

To what extent was the High Court of Australia correct to apply the ‘special equity for wives’ to avoid an otherwise binding contract in *Garcia v National Australia Bank Ltd*?

Introduction

The plight of women in law has not been an easy one and has often lead to special categories and distinctions being made to accommodate society’s change in attitudes towards women. The Special Wives Equity rule at its heart is concerned with the prevention of unconscionable conduct and undue influence upon a third party in a contract. The controversy surrounding the principle is due to the narrow category that the rule applies to, namely married women.

Comment [anon1]: A good introduction does two things – it introduces the topic and it introduces the paper – this introduction has done both things. If it were a longer piece of work we would expect it to be in parts and the introduction also introduce what each part will cover.

Comment [anon2]: This is lead as in lead pipe, or lead as in leader. Led is the correct word here.

Whether the High Court of Australia was correct to apply the rule in *Garcia v National Australia Bank Ltd* (*Garcia*) is a debatable issue that is best dealt with by looking into the reasoning behind the sudden resurrection of this almost outdated rule.

Comment [anon3]: For completeness the student should have footnoted the citation

The rule’s distinct deviation from classical contract theory and perceived inconsistency with principles of sexual equality in law has raised concern from many sectors of the legal field. An assessment of the potential redundancy of the rule and its operation within current statutory provisions will be looked at in this paper along with a discussion on whether it is fair and just to continue to apply the principle in the 21st Century.

Comment [anon4]: Usually a footnote would be provided here with some examples of published works expressing concerns.

Comment [anon5]: Sets a useful context to the paper.

The Special Wives Equity Rule

The special wives equity rule is a unique rule in Australia that has risen out of two major decisions of the High Court of Australia (HCA), namely with the cases of *Yerkey v Jones*¹ in the 1930s and *Garcia v National Australia Bank Ltd*² in 1998.

Comment [anon6]: This expression is borderline. Could say ‘arisen from’ or ‘developed from’

Comment [anon7]: Need to make sure italics is not left on when a footnote is added

Comment [anon8]: All footnotes should end with a full stop.

¹ *Yerkey v Jones* (1939) 63 CLR 649 (*Yerkey*)
² *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395-2

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The rule can be described as an equitable doctrine which applies when a married woman guarantees her husband's loan³. It protects wives from inheriting their husband's debt on the basis that they were vulnerable to a bond of *trust* and *confidence* within their marriage, and due to this vulnerability, were not aware of the financial or business implications that arose from providing a guarantee.

Comment [anon9]: Punctuation should always come before the footnote. In this case, it should come after the full stop.

The principle is based in equity law and was originally developed as a way to soften the harshness of the common law, which prevented a married woman from dealing with property in her own name.⁴

This historic protection that equity courts afforded married women in regards to transactions affecting their property⁵ sought to prevent wives from becoming the victims of undue influence within their marriage and henceforth involved in the loans of their partners due to their relationship rather than any appreciation of the legal agreement created.⁶

Today, the capacity of a married woman to deal with her property freely and independently is long established⁷ yet the rule still applies and the vulnerability of women is still assumed to be in existence within all marriages. The rule itself has two limbs. The first allows a wife to have a guarantee set aside if her consent was obtained by undue influence, unless she has received independent advice.⁸ The second gives a wife the right to have a guarantee set aside if she failed to understand the effect of the guarantee or its significance, unless the lender took steps to inform her of these matters⁹

Comment [anon10]: It may have been better in this sentence to finish with the discussion of what the rule is by stating the second part of the paragraph before this first sentence which leads into a discussion of the change that has taken place since.

³ Law Reform Commission NSW Issues Paper 17 '*Guaranteeing someone else's debt*' (2000) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip17chp2#2.39>> at 10 April 2010.

⁴ Charles Chew 'Rethinking the Special Equity Rule for Wives: Post Garcia, Quo Vadis, Where to From Here?' (2007) 19(1) *Bond Law Review* [need page at which article starts here]. Iss 1 (2007) Article 3

⁵ [First name] Stavrianou, 'Expanding the equitable doctrine of wife's special equity' (2007) 18 *JBFLP* 105, 108.

⁶ [First name] Howell, 'Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1995) 4 *AFLJ* 93, 93.

⁷ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, at 66 (Kirby).

⁸ NSWLRC, above n 3. Law Reform Commission NSW Issues Paper 17 '*Guaranteeing someone else's debt*' (2000) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip17chp2#2.39>> at 10 April 2010.

⁹ *Ibid.*

The rule has come to be doubted since the decision of *Yerkey* in 1939 and it could be seen that there was a distinct movement away from its principles. The NSW Court of Appeal held in *Atkins v National Australia Bank*¹⁰ that the principle in *Yerkey* should no longer be applied because the special position of wives had been overtaken by the general doctrine of unconscionable conduct.¹¹ The rule has however since been reaffirmed in Australia by the High Court in 1998 with *Garcia*.¹²

Comment [anon11]: This footnote is to a secondary source, when referring to the primary source (the case itself) would be more appropriate. It would be applicable to use the secondary source, for example, where Clement Shum made some useful comments on the *Garcia* decision.

Classical Theory

The creation of the Special Wives Equity rule is a move away from classical principles of contract law. Classical contract theory is built on the underlying assumption that contracts are made in the private sphere by self-interested individuals who wish to bind themselves by an agreement and be given the freedom to do so by the courts.¹³

The courts themselves interfere with contracts as little as possible and their main purpose is to uphold the agreement entered into by the individual parties, rather than determine its fairness or make **judgements** on parties' rights or obligations arising from the contract.¹⁴

Comment [anon12]: We use judgments for court decisions and judgements for situations where a person exercises their mental discretion

The Special Wives Equity doctrine involves **a delving not only** into the fairness of contractual obligations but imposes a presumption into the private institution of marriage, the marital home and the competency, or lack thereof, of wives in the realm of finance and business.¹⁵

Comment [anon13]: Expression could be improved here

In the name of equity, the courts have enforced obligations on lenders and guarantors to ensure that undue influence is not an element of the agreement between a husband

¹⁰ (1994) 34 NSWLR 155.

¹¹ NSWLRC, above n 3, Law Reform Commission NSW Issues Paper 17 'Guaranteeing someone else's debt' (2000) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip17chp2#2.39>> at 10 April 2010

¹² Clement Shum 'Protection of Married Women as Guarantors' (1996) 14 *Australian Bar Review* [need to add here the page at which the article starts]

¹³ [need first names] Paterson, Robertson & Duke 'Principles of Contract Law' (publisher, 3rd ed., (2009) 6.

¹⁴ *Ibid.*, 7.

¹⁵ Howell, above n 6, 'Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1995) 4 *AFLJ* 93, 93.

and wife,¹⁶ and as such are denying the freedom that classical contract theory gives to individuals to create a contract without the ‘meddling’ of the courts.

Why a court would seek to impose such obligations upon the free will of contracting parties is often speculated upon and one theory put forward by Dal Pont is that *Garcia*¹⁷ is simply a wealth distribution case, placing the loss upon the party most able to bear it¹⁸

Feminist Theory

Taking the equity rule at face value, Germaine Greer would be proud. The rule protects married women’s interests and seeks to improve their rights to protection from unconscionable conduct within their marriage.

Comment [anon14]: This sentence is too colloquial for a law essay.

However, a deeper look into the rule reveals that it assumes women require a special handicap or concession simply due to their gender.¹⁹ Hence, it is inconsistent with the identical treatment approach of feminist theory, which seeks to place women on an equal footing and remove the distinction between the sexes at law.²⁰

Although it can be said that women are inherently different from men in many aspects (the most obvious being physical), and may need some form of protection or recognition of a feminist viewpoint through the eyes of the law;²¹ it cannot be denied that women have also become more powerful in the community and that the plight of women has very much changed from the days of dutiful housework and child rearing.

¹⁶ Paterson et al, above n 13, Robertson & Duke ‘Principles of Contract Law’ 3rd Ed (2009) 8.

¹⁷ *Garcia v National Australia Bank Ltd* (1998) 194 CLR [this reference is incomplete].

¹⁸ G[need the rest of the first name]. Dal Pont, ‘The Varying Shades of “Unconscionable” Conduct – Same Term, Different Meaning’ (2000) 19 *Australian Bar Review* 135, 147.

¹⁹ Professor Margaret Thornton ‘Feminist Legal Theory: An introduction’ *Australian Law Reform Commission Issue 83* (2003) 5-9. [There is something wrong with this reference. Issues Paper 83 perhaps? It may cite Thornton’s paper]

²⁰ [first name] Sheehy, ‘Personal Autonomy and the Criminal Law: Emerging Issues for Women’ reproduced in Paterson, Robertson and Duke ‘Principles of Contract Law’ (publisher, 3rd ed Ed, (2009) 19.

²¹ Paterson et al, above n 13, Robertson & Duke ‘Principles of Contract Law’ 3rd Ed (2009) 20.

The special wives equity doctrine fails to pay regard to the advance in the status and education of women, the increasing role of women in business and commercial affairs and the variety of personal relationships today.²² Therefore, the rule is consistent with the difference approach which denies that women have reached a state of equality and calls for special distinctions to be made in law that perpetuate stereotypical feminine characteristics.²³

The special wives equity doctrine also shows consistency with the subordination approach.²⁴ It presumes a subordinate status of married women in our society²⁵ and takes the power relationship between men and women into account when resolving contractual disputes.

Therefore, whilst the courts may have been seen to be taking a feminist approach with the special wives equity rule, in fact they are restricting and institutionalizing the status of women to an inferior position. This ultimately is inconsistent with the fundamentals of feminist theory.²⁶

Comment [anon15]: Make sure to set your spelling to English (Australian) to avoid American spelling such as -ize.

Application of the equity rule in 21st Century Australia

To determine whether the High Court was correct to resurrect the special wives equity rule in *Garcia* and make it operational for the 21st Century, we must look at whether the special wives equity rule is in fact required above the operations of the doctrine of unconscionable conduct, undue influence and the framework of statutory provisions that can be relied upon by those seeking to have a guarantee set aside or modified.²⁷

Comment [anon16]: Avoid using title case except on proper nouns.

Unconscionable conduct

Comment [anon17]: Never put a heading at the bottom of a page as it does not 'head' anything

²² Clement Shum, above n 12, "Protection of Married Women as Guarantors" (1996) 14 *Australian Bar Review* 246.

²³ [first name] Otto, 'A Barren Future? Equities Conscience and Women's Inequality' (1992) 18 *Melbourne University Law Review* 808, 812.

²⁴ Paterson et al, above n 13, Robertson & Duke 'Principles of Contract Law' 3rd Ed (2009) 21.

²⁵ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 424.

²⁶ Paterson et al, above n 13, Robertson & Duke 'Principles of Contract Law' 3rd Ed (2009) 961.

²⁷ NSWLRC, above n 3 Law Reform Commission NSW Issues Paper 17 'Guaranteeing someone else's debt' (2000) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip17chp2#2.39>> at 10 April 2010 [need pinpoint reference ie the page from which the reference was taken]

Traditionally, relief on the basis of unconscionable conduct is available where one party to a transaction is at a 'special disability' in dealing with the other party due to circumstances that affect his ability to conserve his own interests, and the other party takes advantage of this opportunity²⁸

In *Louth v Diprose*²⁹ the High Court accepted that emotional dependence could create a disability for the purposes of the unconscionable dealing rule. A person who is emotionally dependant on another may be vulnerable to exploitation or abuse by that other (regardless of their sex).

Taking this into account, there seems no reason why a wife would not be able to show that she was under a special disability within her marriage arising from her emotional dependence. There are also other categories of special disability as explained by Fullager J in *Blomley v Ryan*³⁰ that a wife may fall into due to her sex, lack of education or the lack of assistance and explanation where it is deemed necessary.

Once a wife is able to establish that she was under a special disability she need only prove that her disability was sufficiently evident to the defendant as to make it unconscientious that he procure or accept her assent to the contract.³¹

Comment [anon18]: Accent is a particular style of speaking a language

Undue Influence

Undue influence is concerned with the exploitation of a relationship of influence.³² Which This prevents a person the plaintiff from making an independent judgement in entering a contract.³³ Categories of relationships exist whereby it is presumed that undue influence occurs, however the husband and wife relationship is not one of them.³⁴

²⁸ *Blomley v Ryan* (1956) 99 CLR 362 at 415, per Kitto J.

²⁹ (1992) 175 CLR 621.

³⁰ (1956) 99 CLR 362.

³¹ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 474.

³² Paterson et al, above n 13, Robertson & Duke 'Principles of Contract Law' 3rd Ed (2009) 541.

³³ Ibid.

³⁴ *Yerkey v Jones* (1939) 63 CLR 649, Dixon J at 675 (Dixon J).

For a wife to establish that undue influence has occurred within her relationship she must establish that she places such trust and confidence in her husband that a presumption should be made in fact. Once the presumption has been made, undue influence is assumed in all transactions.

The only way to rebut this presumption is to show that the wife received independent advice and exercised free and informed judgement. Undue influence was argued in *Garcia*, however it failed because the bank was not affected with an equity unless it had notice and it was found in the trial case that there was no notice.³⁵ Although her husband pressured her to sign the document it was found that his pressure did not prevent her from exercising her “independent and voluntary” will.³⁶

Comment [anon19]: Always use single quotation marks except where there is a quote within a quote

Legislation

There are multiple pieces of legislation that aim to address unconscionable dealing within contracts. One of which is the Contracts Review Act 1980 (NSW) which allows a court to grant relief in unjust circumstances. There are however difficulties for wives trying to use this legislation for their protection in instances of guaranteeing their husbands loans.

Comment [anon20]: This statement needs some explanation or evidence in support

Young J held that relief under the Contracts Review Act 1980 (NSW) could be obtained for cases relating to bank guarantees, however³⁷ “... Unless one can see that there is some substantive injustice in the contract itself or there was procedural injustice leading up to the making of the contract, the Contracts Review Act is of no assistance”.³⁸

Comment [anon21]: The year should be italicised when citing legislation

Comment [anon22]: This is not an appropriate place to put this footnote. Perhaps after the word ‘guarantees’?

The *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987* (NSW) also prohibit unconscionable, misleading or deceptive conduct however it is mainly for instances of trade or commerce and hence would be difficult to apply to wives in surety situations.

Comment [anon23]: Quotations should not be italicised. If less than three lines they should be written in the text with single quotation marks, and if three lines or more, indented and put in one point size smaller.

³⁵ *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11, 996, 38. [should have used the CLR]

³⁶ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 12.

³⁷ See eg the conclusive amount owing clause referred to by Wootten J in *Cook v Bank of New South Wales* (1982) 2 BPR 9580.

³⁸ *Ibid*, 12.

The special equity rule therefore operates much like a safety net for cases such as *Garcia* where a wife is unable to obtain relief under the doctrine of unconscionability and undue influence, or via the statutory framework as it stands today.

Fairness and Justice

Principles of fairness and justice such as the rule of law, the right to a trial and the presumption of innocence are all fundamental elements of our legal system today. The expectation that morally right and fair principles are practiced by the law and applied to all persons equally underpins the foundations of our justice system.

One of the main criticisms of the equity rule is that its effect is unjust in that all married women are subject to the principle because they trust their husbands with economic management.³⁹

As Kirby J stated in his dissenting judgment in *Garcia*

“Whatever may have been the position in Australian society of 1939, it is offensive to the status of women today to suggest that all married women, as such, are needful of special protection supported by a legal presumption in their favour.”⁴⁰

The protection under the special wives equity rule should be surrounding the prevention of undue influence and unconscionability that can be exerted by one party to another within any relationship; rather than the presumption of vulnerability of a woman simply because she is a wife.⁴¹

How just and fair can a rule be that does not require any proof of unconscionable conduct?⁴² Our legal system should not rely on assumptions but rather on hard

³⁹ Andrew Aykes “Unfair” results and unfair doctrines: Structuring the application of the equitable doctrines of undue influence and unconscionable dealing” *Deakin University* [this is incomplete], 50.

⁴⁰ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 424.

⁴¹ Stavrianou, above n 5, “Expanding the equitable doctrine of wife’s special equity” (2007) 18 *JBFLP*

evidence. Likewise, it should not endorse any rule that denies relief to certain members of society based on their gender and marital status.⁴³

The rule should be extended into other categories of relationships to ensure it is fair and just.⁴⁴ Equity should protect all vulnerable parties in a relationship, not just wives. It should ensure that they receive full information and independent advice before they risk their own assets for the primary advantage of their partner to whom they may feel particularly vulnerable.⁴⁵

Conclusion

All persons of capacity, including married women, should conform to contracts to which they enter unless statute or judicial law provides them with relief. Marriage and gender are not relevant reasons for relief from contractual obligations in today's society.⁴⁶

Expansion of the current equity rule to cover the propensity for all cohabitants to be at a disadvantage in relationships and the insertion of cohabitants as a category with a presumption of undue influence would ensure the rule is consistent with equitable principles and sexual equality.

Comment [anon24]: This is not an expression known to the English language

Until the category of persons suffering the disadvantage recognized through the special wives equity rule are represented thoroughly, it will still be wrought with controversy in our modern legal system and the fairness of its application will continue to be critiqued.

⁴³ Paterson et al, above n 13, Robertson & Duke *Principles of Contract Law* 3rd Ed (2009) 960.

⁴⁴ Stavrianou, above n 5, 'Expanding the equitable doctrine of wife's special equity' (2007) 18 *JBFLP* 105-117.

⁴⁵ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 426

⁴⁶ Australian Law Reform Commission, 'Equality Before the Law: Women's Equality' *ALRC* 69, Pt II, (1994) 259-261.