibility, it is not clear that the probate doctrine goes quite as far as its equitable counterpart in relation to improper pressure. It has been observed that in the 19th century (the period of most of the leading cases) the courts generally required considerable pressure. The difference in approach was most apparent in cases involving a special relationship: in this context, in *Parfitt v. Lawless*, Lord Penzance drew a sharp distinction between the two doctrines, stating that equity would give a remedy where the natural influence stemming from such a relationship

---


63 Boyse v. Rossborough (1857) 6 HLC 2, at 48-49; 10 ER 1192, at 1211 (Lord Cranworth LC).

64 (1868) LR 1 P&D 481, at 482. See also Wingrove v. Wingrove (1885) 11 PD 81, at 82–83 (Hannen P).

65 (1868) LR 1 P&D 481, at 482 (Sir J.P. Wilde).

66 PARRY & CLARK (n. 62), para. 5-13.

67 (1872) LR 2 P&D 462, at 469.
was used, but in probate cases there had to be more, ‘the exercise of dominion or the assertion of adverse control’. 68

A will can also be challenged in cases of fraudulent misrepresentation. However, this must be pleaded as fraud: unlike in equity, undue influence in probate cases does not cover deception. This was not always so: older cases took the same approach as equity in this regard, 69 but the modern practice emerged when jurisdiction over wills was transferred from the ecclesiastical courts to the new Court of Probate. Rules on pleading were introduced, 70 designed primarily to bar certain tenuous pleas, 71 but in setting out the acceptable grounds, they distinguished clearly between fraud and undue influence. 72

1.2.2 Presumptions of Improper Conduct

Improper conduct must be proved and will not be presumed simply because a person benefiting under a will stood in a special relationship to the testator. Such was the traditional view of the courts of probate, but in the mid-19th century, as the equitable doctrine became firmly established, this position came under attack on two fronts. Hitherto the courts of equity had generally respected the jurisdiction of the courts of probate to determine conclusively the validity of wills, but some judges questioned this. It was suggested that, notwithstanding the grant of probate, it might be possible for the issue of undue influence to be raised in a court of equity, where a constructive trust might be imposed on the beneficiary if he could not rebut the equitable presumption. 73 Against the background of this threat to outflank the traditional probate position, a direct assault was launched in Parfitt v. Lawless, 74 where the Court of Probate was pressed to recognize a presumption of undue influence where a will conferred a benefit on a person standing in a special relationship with the testator. But in a highly influential judgment Lord Penzance defended the established probate doctrine, arguing that in principle a presumption was inappropriate in the context of

---

68 But cp. Re Wilkes (HC, unreported, 8 June 2000) where the judge treated the equity cases on actual undue influence as directly applicable to wills. The phrase ‘actual undue influence’ certainly figures in the vocabulary of modern probate judges.

69 E.g. Boyse v. Rossborough (1857) 6 HLC 2, at 48; 10 ER 1192, at 1211 (Lord Cranworth LC).

70 Contentious Probate Rules 1862, amended 1865.


72 The effect of the new rules on the definition of undue influence is made clear by Lord Penzance in Parfitt v. Lawless (1872) LR 2 P&D 462, at 470-71.

73 The presumption was held applicable in two cases involving wills in favour of the testator’s solicitor: Hindson v. Weatherill (1853) 1 SM&G 604, 65 ER 265 and Walker v. Smith (1861) 29 Beav 394, 54 ER 680 (but cp. Hindson v. Weatherill (1854) 5 De GM&G 301, at 313; 43 ER 886, at 890 (Turner LJ)).

74 (1872) LR 2 P&D 462.
wills, and by implication he attacked the basis on which the case for equitable intervention was founded.

One argument was based on the narrow meaning of undue influence in relation to wills. His Lordship observed that while equity was prepared to set aside a transaction *inter vivos* where influence had been exercised, in probate cases more heinous conduct was required, i.e. coercion. He then argued that, while it might be acceptable to presume the lesser kind of wrongdoing, it would be ‘a very different thing to presume [the greater] without a particle of proof’.75 This reasoning assumed, of course, that it was right to interpret undue influence in such narrow terms in relation to wills, but that assumption might not be shared by a court of equity. His second argument, however, was clearly of general application, and this was founded on what was required to rebut a presumption of undue influence. In the case of a transaction *inter vivos*, the beneficiary would have taken part in it: he might have instigated it, but even if he did not, the transaction could not be carried out without his cooperation. A beneficiary under a will, on the other hand, ‘may have, and in point of fact generally has, no part in or even knowledge of’ the making of the will and it would be wrong to put the burden of proof on him.76 That ‘would be to cast a duty on him which in many, if not most cases, he could not possibly discharge’.77

If, then, as this case insisted, there are objections to basing a presumption simply on the fact of benefit coupled with the existence of a special relationship, a different approach can be taken, and indeed to a certain extent is taken, if the person with influence does in fact instigate the will or is otherwise involved in its making. The person propounding a will bears the initial burden of proving that the testator knew of and approved the contents of the will. In a normal case, it suffices to show that the testator was mentally capable and that the will was duly executed; but where a person involved in the making of the will takes a benefit under it, this is regarded as suspicious and further evidence is required.78 As with the equitable presumption, the degree of suspicion and consequently the evidence required to dispel it may vary from one case to another.79 As in equity cases, the court will have regard to the size of the gift80 and the nature of the relationship between the parties;81 and it is said that the

---

75 At 470.
76 At 469.
77 Ibid.
78 Barry v. Butlin (1838) 2 Moo PC 480, at 483; 12 ER 1089, at 1090 (Parke B).
clearest way of preventing the will being impeached is to ensure that the testator has independent legal advice, but it is not always necessary to go so far.\footnote{Lutchman Ramcoomarsingh v. The Administrator General, at paras. 18–19 (Lord Slynn).}

Nevertheless, this probate rule falls far short of the equitable doctrine. It does not involve a presumption of undue influence or fraud as such.\footnote{WINDER (n. 6), at 107–108.} Rather, the onus is on the person propounding the will to demonstrate that the testator knew of and approved the contents of the will. While undue influence or fraud can sometimes have the result that the will does not say what the testator intended, they generally have wider relevance; consequently, as explained in \textit{Tyrell v. Painton},\footnote{[1894] P 151, CA, at 157 (Lindley LJ).} once the proponent of the will has removed the suspicion by proving ‘affirmatively that the testator knew and approved of the contents of the document . . . the onus is thrown on those who oppose the will to prove fraud or undue influence’. Moreover, the rule is subject to the difficult restriction that it cannot be used as a cloak for making what is in substance a claim of wrongdoing. If a party wishes to attack the will on the grounds of undue influence or fraud, he or she must plead it and prove it.\footnote{Re Stott [1980] 1 WLR 246, Ch, at 252–53 (Slade J).} This is a significant restriction, even if the courts do give pleaders ‘a fair measure of latitude’.\footnote{Re R [1951] P 10, at 19 (Willmer J), cited with approval in Re Stott [1980] 1 WLR 246, at 252.}

2. French Law

2.1 Proven Improper Conduct

As far as proven misconduct in French law is concerned, the starting point is Article 1109 of the \textit{Code civil}. This deals with the consent necessary for a contract and lists three grounds on which that consent may be vitiated: \textit{erreur} (mistake), \textit{violence} (duress) and \textit{dol} (fraud), of which the last two are of particular relevance here. In the past this provision has been applied not only to what English lawyers would think of as contracts, but also to gifts \textit{inter vivos} (which are regarded in French law as a species of contract) and, by analogy, to testamentary gifts;\footnote{F. \textsc{Terre} & Y. \textsc{Lequette}, \textit{Droit civil: les successions, les libéralités}, Dalloz, Paris, 3rd edn. 1997, para. 262; P. \textsc{Malaurie}, \textit{Les successions, les libéralités}, Defrénos, Paris, 1st. edn. 2004, p. 153.} and with effect from 1 January 2007 this has now been put on a statutory footing,\footnote{By Art. 10 of the \textit{loi} of 23 June 2006, \textit{JO} 24 June 2006. See P. \textsc{Malaurie}, \textit{Les successions, les libéralités}, Defrénos, Paris, 2nd. edn. 2007, pp. 147 et seq.} with a revised Article 901 explicitly making gratuitous dispositions null and void in the event of \textit{erreur}, \textit{violence} or \textit{dol}. But it is evident that neither Article 1109 nor the new Article 901 contains a specific \textit{vice} dealing with abuse of a special relationship, a direct counterpart to undue influence in English law. This was not always the case. Before the Revolution, the \textit{ancien droit} recognized other grounds for impugning a transaction, amongst which \textit{suggestion} and \textit{captation} in the field of gifts...
corresponded closely to undue influence. But these were ill-defined\(^\text{89}\) (as undue influence remains in English law), and the draftsmen of the *Code civil* opted for a clearer, shorter list of *vices de consentement*. Situations that had formerly been dealt with under the heads of *suggestion* and *captation* now had to be dealt with, as far as possible, within the confines of *dol* and *violence*, a process which may have led to some distortion of these *vices*, particularly in relation to gifts, with which the old heads had been particularly concerned. *Suggestion* and *captation* have not been expunged from the law, however: confusingly perhaps, in the context of gifts French lawyers continue to use these terms not only in their discussions of *dol* and *violence*, but also (as will be seen below) when describing the special rules that dispense with the need for proof of misconduct. Their meaning remains vague, but used together or, commonly, separately (and in practice interchangeably)\(^\text{90}\) they denote dishonest conduct calculated to overreach a donor or testator and influence improperly the disposition of his or her property.\(^\text{91}\)

The precise extent of the protection afforded by the modern law is difficult to determine, partly because there is disagreement among the commentators and partly because doctrinal and judicial analysis is expressed at a high level of abstraction. Some English cases of actual undue influence would certainly be covered by *violence*, which embraces the illegitimate application of pressure that puts a person in fear for his or her person or fortune.\(^\text{92}\) This is generally applied quite restrictively, though, more like the English common law of duress, but there is possibly some relaxation in relation to gifts. Some writers suggest that less pressure is required for gifts *inter vivos* and wills, but this is disputed.\(^\text{93}\) Be that as it may, the *vice* most commonly relied on is *dol*, and it is in this context that *suggestion* and *captation* are mainly discussed. *Dol* is classically understood as involving dishonest conduct deceiving the victim.\(^\text{94}\)

Where *suggestion* and *captation* involve deception, they can therefore be readily

\(^{89}\) J. GUYÉNOT ‘La suggestion et la captation en matière de libéralités dans leur rapports avec la notion de dol’ *RTD civ* (Revue trimestrielle de droit civil) 1964, p. 199, at para. 1.

\(^{89}\) *Suggestion* emphasizes the means used, whereas *captation* stresses the end achieved.

\(^{90}\) GUYÉNOT (n. 89), para. 1.


\(^{91}\) TERRÉ, SIMLER & LEQUETTE (n. 92), para. 237; MALAURIE, AYNÈS & STOFFEL-MUNCK (n. 92), para. 511.
accommodated within this *vice*, e.g. worming one’s way into a person’s favour by disparaging his or her relatives.

It would seem that some cases of undue influence may fall through the net, where there is an attempt to influence the victim without instilling fear as required for *violence* and without using deception. As one commentator has put it, a no-man’s land has been left between *dol* and *violence* by the abolition of the old *vice of suggestion* and *captation*. Interestingly, an attempt was made by the Court of Appeal in Colmar to fill the gap by extending the reach of *dol*, in a case where an elderly widow had been browbeaten by members of her family into making a gift, being confined to her rooms and subjected to lengthy arguments late into the night until her resistance was worn down. Despite the absence of any misrepresentation on the part of the relatives, the gift was held to be null and void on the grounds of *dol*, it being said to be sufficient that the relatives had acted dishonestly. It has been argued that this decision was entirely consistent with many gift cases down the years based on *suggestion* and *captation*, but the *Cour de cassation* has subsequently re-asserted the need for deception.

### 2.2 Presumptions of Improper Conduct

In the *ancien droit*, *dol* could often be presumed, but the *Code civil* specifically provides that it must be proven, and this is equally the rule for *violence*. However, despite the *Code’s* failure to list *suggestion* and *captation* as an independent *vice de consentement*, transactions can be impeached on a number of grounds that are based on a presumption of such misconduct. The relevant provisions naturally constitute a direct counterpart to the English rules on presumed undue influence, but they have distinctive features: they are usually confined to gratuitous transactions, they generally include testamentary gifts, and the presumptions they embody are irrebuttable.

---

95 GUYÈNOT (n. 89), paras. 5-22.
97 TERRÉ, SIMLER & LEQUIETTE (n. 92), para. 254.
101 GUYÈNOT (n. 89), para. 30.
102 Art. 1116, al. 2.
2.2.1 Les Incapacités

The favoured approach of French civil law to relationships where there is a significant danger of undue influence is to take away the potential victim’s ability to make gifts or legacies in favour of the party with influence. This approach has its origins in the ancien droit. The ordonnance of Villers-Cotterets in 1539 invalidated gifts, whether inter vivos or by will, made in favour of the donor or testator’s guardian or any administrator of his or her property. This was followed by the Coutume de Paris, which extended the prohibition to include dispositions in favour of teachers and apprentice masters, and further extensions were made by the courts in the fields of religion (directors of conscience and confessors), medicine (doctors, surgeons and apothecaries) and the law (attorneys). In turn, the draftsmen of the Code civil adopted much of this law, but proceeded cautiously, limiting the relationships affected and defining more closely the situations in which libéralités are not possible. Article 907 prevents dispositions by wards to their guardians, and Article 909 those made by persons during their last illness to the doctors, surgeons, pharmacists and ministers of religion who care for them. An unrelated provision was also added, striking down testamentary gifts made by a passenger on a ship in favour of the ship’s officers, reflecting the dangers of sea travel in the early 19th century and the vulnerability of those not used to such perils.

The courts have resisted attempts to extend Article 909 by analogy (for example, to lawyers), insisting on the exceptional character of the provision and the need to interpret it strictly, but further cases of incapacity have been added from time to time by legislation. Carers in a broad sense have attracted particular attention. Article 1125-1 of the Code civil, introduced in 1968, applies to dispositions by persons living in homes for the elderly and psychiatric institutions and avoids both gifts inter vivos and transactions for value in favour of those running the establishment or working there. Overlapping with this, the Code de l’action

---

103 TERRÉ & LEQUETTE (n. 87), paras. 287-289; MALAURIE (n. 88), paras. 339-340; GUYÉNOT (n. 89), paras. 30-36.
105 Art. 131 of ordonnance 188 of 25 August 1539: ‘Nous déclarons toutes dispositions d’entrevifs ou testamentaires qui seront ci-après, faictes par les donateurs ou testateurs, au profit et utilité de leurs tuteurs, curateurs, gardiens, baillistes, et autres leurs administrateurs estre nulles et de nul effet et valeur’.
106 Art. 276.
107 Art. 997, now Art. 995 (revised 18 June 1893).
108 GUYÉNOT (n. 89), para. 35. The provision is now regarded as an anachronism: GUYÉNOT, ibid; MALAURIE (n. 88), para. 339.
110 TERRÉ & LEQUETTE (n. 87), p. 236, fn. 3; Cass. 1er civ. 12 June 1990, D. 1991, 405, note J. MASSIP.
sociale et des familles includes a provision dealing with gifts made by persons living in homes for minors, the elderly, the infirm, the poor or those being rehabilitated and prevents gifts *inter vivos* and legacies in favour of those who own or run these establishments or who work in them (whether for pay or on a voluntary basis). This Code also strikes down transactions in favour of those who, for payment, take elderly or handicapped persons into their own homes. In addition, in the legal context, *notaires* cannot receive documents containing dispositions in their favour.

Although classified as cases of incapacity and therefore discussed by commentators under that heading and not with the *vices de consentement*, these provisions are recognized both by writers and by the courts as involving presumptions of *captation*. For Pothier, commenting on the relationships dealt with by the *ancien droit*, the reason for imposing such presumptions lay in the fact that the relationships in question involved one party having authority over the person or property of the other. In modern times, however, it has been observed that the collection of *incapacités* that the law now recognizes is not particularly coherent, and the emphasis is placed more broadly (in terms familiar to English lawyers) on the ascendancy of one party and the dependence of the other rather than on how that is achieved.

Unlike their English counterparts, these presumptions are in the full sense irrebuttable: not only is it not open to the beneficiary to prove that the relationship in question was not in fact one of ascendancy or that no misconduct took place, but it is also no defence to show that the person making the disposition had the benefit of independent advice. This provides strong protection for persons in a state of dependency, protection which it is felt would be undermined if contrary proof were allowed. Nevertheless, some attempt is made to prevent these provisions being invoked when the disposition is not in fact the result of an abuse of influence. Many contain exceptions, designed to filter out specific cases which should not excite suspicion. This may be because there is an alternative plausible explanation of the

112 Art. L 443-6, codifying Art. 13 of the *loi* of 10 July 1989.
113 Art. 2 of the *décret* of 26 November 1971, *JO* 3 December 1971; TERRÉ & LEQUETTE (n. 87), para. 287, fn. 1.
114 E.g. TERRÉ & LEQUETTE (n. 87), para. 287; MALAURIE (n. 88), para. 339; GUYÉNOT (n. 89), para. 30.
117 TERRÉ & LEQUETTE (n. 87), para. 287.
118 TERRÉ & LEQUETTE, ibid, and MALAURIE (n. 88), para. 339 (*emprise*).
119 GUYÉNOT (n. 89), para. 31.
transaction: it is common to find that, within limits, the incapacity does not apply if
the beneficiary is a relative of the donor or testator.\footnote{Arts. 907, 909 and 995, C. civ.; Art. L 331-4, al. 2 and Art. L 443-6, CASF. By contrast, Art. 1125-1, C. civ. allows the suspicion to be dispelled by obtaining judicial authorization.} Sometimes, (in a manner reminiscent of English law)\footnote{Cf. the text to n. 48.} there is an exception based on the fact that the transaction is not disadvantageous, the disposition being valid in so far as it is merely intended to provide reccompense for expenses incurred.\footnote{Art. 909, C. civ.; arts. L 331-4, al. 2 and L 443-6, CASF.}

\subsection{2.2.2 Other Approaches}

Although it is the principal approach, denying the parties the ability to make a disposition is not the only technique employed by French law. Thus, at one time gifts by a nun to her order or to another member of it\footnote{As in the English leading case of \textit{Allcard} v. \textit{Skinner} (1887) ChD 145, CA (see the text to n. 273).} were subject to financial limits.\footnote{Discussed in detail below, text to n. 300 et seq.} Of considerably greater importance, however, has been the case of gifts \textit{inter vivos} between spouses\footnote{The French courts have regarded such \textit{préts d’usage} as exempt from Art. 1096: C. RIEUBERNET, \textit{Les donations entre époux - Étude critique}, Defrénos, Paris 2003, para. 24.} (other than ordinary birthday and anniversary presents)\footnote{Discussed in detail below, text to n. 223 et seq.} which have traditionally been viewed with suspicion, in part because of the influence a husband may have over his wife and a wife may have over her husband. Under Article 1096 of the original \textit{Code civil} such gifts could be freely revoked by the donor at any time during his or her lifetime. Like the \textit{incapacités}, this rule was said to rest on presumptions of \textit{captation},\footnote{Cf. to n. 235 et seq.} but again any such presumption was irrebuttable. Article 1096 has, however, undergone radical reform and since 1 January 2005 its scope has been much reduced.\footnote{See the text to n. 245 et seq.} In practice, it now only applies to gifts intended to take effect on the donor’s death.

\subsection{2.2.3 The Contribution of Rules on Formalities}

The above rules are reinforced by the requirement in Article 931 of the \textit{Code civil} that gifts \textit{inter vivos} must be notarized.\footnote{See the text to n. 25 et seq.} The notary does not merely record the gift, but should also attempt to ensure that it represents the free, informed will of the donor. To that extent, the formality is seen, amongst other things, as a ward against \textit{captation};\footnote{Cf. to n. 245 et seq.} and given that English law’s presumptions of undue influence in most cases amount in practice to no more than a requirement that legal advice be obtained, it is
clearly of interest for the comparison between the two legal systems. Where it applies, Article 931 certainly operates in a broadly similar way to the English rules, though not identically: in some cases in England, as has been noted, the influence may be so strong that even the taking of legal advice is not enough to rebut the presumption; and English law emphasizes the need for the advice to be independent, whereas Article 931 does not, leaving the door open for abuse, as where the notary is supplied by the donee.\textsuperscript{132}

Nevertheless, the interest of Article 931 is limited, for there are extensive exceptions to the rule, allowing most\textsuperscript{133} gifts to escape the need for a notary. In particular, there is a broad exemption for \textit{dons manuels}, a category originally comprising gifts of chattels completed by delivery, but now including gifts of money or cheques\textsuperscript{134} and bank transfers.\textsuperscript{135} Indirect gifts, such as the release of a debt,\textsuperscript{136} are also exempt, as are disguised ones, e.g. a gift dressed up as a sale, but where the price is fictitious.\textsuperscript{137}

\textbf{2.3 Third Parties}

As has been seen, in England many undue influence cases involve three parties. In France, too, transactions with third parties can be impeached, the rules varying according to whether misconduct has been proved or not and, where it has been proved, according to whether the transaction is a gift or a contract.

In the case of proven misconduct, French law, like English law, allows gifts to third parties to be set aside freely, but is more restrictive in relation to contracts. As far as the latter are concerned, the \textit{Code civil} draws a sharp distinction between \textit{violence} and \textit{dol}. A contract can be annulled freely where it results from \textit{violence}, irrespective of who is guilty of the coercion,\textsuperscript{138} but a different approach is taken to \textit{dol}, where Article 1116 requires the fraudulent conduct to be that of a contracting party.\textsuperscript{139} This means in practice that where A induces B to guarantee A’s loan from a bank, in the case of \textit{dol} the bank must be shown to be involved in the dishonesty (e.g. because A was acting as the bank’s agent or the bank had actual knowledge of the

\begin{footnotes}
\footnote{E.g. CA Colmar 30 Jan 1970 (n. 98) (cp. Whyte v. Meade (1840) 2 Ir Eq Rep. 420; Powell v. Powell [1900] 1 Ch 243).}
\footnote{MALAURIE (n. 88), para. 396.}
\footnote{J-P. ARRIGHI, ‘Le don manuel par chèque’ \textit{D.} 1980, chron., p. 165.}
\footnote{E.g. Cass. civ. 2 April 1862, \textit{DP.} 63, 1, 454.}
\footnote{Art. 1111 states expressly: ‘la violence est une cause de nullité encore qu’elle ait été exercée par un tiers, autre que celui au profit duquel la convention a été faite’. See further TERRÉ, SIMLER & LEQUETTE (n. 92), para. 246; NICHOLAS (n. 98), p. 108.}
\footnote{TERRÉ, SIMLER & LEQUETTE (n. 92), para. 246; NICHOLAS (n. 98), pp. 101 and 108.}
\end{footnotes}
fraud). Gifts, on the other hand, are treated differently and even in the case of dol it is no objection that the misconduct was not that of the donee.

Where misconduct need not be proven, French law does not normally extend this special protection to transactions intended to benefit third parties, though there are exceptions. Thus, the bar on gifts in favour of those who take an elderly or handicapped person into their own homes for payment applies equally to gifts in favour of spouses or partners as well as certain close relatives; the restriction on gifts to persons working in homes for minors, the elderly, the infirm, the poor or those being rehabilitated extends to gifts to their employers or, in the case of volunteers, the organizations to which they belong; and a notaire cannot receive actes in favour of members of his or her family. These are limited exceptions, however. On the other hand, in many cases provision is made to prevent transactions with third parties which are really intended to benefit the party with influence. If the intention is that the benefit will be passed on by the third party to the party with influence, this is viewed as an attempt to circumvent the law’s restrictions and transactions involving personnes interposées are therefore absolute nullities. This in itself is, of course, very different from the broad approach adopted by English law. Until recently, however, in practice the difference was not as great as would first appear. This is because certain persons were automatically deemed to be acting as intermediaries. Thus, in the case of a gift by a ward, Article 911, alinéa 2 of the Code civil struck down gifts to the parents, descendants or spouse of the guardian, laying down an irrebuttable presumption that they acted as personnes interposées. The same provision applied to gifts by medical patients and followers of religions as well as persons in homes for minors, the elderly, the infirm, the poor or those being rehabilitated, and a similar rule applied to gifts and contracts made by those in homes for the elderly and psychiatric institutions. The end result was that, although the

---

140 TERRÉ, SIMLER & LEQUETTE ibid; GUYÉNOT (n. 89), p. 25. For rare cases of erreur, see C. LEBON ‘Vorlagebeschluss of June 29, 1999 – The protection of ‘vulnerable sureties’ as to German, French, Belgian, Dutch, English and Scottish law’ 9 European Rev. of Private Law 2001, p. 417, at 424.

141 TERRÉ & LEQUETTE (n. 87), para. 264; MALAURIE (n. 88), para. 305; GUYÉNOT (n. 89), paras. 24-29.

142 L 443-6, CASF.


144 Art. 2 of the décret of 26 November 1971, JO 3 December 1971.

145 TERRÉ & LEQUETTE (n. 87), paras. 509-510; GUYÉNOT (n. 89), paras. 42-46.

146 Art. 911, C. civ. for the incapacités in that Code and, by virtue of Art. L 331-4, al. 2, CASF, for the incapacité relating to homes for minors, the elderly, the infirm, the poor or those being rehabilitated. A provision of this kind used to apply to gifts between spouses (Art. 1099, C. civ.), but this was repealed by the loi of 25 May 2004, JO 27 May 2004.

147 Cass. civ. 22 January 1884, DP. 1884, 1, 117.

148 Art. L 331-4, al. 2, CASF.

position of third parties was approached from a very different perspective, at least in the case of gifts French law struck down many of the third party transactions that would be voidable in English law.\textsuperscript{150} French law nevertheless remained narrower: a person with influence might seek to secure benefits for a sibling,\textsuperscript{151} for example, and this would not in general be caught by the French provisions, nor would gifts to an uncle, aunt, cousin, friend or cohabitant.\textsuperscript{152}

As from 1 January 2007, however, this \textit{de facto} convergence has been reversed. The presumption in Article 911, alinéa 2 has been changed\textsuperscript{153} so as to make it rebuttable, allowing gifts to be upheld if a genuine intention to benefit the third party is proved. In English law, of course, that consideration would be irrelevant. This new divergence between the two legal systems with respect to gifts comes, moreover, on top of a long standing difference regarding contracts: given that for the most part the special protective rules in French law only apply to gifts and not to contracts, a whole swathe of third party transactions escapes their control. In particular, there is nothing in the special rules to deal with the common English three party case involving the giving of security.\textsuperscript{154}

3. Commentary

3.1 A Common Core

The first point to make is that, despite obvious differences of detail, both systems share certain core features. Both are alive to the possible exploitation of special relationships and seek to provide enhanced protection for potential victims. Indeed, in implementing that protection, both proceed in the same way, deploying presumptions of undue influence. Both have their lists of relationships that automatically attract protection, and those lists are very similar: English law’s enumeration of the relationships presumed to be of trust and confidence is strikingly like that found in Pothier and in the \textit{Code civil}.

That core similarity may come as no surprise to those inclined to expect similarities. Perhaps an argument could be made that, to some extent at least, the resemblance can be accounted for in terms of the similarities between English and French societies. However, there is clearly more at work here than a simple independent parallel development: at an early and key stage in its development English law was directly influenced by ideas from France.\textsuperscript{155} The importance of the leading case of

\textsuperscript{150} E.g. \textit{Huguenin v. Baseley} (1807) 14 Ves 273, 33 ER 526 (gift in part to the wife and children of the person with influence).

\textsuperscript{151} As in \textit{Bridgeman v. Green} (1757) Wilm 58, 97 ER 22.

\textsuperscript{152} Subject to the provisions referred to in nn. 142 and 144

\textsuperscript{153} By Art. 10 of the \textit{loi} of 23 June 2006, \textit{JO} 24 June 2006, reforming the law of succession and gifts.

\textsuperscript{154} LEBON (n. 140).

*Huguenin v. Baseley*156 has already been explained, and in particular the peculiar resonance of the submissions made by the Attorney General, Sir Samuel Romilly, which were much admired157 and which inspired the expansion of the list of protected relationships. But Romilly - the son of French Huguenot parents158 and with an interest in French law159 - leant explicitly and heavily on Pothier, and his summary of the *ancien droit* and his eloquent argument that English law should follow the lead of the older and more fully worked out French law gained a wide audience, not only from its inclusion in the law reports, but also from the prominence it received in the influential *White and Tudor's Leading Cases in Equity*.160 It is to be noted that the examples that Romilly gave which were adopted in subsequent cases (doctor and patient, religious adviser and disciple) were culled from French law. That is not to say that there was a crude transplant of French rules into English law. Rather, the comparison with French law provided both a spur to development and a model for expansion.

The shaping influence of French law in England, as mediated by Romilly, lasted for much of the 19th century. It is remarkable, though, that throughout it was an asynchronous influence: at the time when English law was being assimilated to the *ancien droit*, French law had already moved on. The *Code civil*, promulgated some three years before *Huguenin v. Baseley*, adopted a narrower approach than the law before the Revolution, with the perhaps ironic result that when, for example, the English courts followed Pothier in recognizing the relationship of doctor and patient as giving rise to a presumption of undue influence,161 French law had by then restricted its protection to patients in their final illness. Such developments passed English lawyers by. There is understandably no mention of the *Code* in *Huguenin v. Baseley*, given the hostilities between the two countries at that time, but there is equally no mention in subsequent cases, even after the *Code* had been translated into English: lawyers seem to have been content to rely on Romilly rather than to research the law of contemporary France.

---

156 (1807) 14 Ves 273, 33 ER 526; see the text to n. 37 et seq.
157 They were said to be ‘celebrated’ in *Dent v. Bennett* (1839) 4 Myl & Cr 269, at 277; 41 ER 105, at 108 (Lord Cottenham LC) and *Nottidge v. Prince* (1860) 2 Giff 246, at 263; 66 ER 103, at 110 (Sir John Stuart V-C) and ‘striking’ in *Reynell v. Sprye* (1852) 1 De GM&G 660, at 689; 42 ER 710, at 721 (Knight-Bruce LJ). See also *Hunter v. Atkins* (1834) 3 Myl & K 113, at 139-40; 40 ER 43, at 53-54 (Lord Brougham LC).
159 Cf. MEDD (n. 158), pp. 123-124 (though he seems primarily to have been interested in criminal law).
161 *Dent v. Bennett* (1839) 4 Myl & Cr 269, 41 ER 105.
162 *Hunter v. Atkins* (1834) 3 Myl & K 113, at 135; 40 ER 43, at 52.
3.2 Strategic Differences

While the common ground between the two legal systems is significant, the extent of the similarities - and of any reception of French thinking into English law - should not be exaggerated. Both systems retain major distinctive features that set them apart and represent important differences in strategy.

One fundamental difference is that French law concentrates on the cases where the need for protection is most acute, where there is the greatest vulnerability, and provides narrowly focused, but intense protection; English law, on the other hand, intervenes more broadly, but less severely. The relative breadth of focus can readily be seen in the range of relationships where presumptions of undue influence are deployed. There is, of course, a rough correspondence between the relationships that in England are presumed to be of trust and confidence and those where the special rules on capacity apply in France. But English law extends its reach significantly by allowing that other types of relationship may also qualify for protection, depending on the facts of the individual case. The willingness of the English courts to infer the exercise of undue influence where a relationship is proved to be one of trust and confidence or of authority appears to have no counterpart in France. Moreover, even in the common areas, French law can be more selective: while English law intervenes wherever there is a relationship of doctor and patient or religious adviser and disciple, the incapacités in Article 909 apply only where the potential victim is dying and therefore most vulnerable. But if the protection under French law is narrower, the other side of the coin is that it is more stringent. In English law, the presumption of undue influence, where it applies, is in theory rebuttable; but in French law, the presumptions are irrebuttable. In England the person seeking to uphold a transaction can do so by showing that proper independent advice was given; but in France there is no such defence. English law seeks to avoid abuse by laying down proper procedures; French law prefers that the transactions that are the most fraught with danger should not take place at all. At root, this is a divergence of principle. English law still reflects Lord Brougham LC’s view that, where a gift or contract has been shown not to be the product of misrepresentation or undue influence, ‘No law that is tolerable among civilized men - men who have the benefits of civility without the evils of excessive refinement and overdone subtlety can ever forbid such a transaction’. 162 Notwithstanding this censure, French law does indeed forbid such transactions, considering it perfectly acceptable to adopt a precautionary principle.

Clearly, breadth of protection and intensity are interrelated: applying the high degree of protection favoured by French law to a wide range of transactions would be an unacceptable inroad on individual liberty. Conversely, English law is able to adopt its broad approach precisely because the presumption of undue influence is rebuttable. It is from that perspective that one should view two particular strategic differences that follow from the first, viz. that, in transactions inter vivos, French law
focuses primarily on gifts, but English law intervenes in contracts for valuable consideration as well and that English law is readier to strike down transactions involving third parties.

Because of their one-sided nature, gifts perhaps naturally attract more suspicion than contracts, and certainly French law has prioritized them for protection here. French writers insist on the need to assure a fuller liberté d’esprit on the part of the donor than is required in contracts for value. 163 This protective attitude underlies a number of modifications of the rules relating to the vices de consentement in the case of gifts (such as the nullity of gifts induced by the dol of a third party); 164 and it is reflected in the presumptions of captation. But the English experience is that bargains are also open to abuse: property can be bought for a song or sold for an excessively high price, and from an early time the courts have intervened. In comparison, therefore, French law may look defectively weak, arbitrarily limiting the protection available. But the restraint exercised in France and the boldness of English law reflect the basic choice between irrebuttable and rebuttable presumptions. The same can be said for the very different strategies adopted with respect to third parties. While English law readily allows gifts and contracts involving third parties to be set aside, French law is much more reluctant to intervene. Both systems seek to strike a balance between protecting those in special relationships against abuse and upholding the legitimate expectations of third parties, and in striking that balance the character of the intervention is highly relevant. English law can afford to extend the range of third parties who are potentially affected precisely because a rebuttable presumption provides those third parties with the means to protect themselves, by advising that independent advice be obtained.

On the other hand, there is one major point of difference which does not fit this neat pattern of a broad English approach based on a rebuttable presumption and a narrow French law based on irrebuttable ones: in the case of wills, French law is the more interventionist. The English courts have refused to extend the presumptions of undue influence to wills, but the French incapacités apply to testamentary gifts as much as they do to gifts inter vivos. Quite why English law behaves in such an apparently uncharacteristic manner is a complex matter. The account given above highlighted the jurisdictional divide between the courts of equity and the courts of probate, but there are clearly considerations of substance at work here in addition to historical, jurisdictional influences. In the present context it is interesting to recall Lord Penzance’s argument that the equitable presumption should not be extended as the person with the alleged influence over the testator might have practical difficulties in rebutting the presumption, not necessarily having been privy to the making of

---


164 Text to n. 141; cf. text to n. 93 (violence) and TERRÉ & LEQUETTE (n. 87), para. 263 (erreur).
the will. In a sense, that marks a hesitation at the point when a rebuttable presumption becomes in practice an irrebuttable one. But at root the difference seems to reflect the two systems’ historically divergent attitudes to the rights of the family and dependants of a testator. In *Craig v. Lamoureux*¹¹⁶ the Privy Council justified the weaker degree of protection given to testators on the ground that, unlike in cases of *inter vivos* transactions, they personally suffered no material detriment. That implies that the real losers, those who would have benefited under the will had there been no undue influence, have no rights in the matter. This is indeed consistent with the traditional English emphasis on freedom of testation, with the concomitant view that a deceased person’s family has no claim on the estate. French law, in contrast, has traditionally accorded significant rights to the family, entitling heirs to a substantial share in the estate. Against that background it is not surprising to find that, in the area of undue influence, French law accepts that there is a case for intervention.

It should be added, though, that the English insistence that in relation to wills undue influence must be proved and cannot be presumed has been questioned by a number of commentators.¹⁶⁶ Not only have any jurisdictional justifications disappeared, but general attitudes to the protection of family and other dependants have changed. The introduction of family provision legislation¹⁶⁷ marked an abandonment of the traditional approach, moving English law closer to French law, and that shift in general attitudes has prompted a call for the rules on undue influence to be re-evaluated.¹⁶⁸ Those calling for reform can no doubt draw some support from the comparison with French law, which both highlights the anomalous character of the current English rules in this context and suggests the appropriateness of more extensive intervention where the legal system is more supportive of the rights of ‘natural beneficiaries’.¹⁶⁹

3.3 Differences in Style

Finally, something should be said about one obvious difference, which may be described as a matter of style. English law here gives a central role to the courts: not only is the general framework of the rules on undue influence a judicial creation, but the judges also determine the content of the list of relationships irrebuttably presumed to be special, as well as enjoying considerable discretion both in deciding when other relationships qualify for protection and in assessing whether a transaction is sufficiently unusual to justify imposing a presumption of undue influence. In

¹⁶⁶ P.V. BAKER 86 LQR 1970, p. 447; RIDGE (n. 62); and cf. KERRIDGE (n. 71).
¹⁶⁸ RIDGE (n. 62), esp. at 633-34.
¹⁶⁹ A phrase used by RIDGE (n. 62), at 627.
contrast, whatever the contribution of the parlements before the Revolution, the modern French law here is based squarely on legislative provisions which are tightly drawn and leave the courts with limited room for manoeuvre. Indeed, as has been seen, the courts even deny themselves the freedom to extend the provisions of the Code civil by analogy. One might well expect this difference to have the consequence that English law is more flexible, more adaptable to novel situations and changing social attitudes, and to a certain extent this is borne out in practice. On the other hand, it is noticeable that the list of relationships presumed to be of trust and confidence, has not changed in more than a century, whereas the equivalent French provisions have been added to and modified over the years and continue to be so. Quite which legal system is more responsive is therefore not so clear cut.

III. Specific Relationships

While there is much to be learned from looking at the approaches of English law and French law in general terms, there is equally considerable value in studying how they apply in concreto in the context of particular relationships. This naturally clarifies their practical impact, but it is also at this level that the operation of social and other factors can be seen, shaping the law sometimes in the same way in each jurisdiction, sometimes in very distinctive directions. What follows is a series of vignettes, each looking at a particular relationship to which special treatment is given in one or other legal system (or both). This is perforce a far from exhaustive survey of the relevant relationships; indeed, comprehensiveness would be impossible, given the open-ended nature of equitable intervention in English law. Instead, three key groups of relationships have been selected which between them exemplify the existence of some convergence between English law and French law but also the influences that can produce divergent solutions. These are: parent and child and analogous cases, sexual relationships and religious relationships.

4. Parent and Child and Analogous Cases

4.1 Parent and Child

4.1.1 English Law

Interestingly, the relationship of parent and child was not mentioned by Lord Eldon in Huguenin v. Baseley. There had, in fact, been many cases in the 18th century in which the courts demonstrated that they were alert to the dangers of ‘parental influence’, usually that of a father over his children, but sometimes that of a

---

170 The most that can be said is that some debatable cases have now been ruled out: Howes v. Bishop. [1909] 2 KB 390, CA (husband and wife); Kaur v. Bunwaree (CA, unreported, 5 May 1988) (engaged couples).

171 (1807) 14 Ves 273, 33 ER 526.

172 In addition to the cases cited in n. 175 and n. 176, see, e.g., Burden v. Barker (1720) 1 P Wms 634, at 639-40; 24 ER 548, at 550 (Parker LC); Kinchant v. Kinchant (1784) 1 Bro CC 369, at 373-74; 28 ER 1183, at 1186 (Gould J).
(widowed) mother.\textsuperscript{173} Children who had not come of age had limited capacity to enter into transactions, but over and above that restriction, equity regarded transactions between parent and child ‘with a jealous eye’.\textsuperscript{174} The precise nature of that jealousy was not always clear, however: in some cases relief was founded on proof of improper conduct,\textsuperscript{175} but in others the mere fact of an unacceptable benefit to the parent was sufficient.\textsuperscript{176} But in \emph{Huguenin v. Baseley}\textsuperscript{177} the Solicitor General, Sir Samuel Romilly, treated the relationship of parent and child as being on the same footing as guardian and ward and in the years that followed this view was confirmed. It was made clear that this jurisdiction involved a presumption of undue influence,\textsuperscript{178} and parent and child was duly added to the list of protected relationships presumed to be of trust and confidence.\textsuperscript{179}

There has been some difficulty, however, in establishing at what age a child should cease to be protected in this way. It is settled that the presumption only applies when the child, although legally of age, has not yet been completely ‘emancipated’ from parental influence.\textsuperscript{180} Early cases focused on the need to protect those who had just come of age. In \emph{Smith v. Kay},\textsuperscript{181} Lord Cranworth attempted to be more specific, suggesting that there was an irrebuttable presumption of trust and confidence for the first year after a child came of age. Later cases have, however, eschewed such precision, preferring simply to say that there is a presumption for a short period. Whether that period has come to an end is a question of fact, turning on the character and experience of the child. As the Court of Appeal observed in \emph{Re Pauling’s Settlement Trusts},\textsuperscript{182} ‘One begins with a strong presumption in the case of a child just [of age] and living at home, and this will grow less and less as the child goes out in the world and leaves the shelter of his home’.

Once the child has achieved sufficient independence of judgment, there is no presumption of trust and confidence and transactions cannot be impeached simply on

\begin{itemize}
\item \textsuperscript{173} Cocking \emph{v. Pratt} (1750) 1 Ves Sen 400; 27 ER 1105 (Sir John Strange MR).
\item \textsuperscript{174} Ibid, at 401, 1106.
\item \textsuperscript{175} Intimidation: Blackborn \emph{v. Edgeley} (1719) 1 P Wms 600, 24 ER 534. Deceit: Carpenter \emph{v. Heriot} (1759) 1 Eden 338, 28 ER 715. Taking advantage of necessity: \\textsuperscript{175} Gould \emph{v. Okenden} (1731) 4 Bro PC 198, 2 ER 135, HL (as explained, under the name of Glissen \emph{v. Ogden}, by Lord Hardwicke LC in Young \emph{v. Peachey} (1741) 2 Atk 254, at 258-89; 26 ER 557, at 559); Heron \emph{v. Heron} (1741) 2 Atk 160, 26 ER 500.
\item \textsuperscript{176} E.g. Morris \emph{v. Barroughs} (1737) 1 Atk 399, at 403; 26 ER 253, at 255 (Lord Hardwicke LC); Cory \emph{v. Cory} (1747) 1 Ves Sen 19, 27 ER 864 (Lord Hardwicke LC); Wycherley \emph{v. Wycherley} (1763) 2 Eden 175, at 180; 28 ER 864, at 866 (Lord Henley LC).
\item \textsuperscript{177} 14 Ves 273, at 286 and 288; 33 ER 526, at 531 and 532.
\item \textsuperscript{178} Archer \emph{v. Hudson} (1844) 7 Beav 551, at 560; 49 ER 1180, at 1183 (Lord Langdale MR).
\item \textsuperscript{179} Houghton \emph{v. Houghton} (1852) 15 Beav 278, at 299-301; 51 ER 545, at 553–554 (Sir John Romilly MR).
\item \textsuperscript{180} Archer \emph{v. Hudson} (1844) 7 Beav 551, at 560; 49 ER 1180, at 1183 (Lord Langdale MR).
\item \textsuperscript{181} (1859) 7 HLC 750, at 772; 11 ER 299, at 308.
\item \textsuperscript{182} [1964] Ch 303, CA, at 337.
\end{itemize}
the grounds that the child acted out of ‘filial piety’.\textsuperscript{183} Indeed, as modern cases increasingly show, in time the tables may eventually be turned and the parents may come to rely on the child, particularly where the child is better educated.\textsuperscript{184} Where such a relationship of dependence can be established, an evidential presumption of undue influence arises, but clearly there is no presumption of trust and confidence here.

4.1.2 French Law

In France, there is strikingly no counterpart to the English equitable presumption in favour of children. Minors are protected by general rules relating to their incapacity to make gifts\textsuperscript{185} and by the rules on lesion,\textsuperscript{186} but otherwise there is no bar to transactions entered into at the behest of a parent. One reason for this can be gleaned from the \textit{Code civil}’s provisions on violence. Article 1114,\textsuperscript{187} reflecting the \textit{Code}’s respect for authority in the family, stipulates that a contract cannot be annulled simply on the grounds of ‘reverential fear . . . directed to a father, mother, or other ascendant’.\textsuperscript{188} But if the exercise of parental influence is thus seen as legitimate,\textsuperscript{189} it has also been seen as generally benign. So much is apparent from Pothier’s account of incapacities, in the course of which he explained that the restriction on gifts to a guardian or administrator was interpreted as not applying where that person was the donor’s parent.\textsuperscript{190} This exception (now enshrined in Article 907 of the \textit{Code civil}) was justified, he said, on the ground that a parent would normally have the child’s best interests at heart and therefore gifts in this context should not be regarded as inherently suspicious. In addition, (foreshadowing the problems English law would have in this regard) he referred to the difficulty of defining the time when the protection would cease.

4.2 Guardian and Ward

Despite significant differences with respect to the relationship of parent and child, English law and French law have fairly similar approaches to that of guardian and ward.

\textsuperscript{183} Powell \textit{v.} Powell [1909] 1 Ch 243, at 246 (Farwell J).


\textsuperscript{185} TERRE´ & LEQUETTE (n. 87), paras. 270-271; MALAURIE (n. 88), paras. 322–323.

\textsuperscript{186} Art. 1305, C. civ.; TERRE´, SIMLER & LEQUETTE (n. 92), para. 309.

\textsuperscript{187} ‘La seule crainte révérentielle envers le père, la mère, ou autre ascendant, sans qu’il y ait eu de violence exercée, ne suffit point pour annuler le contrat’.


\textsuperscript{189} TERRE´, SIMLER & LEQUETTE (n. 92), para. 243; P. MALAURIE, L. AYNÈS & P. STOFFEL-MUNCK (n. 92), para. 517.

\textsuperscript{190} POTHIER (n. 104), pp. 242–243.
In England it was settled in the 18th century that a transaction between a ward and his or her guardian could be set aside, even though at the time the ward had already come of age.191 The early cases stressed the power that the guardian wielded by virtue of his control over the ward’s property. As Lord Hardwicke explained in *Hylton v. Hylton*,192 the guardian was in a position to threaten to withhold the ward’s estate unless some gift were agreed to, and public utility required that this possibility be guarded against. In line with this analysis, equitable intervention was restricted to situations where the guardian had not yet settled his account and relinquished control of the ward’s property.

This emphasis on control over property naturally caused the relationship of guardian and ward to be seen as analogous to those of trustee and beneficiary and of attorney and client.193 In the course of the 19th century, however, stress was increasingly laid on the personal influence of the guardian which, it was recognized, could continue even after the property management role had come to an end.194 The same rules were applied as in the case of parent and child,195 to which the relationship of guardian and ward was now effectively assimilated.

In France, Article 907 of the *Code Civil* provides that wards cannot make gifts *inter vivos* or by will in favour of their guardians, a rule that dates back to the *ordonnance* of Villers-Cotterets,196 which declared such gifts null and void. Although the general thrust of this rule is clearly the same as that of the equitable presumption found in English law, there are some differences of detail. Apart from the obvious point that this incapacity is seen as based on an irrebuttable presumption of undue influence rather than a rebuttable one, there are two other differences of note. The first has already been alluded to: gifts to guardians who are *ascendants* are exempted. The second relates to the time when the presumption ceases to apply. Like 18th century English law, Article 907 only affects gifts made before the guardian has presented and settled his account. This restriction was recognized by the *ancien droit* (subject to some controversy as to whether the account must be settled),197 Pothier explaining it in much the same way as Lord Hardwicke: the guardian who has not presented his account remains in possession of the ward’s property and thereby

192 2 Ves Sen 547, at 548–49; 28 ER 349, at 350. See also Hatch v. Hatch (1804) 9 Ves 292, at 296; 32 ER 615, at 617 (Lord Eldon LC).
194 Wright v. Proud (1806) 13 Ves 136, at 138; 33 ER 246, at 246 (Lord Erkine LC); Maitland v. Irving (1846) 15 Sim 437, 60 ER 683; Maitland v. Backhouse (1847) 16 Sim 58, 60 ER 794.
195 Wright v. Vanderplank (1836) 8 De GM&C 133, at 137; 44 ER 340, at 342 (Knight Bruce LJ); Smith v. Kay (1859) 7 HLC 750, at 772; 11 ER 299, at 308 (Lord Cranworth); Powell v. Powell [1900] 1 Ch 243, at 246 (Farwell J).
196 See n. 105.
197 POTHIER (n. 104), pp. 242 and 244, discussing Art. 276 of the *Coutume de Paris.*
has indirect control over the ward. But while this restriction became enshrined in Article 907, English law, as has been seen, went on to adopt a more relaxed approach, allowing later transactions to be set aside, but without providing any specific cut-off point. This marked contrast between the two systems is understandable: the more draconian French rule requires tighter and clearer delimitation, whereas English law can allow itself a greater degree of flexibility.

4.3 Other Cases

Although in English law there is no presumption of trust and confidence outside the cases of parent and child and guardian and ward, the courts have presumed undue influence ad hoc in relation to relatives and others who have looked after a child or provided support. French law, in contrast, has no provision dealing with any such wider class of persons and, as noted earlier, the courts refuse to analogize from the limited incapacities listed in the Code Civil. Again, this difference seems attributable to French law’s need to keep its irrebuttable presumptions within narrow, well-focused bounds.

5. Sexual Relationships

5.1 A Husband’s Influence Over his Wife

5.1.1 English Law

Equity’s protection of wives against the influence of their husbands has its origins in the 18th century, at a time when steps taken to give married women greater property rights laid them open to abuse. Under the traditional common law, based on the medieval law of baron et feme, there was little need for husbands to take advantage of their wives, as the law already gave them extensive rights over their wives’ property. Equity, however, had made substantial inroads on the common law position by recognizing that a married woman could hold separate property under a trust, usually set up by a marriage settlement. But while this gave a wife independent means, in the 18th century numerous cases came before the courts where a husband had persuaded his wife to support his career or business ventures. The judicial

---

198 Ibid., p. 244.
199 E.g. Archer v. Hudson (1844) 7 Beav 551, 49 ER 1180 (uncle); Sercombe v. Sanders (1865) 34 Beav 382, 55 ER 682 (older brother).
200 Osmond v. Fitzroy (1731) 3 P Wms 129, 24 ER 997 (family servant).
response was cautious. In 1750 Lord Hardwicke LC insisted that wrongdoing must be proved and rejected any presumption, though he did concede that the involvement of a wife meant that ‘a court of equity will have more jealousy over [the transaction]’. In the 19th century, as the equitable doctrine of undue influence flowered after *Huguenin v. Baseley*, many judges went further, stating that a presumption always arose in favour of a wife, but this view was not universal and the law was unsettled. With the statutory reform of married women’s property rights in the second half of the century, removing the traditional restrictions on wives’ owning and disposing of property, the need to resolve this issue became more acute. Finally, in the early years of the 20th century, the matter was settled by the Court of Appeal in *Howes v. Bishop* and the Privy Council in *Bank of Montreal v. Stuart*, any presumption of trust and confidence being decisively rejected.

Various reasons have been given for this rejection. In *Howes v. Bishop*, Farwell LJ suggested in argument that since the Married Women’s Property Act 1882 such a presumption was no longer appropriate, apparently implying that wives could not both claim equality in property rights and at the same time demand protection on the ground of dependence. In similar vein, in *Barclays Bank v. O’Brien*, Lord Browne-Wilkinson regarded a presumption of trust and confidence as inconsistent with social attitudes to the equality of the sexes, being based on the ‘outmoded concept’ that ‘the wife is subservient to the husband in the management of the family’s finances’. But arguably, what is important here is not the abstract possession of equal rights nor ideology, but the practical realities that they imply, and in that

---

204 *Grigby v. Cox* (1750) 1 Ves Sen 517, at 518; 27 ER 1178, at 1178.
205 (1807) 14 Ves 273, 33 ER 526.
206 *Coulson v. Allison* (1860) 2 De GF&J 521, at 524; 45 ER 723, at 724 (Lord Campbell LC); *Broun v. Kennedy* (1863) 33 Beav 133, at 140; 55 ER 317, at 320 (Sir John Romilly MR); *Parfitt v. Lawless* (1872) LR 2 P&D 462, at 468 (Lord Penzance).
207 *Nedby v. Nedby* (1852) 5 De G&Sm 377, at 383-84; 64 ER 1161, at 1164, (Sir James Parker V-C).
208 Married Women’s Property Acts 1870 and 1882, the latter being the major reform.
209 HOLCOMBE (n. 202), pp. 221–222.
210 [1909] 2 KB 390, at 395-97 (Lord Alverstone CJ), at 399 (Fletcher Moulton LJ) and at 399-403 (Farwell LJ). The judgments are rather disappointing, being primarily concerned with a sterile (and rather unconvincing) review of what had been established by past cases, with very little discussion of principle.
211 [1911] AC 120, at 137 (Lord Macnaghten).
212 [1909] 2 KB 390, at 394. In his judgment (at 402), he merely pointed out the inconvenience of allowing a presumption of trust and confidence.
213 This linkage between reform of property rights and the presumption of trust and confidence in favour of the wife can also be found amongst supporters of the presumption: Lord Penzance, who listed the husband and wife relationship, as being one that attracted a presumption of trust and confidence in *Parfitt v. Lawless* (n. 206), was a leading opponent of the reforms in Parliament (HOLCOMBE (n. 202), p. 149).
214 [1994] 1 AC 180, HL, at 188.
regard the courts are quick to point out the diversity that exists in marital relationships rendering any general presumption inappropriate. A second explanation was put forward by Dixon J in the Australian case of Yerkey v. Jones. He argued that presumptions of trust and confidence are reserved for relationships where it is not ‘natural to expect the one party to give property to the other’ and that it would be inappropriate to recognize a presumption in relation to married couples, because ‘there is nothing unusual or strange in a wife from motives of affection or even of prudence conferring a large proprietary or pecuniary benefit upon her husband’. This view has been referred to with approval by a number of English judges.

If there is no presumption of trust and confidence, equity has nevertheless shown wives a ‘special tenderness’, as Lord Browne-Wilkinson put it in Barclays Bank v. O’Brien. One aspect of this is that it is somewhat easier for a wife to prove actual undue influence, for the courts are sensitive to the fact that ‘the sexual and emotional ties between the parties provide a ready weapon for undue influence’. In addition, in many cases the relationship between a married couple will be recognized as being one where the wife places trust and confidence in her husband, such as to raise an evidential presumption of undue influence. However, many attempts to establish a presumption will fail on the second requirement, that the transaction must be an unusual one.

Where a wife makes a will in favour of her husband, the probate rules apply and there is no presumption of coercion or fraud. Nevertheless, here too the courts recognize the potential for abuse, so that if the husband is instrumental in the preparation of the will, the degree of suspicion with which the will is regarded will be all the greater.

5.1.2 French Law

Until recently, French law gave wives extensive protection against their husbands’ influence. Article 1096 of the original Code civil provided that ‘All gifts made

216 But cp. Etridge [2002] 2 AC 773, HL, at para. 159, where Lord Scott described a relationship of trust and confidence as being ‘the norm’ in the case of a cohabiting married couple.
217 (1939) 63 CLR 649 (High Court of Australia), at 675.
220 At 190–91.
221 At 196. In Etridge [2002] 2 AC 773, HL, at para. 159, Lord Scott went so far as to say that the relationship, would be rebuttably presumed to be of that nature.
222 E.g. Marsh v. Tyrrell (1828) 2 Hag Ecc 84, at 87; 162 ER 793, at 794–795.
223 MALAURIE (n. 88), paras. 709-727 and, for the law before the 2004 reforms, RIEUBERNET (n. 127) and TERRÉ & LEQUETTE (n. 87), paras. 542-544 and 553-560.
between spouses during the marriage . . . will always be revocable'. Even taking into account the fact that this was understood as not applying to présents d’usage (customary gifts, such as birthday or anniversary presents), this sweeping rule clearly went well beyond English law with respect to gifts between husband and wife. The freedom to reconsider gifts was not restricted to any particular grounds (hence these gifts were commonly described as being revocable ‘ad nutum’, i.e. at will). The revocation could be made expressly or impliedly (e.g. by making a will leaving the property in question to someone else). The right to revoke was, however, a personal right: if the donor died without revoking the gift, the revocation could not be made by his or her heirs. Given this personal character, it is not surprising to find that, unlike in the case of other protected relationships, testamentary gifts between spouses were unimpeachable.

The precarious nature of gifts between spouses has a long history, the original Article 1096 owing much to Roman law. Antipathy to such gifts was evident by the time of Augustus, the rule initially being that they were completely invalid; however, in 206 AD the law was revised and it was established that a gift would become valid if the donor continued to wish to make the gift and died without changing his or her mind. The law in pre-Revolutionary France was equally antipathetic to gifts between spouses. In those regions governed by the droit écrit, the Roman rule was applied, while in most customary law areas an even more restrictive approach was taken: gifts between spouses were simply not permitted, and generally this applied to testamentary gifts as well as gifts inter vivos. The Revolution saw briefly the introduction of a more permissive regime, but the Code civil marked a return to the traditional hostility. The solution adopted was close to Roman law, but reflecting a small compromise with the droit intermédiaire, gifts were now valid until revoked, rather than invalid until confirmed by death.

This long-standing hostility to gifts between spouses was primarily a reflection of two concerns. The first, not surprisingly, was the need to prevent undue influence. Fears on this score inspired the approach of Roman law, these fears were in turn

224 ‘Toutes donations faites entre époux pendant le mariage . . . seront toujours revocables’.
225 RIEUBERNET (n. 127), para. 24. As these gifts are usually of present property, the new restriction of Art. 1096 to biens à venir will presumably now make this exception irrelevant in practice.
226 TERRE & LEQUETTE (n. 87), para. 544.
228 Cass. req. 25 Feb 1878, DP. 1878, 1, 449; T. civ. Grenoble 14 June 1945, JCP II, no 2935, note P. VOIRIN.
232 E.g. Digest 24.1.1, Ulpian xxxii ad Sabinum.
echoed under the *ancien droit*\(^{233}\) and, as is clear from the *travaux préparatoires*,\(^{234}\) they were much to the fore when the *Code civil* was drafted. In modern times, too, potential undue influence (typically in the form of abuse of a husband’s authority) continued to be cited as the main justification for revocability,\(^{235}\) though many questioned whether this degree of protection was appropriate.\(^{236}\) The authority of husbands has, of course, changed significantly since the *Code* was promulgated:\(^{237}\) wives’ legal disabilities were removed in 1938 and reforms of matrimonial property law have brought equality between spouses. In the light of these developments, critics argued that the danger of undue influence was now so reduced that special measures to ward against it were no longer justified.\(^{238}\)

Alongside the need to protect against undue influence, there had long been a second concern, however: the policy of keeping assets within the family, in the sense of those related by blood. French law has traditionally accorded consanguinal kin extensive rights over a person’s estate. Thus, one can only dispose of a certain part of one’s assets, the rest falling to one’s blood kin as heirs; and where a deceased is found to have exceeded the *quotité disponible*, these heirs can challenge testamentary gifts and gifts *inter vivos* to make up the shortfall in their *réserve héréditaire*.\(^{239}\) In the context of this policy of preventing the dissipation of family assets, gifts to spouses have occupied a sensitive position. As Rieubernet contends, the original *Code civil* effectively treated those who marry into a family as outsiders against whom the family assets had to be protected.\(^{240}\) This could clearly be seen in the minimal rights of inheritance enjoyed by a spouse and in the special highly restrictive quota that applied to gifts to a spouse, but it could equally be seen in the revocability *ad nutum* of such gifts, where protection of the rights of heirs reinforced the concerns based on undue influence.\(^{241}\) However, society and the law\(^{242}\) had moved on since the early 19th century. It is therefore not surprising to find critics of revocability arguing that from this point of view, too, it was outdated.\(^{243}\)

---

\(^{233}\) Pothier (n. 230), para. 1 cites Ulpian with approval.

\(^{234}\) Rieubernet (n. 127), para. 12.

\(^{235}\) Terré & Lequette (n. 87), para. 542; Malaurie (n. 88), para. 709.

\(^{236}\) Rieubernet (n. 127), para. 17, arguing that the general rules on *vices de consentement* suffice.

\(^{237}\) Rieubernet (n. 127), para. 17. Cf. Terré & Lequette (n. 87), para. 542 (‘les risques auxquels entend répondre l’article 1096 . . . sont de toutes les époques’).

\(^{238}\) Rieubernet, *ibid*.

\(^{239}\) In the past this has involved the subject matter of gifts being restored, in whole or in part: Terré & Lequette (n. 87), para. 619 et seq.; Malaurie (n. 88), pp. 297 et seq. With effect from 1 January 2007, the heirs are entitled to an indemnity reflecting the value of the property rather than the property itself: arts. 924 et seq., C. civ., as amended by the *loi* of 23 June 2006, *JO* 24 June 2006.

\(^{240}\) Rieubernet (n. 127), para. 12.

\(^{241}\) *Ibid*.

\(^{242}\) Terré & Lequette (n. 87), para. 629 et seq.; Malaurie (n. 88), para. 694 et seq.

\(^{243}\) Rieubernet (n. 127), paras. 15–16.
The criticisms of this revocability *ad nutum* for gifts between spouses have led to reform. Initially, it was proposed that it should simply be abolished, but calls were made, particularly by notaires,244 for its retention in relation to gifts intended to take effect on death. These are commonly used as an alternative to making provision for a surviving spouse by will, and it was argued that, to preserve this flexibility, such gifts should remain freely revocable like wills. To that end, Article 1096 was modified in 2004245 and 2006,246 so that gifts of *biens présents* intended to take effect during the marriage are now irrevocable as under the general law, but other gifts remain revocable *ad nutum*.

It is clear that the special revocability of gifts between spouses is now much reduced in scope. Moreover, it would appear that undue influence has become very much a secondary consideration: in deciding which gifts should remain revocable, the primary concern has not been to identify those situations where the donor is vulnerable, but rather the pragmatic desire not to subvert useful tools for providing for a surviving spouse.

5.2 A Wife’s Influence Over her Husband

While the discussion of marital undue influence in English law is dominated by the issue of abuse by husbands, there is nevertheless some recognition that a wife is also capable of unduly influence her husband. In the case of wills that possibility has long been acknowledged,247 but it is only in modern times that in *inter vivos* transactions equity have conceded that there can be a presumption in favour of a husband.248 The case law is very limited, arguably because the courts have traditionally looked for an unequal relationship of dominance, which they consider uncommon in this context.

---


245 Art. 21-I of the *loi* of 26 May 2004, *JO* 27 May 2004, preserving revocability *ad nutum* for a gift of *biens à venir* (often called an *institution contractuelle*: TERRÉ & LEQUETTE (n. 87), paras. 545 and 553).

246 Art. 25 of the *loi* of 23 June 2006, *JO* 24 June 2006, ensuring that free revocability applies to the clause de réversibilité de l’usufruit, often used in family settlements. In the typical case, one spouse will transfer the bare title to property to a child of the marriage, retaining a life interest (usufruit) over it and conferring a further life interest on the other spouse, should he or she survive the donor. The Cour de cassation has declared the creation of the interest in favour of the surviving spouse to be a gift of *biens présents*, the usufruit vesting immediately, even if the enjoyment of the property takes place in the future: Cass. 1re civ. 21 October 1997, *Bull. civ*. IV, no 291. See MALAURIÉ (n. 88), para. 434.

247 Cf. *White v. White and Cato* (1862) 2 Sw&Tr 504, 164 ER 1092; *Hall v Hall* (1868) LR 1 P&D 481.

and which social attitudes would make a man disinclined to admit publicly. But in *Etridge*, it will be recalled, Lord Scott characterized marriage as generally involving ‘reciprocal trust and confidence’ and it remains to be seen whether this will encourage claims by husbands. However, attempted reliance on a presumption will commonly fail for the same reason as in the case of wives: the transaction must be shown to be an unusual one.

In France, in contrast, the protection of husbands is well established: following the long tradition of Roman law and the *ancien droit*, Article 1096, both in its original and revised forms, applies to gifts by husbands as much as to gifts by wives. Nor is this a protection in theory only: in practice, gifts have commonly been revoked by husbands.249 This is clearly a more even-handed approach than has been found in English law, and to the extent that this protection is designed to prevent men from being seduced or brow-beaten out of their property, it evidently reflects a greater readiness to acknowledge the emotional vulnerability of men, which in turn may reflect a difference in social attitudes.

5.3 Relationships Analogous to Husband and Wife

In *Barclays Bank v. O’Brien*,250 Lord Browne-Wilkinson made it clear that the protective attitude taken by equity to wives applies equally to ‘all other cases where there is an emotional relationship between cohabitees’, whether that relationship is heterosexual or homosexual. In addition, the relationship between fiancé and fiancée may in particular cases be treated as one of trust and confidence, whether they are cohabiting or not.251 In the 19th century, when the law relating to husband and wife was unsettled, Lord Langdale MR held that the onus always lies on a fiancé to show that he did not influence his intended ‘either by soothing or violence’.252 But in modern times it has been recognized that social conditions have changed253 and in 1981 the Court of Appeal held that it was clear that a presumption of trust and confidence is no longer justified.254 As with wives, then, a presumption of undue influence will only be applied in favour of a fiancée if the requisite degree of trust and confidence is

251 And even in the absence of an engagement there may occasionally, at least, be a relationship of trust and confidence between unmarried couples who are not cohabiting: *Leeder v. Stevens* [2005] EWCA Civ 50.
established, but it is unclear whether the courts will be as easily convinced as in the case of marriage.\textsuperscript{255} A presumption of undue influence can also arise in favour of a fiancé,\textsuperscript{256} but judging by the limited case-law the courts are not especially protective of engaged men.\textsuperscript{257}

In France, the position of unmarried couples is very different. Article 1096 of the \textit{Code civil} refers explicitly to spouses and, since French law does not recognize same sex marriages, the provision does not apply to gifts between homosexual couples. Equally, it does not to apply to unmarried heterosexual couples.\textsuperscript{258} This is the case even for couples, whether of the same sex or not, who have entered into a civil partnership (\textit{pacte civil de solidarité} or PACS).\textsuperscript{259} A proposal\textsuperscript{260} to extend free revocability to such unions was rejected when they were first introduced, for a variety of reasons: in the \textit{Commission des lois} of the \textit{Assemblée nationale}, the fear was expressed that it would undermine the stability of these relationships;\textsuperscript{261} and when the matter was discussed by the \textit{Assemblée} itself, the Minister of Justice objected that a PACS was not the same as marriage and that in any case it would be unwise to extend revocability, given that it had already proved problematical.\textsuperscript{262} However, the \textit{Cour de cassation} has made one small inroad into the non-applicability of Article 1096 outside the bonds of matrimony, controversially\textsuperscript{263} extending the provision so as to allow one spouse to revoke a gift made before the wedding, provided that it was made in contemplation of the marriage.\textsuperscript{264} But even this modest extension has been undermined by the recent reform of Article 1096, as gifts between engaged couples will seldom take effect on the donor’s death.\textsuperscript{265}

\textsuperscript{255} Donovan LJ’s insistence in \textit{Zamet v. Hyman} (at 1452) that in the case of a fiancée the necessary relationship of trust and confidence must be ‘affirmatively proved’ is in stark contrast to Lord Scott’s view in \textit{Etridge} ([2002] 2 AC 773, HL, at para. 159) that it must be disproved in the case of a wife.

\textsuperscript{256} \textit{Zamet v. Hyman}, above, at 1446 (Lord Evershed MR); \textit{Mayer v. Pongracz} (CA, unreported, 1 November 1984); \textit{Kaur v. Bunwaree}, above (Bingham LJ).

\textsuperscript{257} In \textit{Mayer v. Pongracz}, the Court of Appeal held that no presumption arose on the facts of the case.

\textsuperscript{258} CA Versailles 9 July 1992, \textit{JCP N} 1994, II, n° 89, note J-F. PILLEBOUT.

\textsuperscript{259} PACS were introduced by the \textit{loi} of 15 November 1999, \textit{JO} 16 November 1999: C. RICHARDS, ‘The Legal Recognition of Same-Sex Couples – the French Perspective’ 51 \textit{International & Comparative Law Quarterly} 2002, p. 305.

\textsuperscript{260} An amendment to this effect to the bill establishing PACS was proposed by H Plagnol, a UDF député.


\textsuperscript{265} Gifts of that kind are in practice made after marriage, or sometimes as part of a marriage contract, to which Art. 1096 does not apply: TERRE & LEQUETTE (n. 87), para. 552.
6. Religious Relationships

6.1 English Law

Although not so prominent in modern cases, religious influence has long been a concern. Indeed, one leading work has suggested that ‘[i]t may well be that the origin of the strict law relating to undue influence is the hostility which the Courts have always shown towards spiritual tyranny’. 266 Whatever the accuracy of that view, this ‘hostility’ was certainly evident in the leading case, Allcard v. Skinner, 267 where Lindley LJ observed that ‘of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far’.

The intervention of equity can be traced back to the case of Norton v. Relly 268 in 1764, where the gift of an annuity by a woman to her spiritual advisor was set aside by Lord Northington. But that case was one of actual undue influence, as were at least the majority of similar cases decided over the following hundred years. 269 Indeed, it is difficult to find an unequivocal case of presumed undue influence based on religious domination until Allcard v. Skinner in 1887, which established the relationship of believer and religious superior or adviser as one of presumed trust and confidence. True, the religious dimension was stressed by the Solicitor-General, Sir Samuel Romilly, in his submissions to the court in Huguenin v. Baseley 270 in 1807, where, as will be recalled, a voluntary settlement in favour of a minister and his family was set aside. But Lord Eldon in his judgment made no reference to religion, concentrating instead on the fact that the minister had been entrusted with the control of the donor’s property, and the case was not regarded as an authority on religious undue influence by judges touching on the subject in the following decades. 271 However, it seems to have been commonly assumed that a presumption would arise in cases involving religion 272 and the matter was certainly put beyond doubt by the Court of Appeal in Allcard v. Skinner 273 where substantial gifts made by a

268 (1764) 2 Eden 286, 28 ER 908.
269 Nottidge v. Prince (1860) 2 Giff 246; 66 ER 103, Lyon v. Home (1868) LR 6 Eq 655 and the Irish case of Whyte v. Meade (1840) 2 Ir Eq Rep. 420 were all classified as cases of actual undue influence by Lindley LJ in Allcard v. Skinner (1887) 36 ChD 145, CA, at 181.
270 (1807) 14 Ves 273, 33 ER 526; see the text to n. 37 et seq.
271 Dent v. Bennett (1835) 7 Sim 539, at 546; 58 ER 944, at 947 (Sir Lancelot Shadwell V-C); Middleton v. Sherburne (1841) 4 Y & C Ex 358, at 366 and 391; 160 ER 1044, at 1048 and 1058 (Lord Abinger CB). See also Pratt v. Barker (1826) 1 Sim 1, at 4; 57 ER 479, at 480 and Hunter v. Atkins (1834) 3 Myl & K 113, at 140-41; 40 ER 43, at 53-54 (where, respectively, Sir John Leach V-C and Lord Brougham LC, explaining Huguenin v. Baseley, make no express mention of religion).
272 Dent v. Bennett (1835) 7 Sim 539, at 546; 58 ER 944, at 947 (Sir Lancelot Shadwell V-C); Cooke v. Lamotte (1851) 15 Beav 234, at 240; 51 ER 527, at 530 (Sir John Romilly MR); Houghton v. Houghton (1852) 15 Beav 278, at 299; 51 ER 545, at 553 (Sir John Romilly MR); Nottidge v. Prince (1860) 2 Giff 246, at 269-70; 66 ER 103, at 113 (Sir John Stuart V-C); Parfitt v. Lawless (1872) LR 2 P&D 462, at 468 (Lord Penzance).
273 (1887) 36 ChD 145, CA.
member of an Anglo-Catholic community for women to its Superior for the purposes of the community were held to have been made under the presumed influence of the Superior and of the community’s religious director and confessor.

Lindley LJ’s observation on the dangers of religious influence was made about religion in general and it might therefore suggest that the law’s approach here is one of detached secularism. But it is a striking feature of the cases in this area (both on actual and presumed undue influence) that in practice the law has been invoked to control the activities of religious groups outside the mainstream,274 and in this sense the central preoccupation of the law has been the limits of toleration of religious minorities. So much is clear from the very first case, Norton v. Relly, in 1764.275 The precise religious affiliation of the spiritual advisor here was in fact a matter of contention. He was alleged to be a Methodist preacher, at a time when Methodism was new and highly controversial (the arrival of a preacher might be met with riots); Lord Northington simply damned him as a ‘subtle sectary’.276 While making clear his own position as someone who venerated the Church of England, his Lordship acknowledged the need for toleration of moderate groups outside the established church, but he then roundly denounced the defendant and his like as ‘fanatics whose, canting and whose doctrines have no other tendency than to plunge their deluded votaries into the very abyss of bigotry, despair, and enthusiasm’.277

Subsequent cases in the 19th century would deal with other, usually novel, fringe groups: the Agapemonite sect,278 spiritualists,279 the Exclusive Brethren280 and Roman Catholics.281 Allcard v. Skinner282 dealt with Anglo-Catholics, who were, of course, members of the Church of England, but at the time they were still a controversial movement.283 The 19th century, however, seems to have been the

274 The only case involving the religious influence of a mainstream cleric appears to be Huguenin v. Baseley (1807) 14 Ves 273, 33 ER 526, but as has been seen the decision of the court did not refer to this.
275 (1764) 2 Eden 286, 28 ER 908.
276 At 289, 909.
278 Nottidge v. Prince (1860) 2 Giff 246; 66 ER 103. Prince taught that he was the new incarnation of the Lamb of God and that, the Day of Judgment being at hand, the faithful should give up their property (to him): see C. MANDER, The Reverend Prince and his Abode of Love, EP Publishing, Wakefield 1976.
279 Lyon v. Home (1868) LR 6 Eq 655.
280 Morley v. Laughnan [1893] 1 Ch 736.
281 Whyte v. Meade (1840) 2 Ir Eq Rep. 420; Middleton v. Sherburne (1841) 4 Y&C Ex 358, 160 ER 1044 (a probate case); M’Carty v. M’Carty (1846) 9 Ir Eq Rep. 620; In re Metcalfe’s Trusts (1864) 2 De GJ&S 122, 46 ER 321; Parfitt v. Lawless (1872) LR 2 P&D 462 (a probate case).
283 They had recently come under attack by Parliament itself, in the form of the Public Worship Regulation Act 1874, and in the years leading up to Allcard numbers of the movement’s clergy (under the leadership of the same Rev Nihil who figured in the case) had been imprisoned: J. EMBRY, The Catholic Movement and the Society of the Holy Cross, The Faith Press, London 1931, ch. 7.
heyday of religious undue influence: in the 20th and 21st centuries accusations of undue influence have been levelled at spiritualists, Opus Dei, the Church of Scientology and what may be described as a New Age group, but in general, judging by the paucity of reported cases, the superior courts, at least, have been little troubled by actions of this sort.

6.2 French Law

Not surprisingly, France, home of Molière’s Tartuffe, has also been alert to the dangers of religious influence. But, unlike in England, the central pre-occupation of the law has traditionally been control of the country’s dominant religion, although in recent times there has been a shift to a concern about minority groups, particularly sects.

As noted earlier, under the ancien régime, the courts extended the ordonnance of Villers-Cotterets and the Coutume de Paris to cover gifts and wills in favour of a director of conscience or confessor. The equivalent provision of the Code civil, on the other hand, is more modest in scope. Article 909 strikes down dispositions in favour of a minister of religion (ministre du culte), but only where the minister has spiritual care of the donor or testator during his or her last illness and the disposition is made during that period. The Code thus confines itself to protecting those who are at their most vulnerable. Subject to that major limitation, however, Article 909 is broad in scope, capable of applying not only to the Roman Catholic clergy that Pothier seems primarily to have had in mind but also to Protestant ministers, clergy of non-Christian world religions and leaders of sects. But the mere fact that the beneficiary is a minister is not enough: he or she must provide spiritual care,

284 Chennells v. Bruce (1939) 55 TLR 422, KB.
286 Catt v. Church of Scientology [2001] Civil Procedure Law Reports 41, QB (procedural issues only).
287 Nel v. Kean [2003] EWHC 190, QB, which involved a group with interests in matters such as art therapy, alternative medicine and spiritual writings.
288 That the law here has largely been shaped by the difficult relationship between the State and the Roman Catholic Church has been recognized: R. DRAGO ‘Laïcité, neutralité, liberté?’ 38 Archives de Philosophie du droit 1993, p. 221, at 222; F. MESSNER, P-H. PRÉLOT & J-M. WOEHRING (eds), Traité de droit français des religions, Littér, Paris 2003, para. 1570B; because they were not part of France during the anti-clerical governments of the Third Republic, the law in Alsace and Lorraine is in fact different in certain respects in relation to gifts and legacies to religious bodies: see MESSNER et al., paras. 309 et seq. (history), 1763 et seq. (associations) and 1864 et seq. (congrégations).
289 See the text to n. 105 et seq.
290 For a useful account of this provision, see MESSNER et al. (n. 288), para. 1524 et seq., which includes an extensive bibliography (para. 1524, fn. 8).
291 POTHIER (n. 104), p. 246.
292 CA Bordeaux 7 December 1857, DP. 1858, 2, 197.
293 Cass. req. 19 August 1858, DP. 1859, 1, 81 (rabbi); MESSNER et al. (n. 288), para. 1525 (Hindu and Muslim clergy).
294 MESSNER et al. (n. 288), para. 1525.
and the courts have naturally looked for acts that, by virtue of their frequency and personal character, will confer enhanced influence.295

Being designed to prevent abuse, Article 909 identifies two exceptional situations where the disposition would not be suspicious and the normal incapacity is disapplied. The first is where the gift or legacy is intended as recompense for services rendered, such as where a modest amount is given to cover travel expenses.296 The second applies where the minister is a close relative297 of the person being cared for: here the latter can, in the absence of any direct heirs, validly leave a share in his or her estate to the minister; and such a disposition can equally be made if the minister is himself or herself a direct heir.

A person with religious influence may well solicit benefactions for the church or other body to which he or she belongs. Under the ancien droit, where a person was in the care of a confessor who was a member of a religious order or community, the incapacity that prevented gifts or legacies being made to the confessor also extended to dispositions in favour of that body.298 Article 909 makes no mention of such religious institutions, perhaps because, at the time the Code civil was drafted, they had not yet been permitted to re-establish themselves after their destruction or exile during the Revolution.299 When the position of convents was regularized under Charles X, limits were indeed placed on gifts and legacies by a member of the community to the order (or to another member),300 but this restriction has since been repealed.301 Nevertheless, in modern French law, there is much regulation of religious bodies, inspired in part by the fear of undue influence, and this impacts significantly on their ability to receive gifts or legacies.

To begin with, not every religious body has the capacity to receive gifts or legacies. The basic non-commercial organization in French law is the association, but it cannot receive gifts or legacies unless it falls within certain exceptional categories. Under the anti-clerical loi of 1 July 1901,302 the only exception was an essentially secular one, for associations recognized to be of public utility. This restrictive approach was designed to make life difficult for religious bodies, but in time the Vichy government, pursuing a policy of removing the restrictions imposed on the...
Roman Catholic Church under the Third Republic, introduced a further exception for associations cultuelles. This benefits religious organizations, but only if they are exclusively religious in purpose. Thus, bodies will not fall within this exception if, in addition to supporting the practice of a religion, they engage in the selling of literature or supporting social or cultural activities. There is also a special regime for congrégations (religious orders), which acquire the capacity to receive gifts and legacies if they are authorized. The rules governing congrégations were introduced, as one would expect, to regulate the activities of Roman Catholic orders and to this day most authorized orders belong to that religion.

In addition to having the requisite capacity, religious bodies may also require official permission to receive legacies and gifts inter vivos (other than dons manuels). Until 2006, all associations and congrégations were subject to this administrative control. Authorization would be refused if the beneficiary was considered not to satisfy the conditions for having capacity or if its activities were contrary to public policy. In practice, authorization was fairly automatic for mainstream Roman Catholic bodies and for organizations from other denominations and religions that are well established in France. On the other hand, it has been noted that the administration regularly rejected gifts and legacies in favour of dissident groups or minority religions, for fear of undue influence. The law has now been changed, however, to simplify matters for the majority of organizations, while retaining control over those considered to pose a danger. In general, authorization is no longer required; instead, the administration is given the limited right to object to gifts and legacies that are for a purpose that is ultra vires the beneficiary. But authorization remains

---

304 Art. 19 of the loi of 9 December 1905 on the separation of Churches and State, JO 11 December 1905, as modified by the loi of 25 December 1942, JO 2 January 1943.
306 Cons. d’Ét. 29 October 1990, Association cultuelle de l’Église apostolique arménienne de Paris, Rec. 297
307 Art. 1 of the loi of 2 January 1817 (male orders) and Art. 4 of the loi of 24 May 1825 (female orders).
308 MESSNER et al. (n. 288), paras. 1963–1964.
309 Referred to as tutelle administrative. See Art. 11 of the loi of 1 July 1901, JO 2 July 1901, and Art. 910, C. civ. (associations reconnues d’utilité publique); Art. 19 of the loi of 9 December 1905, JO 11 December 1905, as modified by the loi of 25 December 1942, JO 2 January 1943 (associations cultuelles); Art. 1 of the loi of 2 January 1817 and Art. 4 of the loi of 24 May 1825 (congrégations).
311 MESSNER et al. (n. 288), para. 1960.
312 The relevant provisions (n. 309) were modified by the ordonnance of 28 July 2005, JO 29 July 2005.
mandatory for sectes, about which there has been much concern in recent times. Gifts and legacies to such groups have faced hostility from the administration in the past and will presumably continue to do so.

Finally, these restrictions are reinforced by the criminal law. Notably, a series of changes has been made to counter the threat of undue influence on the part of sectes and their members. In particular, the loi About-Picard makes it an offence to abuse a state of psychological or physical subjection, as well as extending the criminal liability of the organization itself and introducing a procedure for dissolving offending sectes.

7. Commentary

The first part of this study concluded that there were both important similarities and significant differences between English law and French law. The second part has effectively added further layers of similarity and difference.

It has been seen that, putting to one side the standard general differences, in some areas, at least, both systems have developed along broadly similar lines. The relationship of guardian and ward is a case in point, though even here there is some difference in detail relating to the period when the special protection applies. In most areas, however, there are marked differences. The case of parent and child is treated in very different ways; the approaches taken to sexual relationships have diverged significantly in the modern law; and while the specific case covered by Article 909 of the Code civil would be dealt with in a broadly similar way in both jurisdictions, the general area of religious relationships has obviously developed in radically different directions. The detail of these differences has already been seen and need not be repeated here. The question is, however, what general lessons can be learned. The obvious one must be that, even where there is a shared general perception that the prevention of abuse requires enhanced protection for special relationships, the selection of which relationships merit that protection may well vary from one legal system to another. Some commentators have sought to present undue influence in clinical, scientific terms, but as far as the law is concerned value judgments clearly play an

315 Art. 223-15-2, C. pén. (Code pénal); MESSNER et al. (n. 288), para. 1262 et seq.
316 MESSNER et al. (n. 288), para. 1269.
317 Art. 1 of the loi of 12 June 2001 (n. 314); MESSNER et al. (n. 288), para. 1275 et seq.
important role. That can be seen in both England and France, but the two legal systems do not necessarily make those judgments in the same way. The relationship of parent and child provides a simple illustration of this, with English law providing strong protection for the child, even into adulthood, whereas French law has traditionally supported the parent.

However, the law is not only shaped by potentially divergent views of what influences are undue. It is also conditioned by broader social developments. In the area of religious influence, the relationship between church and state has intruded dramatically into French law, taking it in some respects in a markedly different direction, but arguably English law too has not been immune from prevailing attitudes to religion and religious practice. Similarly, in both jurisdictions, the law relating to sexual relationships has seen the influence of female emancipation and, in more recent times, changing attitudes to unmarried heterosexual couples and to homosexual relationships. In neither area, however, are English law and French law the same. As far as religious influence is concerned, that is in part due to the fact that the history of religion has taken very different directions in the two countries. But in the context of sexual relationships, the influences in modern times have been similar, and yet the solutions adopted are markedly different: although both legal systems have more or less achieved parity of treatment for all types of relationship, English law has done this by a process of levelling up, extending a certain degree of protection to all, while French law, having previously given spouses more protection than in England, has now opted to level down, greatly restricting its special rules on the revocability of gifts. In the final analysis, this demonstrates the all pervasive influence of the general strategies outlined in the first part of the study. The French preference for rejecting special protection is a consequence of the restrictive nature of the protection on offer; English law, on the other hand, deploys a less intrusive form of protection and can therefore afford to extend it. In this sense, the policy choices can be seen to be constrained by the legal tools available.

8. Final Conclusions
Du Plessis and Zimmermann have noted that in civil law systems in general any ‘inchoate . . . notion of undue influence gradually withered away’. To a certain extent French law has followed this pattern, with the demise of suggestion and capitation as an independent vice de consentement. But as has been seen many safeguards against undue influence have survived from the ancien droit and indeed have been added to and flourish in the modern law. These safeguards, in particular the series of presumptions that correspond often strikingly to those found in equity, provide a complex but fruitful comparison with English law. The present study has attempted to

unravel some of the complexities, but clearly there is much more that could have been said, much more that could have been investigated. In particular, with its focus on private rights, the study (like so much comparative writing on private law) has underplayed the practical impact of criminal law, which has long had its role here in sanctioning and deterring victimization. It would, for example, be interesting to see how traditional French offences such as escroquerie\textsuperscript{320} and modern ones such as abusing a state of ignorance or weakness\textsuperscript{321} (touched on briefly in relation to religious influence) factor in to the picture presented here, alongside their English counterparts. Nevertheless, what has been said suffices to highlight a series of significant distinctive features in the approaches adopted to the abuse of relationships and to underline the fact that the relevant legal doctrines do not exist in a vacuum, but must accommodate a variety of influences that are often peculiar to the unique legal and social context in which the doctrines have developed and are applied.

\textsuperscript{320} Art 313-1, C. pén.