THE ELEMENT OF WRONGFUL PRESSURE IN A FINDING OF DURESS*

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The author expounds and criticizes the traditional notion that, in a claim for restitution based on duress, it must be shown that the victim was threatened with some unlawful action. After setting forth the common law development of duress, including comparisons between American and Commonwealth jurisprudence, the author argues that on occasion courts have shown a willingness to abandon the traditional view of what type of act must constitute wrongful pressure. In particular, some American courts have adopted a more flexible approach, using as a test of wrongful pressure, not the unlawfulness of the threatened act, but rather the coercive motive of the oppressor. Finally, the author discusses the possibility that duress could be extended to cover the situation where the threat involved is a denial of future contracts.

I. INTRODUCTION

It is the purpose of this paper to examine the case law relating to the recovery of benefits conferred under duress. There is a dearth of Canadian authority in the area and so liberal reference has been made to decisions from the United States, England and Australia.

The undue pressure of the defendant might lead to a benefit being directly conferred on him, such as the payment of money or the transfer of property or the rendering of services. The duress might also lead to an indirect conferral of a benefit on the defendant as where the victim is forced to enter into a contract with his oppressor. In this paper no distinctions will be drawn based upon the type of benefit conferred on the defendant.[1]

Duress is defined in the American *Restatement of Contracts* in the following way:[2]

> Duress in the Restatement of this Subject means:
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> (a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or
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> (b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

There are, therefore, two major components to a finding of duress. There is the element of wrongful pressure on the part of the defendant and the

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1. In the old common law there were some very important distinctions. Thus, it was clear as early as 1732, from *Astley* v. *Reynolds*, 93 E.R. 939 (K.B.) that money paid under duress of goods could be recovered in quasi-contract. In *Skeate* v. *Beale* (1841) 113E.R. 688 (Q.B.), however, it was held that mere duress of goods would not invalidate a contract induced by such pressure. In that case the plaintiff distrained for arrears of rent and the defendant agreed he would pay the arrears demanded if the plaintiff withdrew the distress. The distress was withdrawn but the defendant paid only a small part of the agreed amount. The court held that the agreement could not be set aside because duress of goods was no ground for avoiding an agreement and so the full sum was payable. Lord Denman, C.J. indicated that duress of the person, alone, would have been sufficient as "the fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert." *Id.* at 690.
   A good discussion of the problems raised by these two cases is contained in Beatson, "Duress as a Vitiating Factor in Contract" (1974) 33 *Camb. L.J.* 97.
2. *Restatement of Contracts* (1932) §492, at 938.

element of overcoming the plaintiff's will. This paper will be devoted to the notion of wrongful pressure. In particular, stress will be laid on the supposed rule that "It is never duress to threaten to do what one has a legal right to do."[3] This formula has, rightly, been criticised on the grounds that it does not give a true picture of the law as it is nor as it should be.[4] Dawson has stated:[5]

> It is indeed this concentration on distinctions between legal and illegal means which has chiefly arrested the modern development of the law of duress. No single formula has achieved so wide a circulation in the duress cases as the statement that "It is not duress to threaten to do what there is a legal right to do." Certainly no other formula is anything like so misleading. Its vice lies in the half-truth it contains. For an enormous range of conduct is included in the class of acts that there is a "right" to do (and therefore, under this formula, to threaten) . . . . Doctrines of duress are intended to raise precisely the question whether it is "rightful" to use particular types of pressure for the purpose of extracting an excessive or disproportionate return. Over the whole range of conduct to which this question applies, it is plain that the tests of the criminal law or a damage remedy can no longer determine the limits of relief for unjust enrichment.

This paper will attempt to establish that the lawfulness of the action threatened by the oppressor does not preclude a claim in duress by the victim. The present law does not support the general formula that "It is never duress to threaten to do what there is a legal right to do." There are situations where the courts have been prepared to uphold a claim of duress from a threatened exercise of legal rights and privileges. An attempt will be made to categorize these situations and to determine what general conclusions can be drawn. In this way a rational basis can be laid for the extension of duress doctrines into other areas of the threatened exercise of legal rights.

In many areas, however, the notion still persists that wrongful pressure does not include a threatened exertion of legal rights. As a result of this persistence, the development of restitutionary remedies for duress has been stultified. It is totally unsatisfactory for a finding of duress to be dependent upon a finding that the threatened act was independently actionable in the sense of being a crime, a tort or a breach of contract. It is necessary to consider how broad the present concept of wrongful pressure is and how broad it should be.

II. THE TRADITIONAL CONCEPT OF WRONGFUL PRESSURE

In this section the traditional theory will be stated. The established categories of duress will be considered as will the general formula that "It is never duress to threaten to do what there is a legal right to do."

A. The Established Categories of Duress

1. Duress of the Person

The earliest form of duress to be recognized was duress applied directly to the person of the victim. Woodbury J. in *Morrill* v. *Amoskeag Savings Bank*[6] summarised the early position:

3. *Fidelity and Casualty Co. of N.Y.* v. *United States* (1974) 490 F.2d 960, at 966 (Ct.Cl.).
4. *E.g.* Sutton, "Duress by Threatened Breach of Contract" (1974) 20 *McGill L.J.* 554, at 586: "No duress rule which attempts to test the coercing party's conduct solely by reference to whether his threatened action would be lawful if carried out can do full justice to the issues discussed in this article."
   See generally, Dalzell, "Duress by Economic Pressure" (1942) 20 *N.C.L. Rev.* 341, at 361-367; Hale, "Bargaining, Duress and Economic Liberty" (1943) 43 *Colum. L. Rev.* 603.
5. Dawson, "Economic Duress—An Essay in Perspective" (1945) 45 *Mich. L. Rev.* 253, at 287-288.
6. (1939) 90 N.H. 358, 9 A.2d 519 at 524.

> Duress, under the early common law, might consist in threats as well as in the use of actual force, but only four kinds of threats were regarded as of sufficient gravity to permit one to avoid the consequences of his acts. These were threats of loss of life, of loss of limb, of mayhem, and of imprisonment. Even a threatened battery was not sufficient, and if the threat was of imprisonment, it must be of unlawful imprisonment.

Duress was, therefore, a very narrow concept and its main function was to buttress the existing criminal law and the law of tort. Few cases within this category are ever considered by the courts because of the availability of other equally adequate remedies. Duress of the person, therefore, presents few problems. It does illustrate, however, the perceived need for the threatened act to be independently unlawful.

In Anglo-Canadian jurisprudence duress is still very much limited to duress of the person insofar as an attempt is made to set aside a contract.[7] Spencer, Co. Ct. J. in British Columbia made this point very clearly in 1976:[8]

> The law draws a distinction between duress and undue influence. Duress in the execution of a contract or deed occurs when there is a physical compulsion of the person, which must be very rare, or when there is a threat to the person's life or limb, or a threat of a physical beating (mayhem) or of imprisonment. . . . It may also take into account threats of a wrongful imprisonment or prosecution of the person . . . and possibly of the person's near relative. . . .

The judge extended this narrow concept of duress to include threats to take the lives of the plaintiff's infant children.

2. Duress of Goods

The earliest form of economic duress recognized by the courts was duress of goods. In the typical case the defendant seizes or threatens to seize, or detains personal property to which he is not entitled and thus compels the plaintiff to transfer some benefit to recover his goods or to avert the seizure. The starting point for relief in these circumstances, and still the leading authority, is *Astley* v. *Reynolds*.[9] The plaintiff pawned plate to the defendant for 20£. After three years he attempted to redeem it but the defendant insisted on 10£ for interest. The plaintiff offered 4£ which he knew was more than the legal interest, the defendant refused to accept it. In the end the plaintiff paid the 10£, recovered his plate and sued for the surplus in an action for money had and received. The court held that he could recover the surplus. There was no way in which the payment could be characterized as a voluntary one nor was it relevant that the plaintiff had an alternative remedy in tort:[10]

> [T]his is a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business: where the rule volenti non fit injuria is applied, it must be where the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again.

The old view was that mere duress of goods was not a ground for setting aside a contract induced by such pressure but the basis only for recovery of money paid.[11] This view has been firmly rejected in the United States. In *Hellenic Lines* v. *Louis Dreyfus Corp.*[12] the court stated:

7. *Supra* n. 1.
8. *Saxon* v. *Saxon* [1976] 4 W.W.R. 300, at 305 (B.C.S.C.).
9. *Supra* n. 1.
10. *Id.*
11. *See* the discussion of *Skeate* v. *Beale* and *Astley* v. *Reynolds*, *supra* n. 1.
12. (1966) 249 F. Supp. 526, at 529 (S.D.N.Y.).

> In general, the rule is said to be that where one party has control or possession of the goods of another and refuses to surrender such goods to the owner thereof except upon the latter's compliance with an unlawful demand, a contract made by the owner to emancipate his property is considered as one made under duress and thus avoidable.

It has even now been rejected in the United Kingdom where Kerr, J., in *The Siboen and the Sibotre,* concluded that "The true question is ultimately whether or not the agreement in question is to be regarded as having been concluded voluntarily".[13] He gave the following examples:[14]

> For instance, if I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under an imminent threat of having my house burnt down or a valuable picture slashed, though without any threat of physical violence to anyone, I do not think that the law would uphold the agreement.

There is a general principle that benefits conferred in submission to an honest claim cannot be recovered. A person on whom a claim is made is not allowed to choose his own time for litigation. The courts like to uphold genuine settlements. They do not like to see real compromises reopened as that tends to promote rather than to allay disputes.[15] Such a payment is generally spoken of as being voluntary. It is the duty of the courts to undertake the difficult task of determining why the plaintiff acted as he did. Did he confer the benefit because he intended to enter a genuine compromise or did he so act because of the wrongful pressure exerted by the defendant? Did the plaintiff intend to close the transaction or did he intend to keep his rights alive to recover the benefit at a later stage? In *Mason* v. *The State of New South Wales*[16] Windeyer, J. said:

> It seems plain that a man compelled by pressure *colore officii* or any other form of duress may yet say 'well, I really have no option but to pay, nevertheless, I will not dispute the matter further. I will pay to put an end to this question.'

It is important to remember that the recipient's claim must be honest, or otherwise the settlement can be overturned.[17]

The courts, however, rarely defeat a claim of duress of goods on the basis that the plaintiff submitted to the defendant's honest claim. Indeed, the courts often ignore the question of whether the defendant's claim was asserted in good or bad faith. Thus, in *Murphy* v. *The Brilliant Co.*,[18] a boat was being held by the defendant company which was demanding a higher price for repairs than it could lawfully charge by the contract. The plaintiff paid the overcharges and sued to recover them in duress. Despite the argument that the payments had been made voluntarily in submission to an honest claim, the court held that the plaintiff could succeed. It did not matter that he had not protested all the payments. The court was convinced that the plaintiff had not wanted to close the transaction but had paid only to recover the boat which he needed.

The court cited *Maskell* v. *Horner*[19] which is a more startling example of a failure to find a payment in submission to an honest claim in the area of duress of goods. In that case the plaintiff carried on business as a

13. [1976] 1 Lloyd's L.R. 293, at 335 (Q.B.).
14. *Id. See also North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd.* [1978] 3 All. E.R. 1170 (Q.B.).
15. *See Callisher* v. *Bischoffsheim* (1870) 5 Q.B. 449.
16. (1959) 102 Commw. L.R. 108, at 143.
17. *Ward & Co.* v. *Wallis* [1900] 1 Q.B. 675, at 678.
18. (1948) 323 Mass. 526, 83 N.E.2d 166.
19. [1915] 3 K.B. 106 (C.A.). This case is fully discussed in R. Goff & G. Jones, *The Law of Restitution* (2d ed. 1978) 186-189.

produce dealer near Spitalfields Market. The defendant claimed tolls from him but the plaintiff objected on the grounds that he was not dealing in the Market. The defendant threatened to seize the plaintiff's goods and to close down his business. On the advice of his solicitor, and seeing that all other dealers in a similar position were paying tolls, the plaintiff paid tolls under protest for twelve years. It was then discovered that the defendant was not entitled to these tolls and the plaintiff brought this action to recover them. The trial judge was firmly of the opinion that the money was paid in submission to an honest claim and could not be recovered. The protests had long ceased to be effective and had come to indicate only a "grumbling acquiescence and were not what they must be to satisfy the rule that there must be a declaration that the transaction was not closed but that the payment . . . was to be reclaimed."[20] There is force to these conclusions. The plaintiff should have brought his action earlier if he really thought that the transaction was still open. The delay in suit should have implied acquiescence. The trial judge pointed out that "the plaintiff did not want to challenge the defendant's right, though he was ready enough to claim his money back when someone else had shown that the money was wrongly claimed."[21] Nevertheless, the Court of Appeal reversed the decision of the trial judge. The payments had been made under duress and could be recovered.

It is, therefore, unusual for the courts to hold that a benefit transferred under duress of goods was conferred in submission to an honest claim. There has to be some further factor as, for example, where the duress of goods arises out of some civil law process. Thus, in *Turner* v. *Barber*,[22] the defendant made a claim for $16.00 for wharfage. The plaintiff's boat was attached and he paid the $16.00 to release the attachment so that he could sell the boat, as he was bound to do under a contract with a third party. The court found that the plaintiff did not owe the debt but he could not recover the money as having been paid under duress even though he had protested the payment. The payment was voluntary because made in submission to an honest claim. If Turner had wanted to contest the claim he should have done so in that action, especially as he had sufficient money to procure the release of his boat by giving a bond.[23]

3. Duress by Carriers and Public Utilities

There is a long history of relief in duress for excessive charges levied by carriers and public utilities. The emphasis in the authorities has lain upon the severe inequality of the bargaining position between the parties in such cases. The law in this area was first developed in relation to common carriers. Blackburn, J., in *Great Western Rlwy. Co.* v. *Sutton*,[24] elucidated the common law position in the following terms:

> At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on

20. *Id.* at 111.

21. *Id.* at 111-112. The plaintiff was made aware of the illegality of the defendant's claim from the decision of *Attorney-General* v. *Horner (No. 2)* [1913] 2 Ch. 140 (C.A.).

22. (1901) 66 N.J.L. 496, 49 A. 676.

23. In *Chandler* v. *Sanger* (1874) 114 Mass. 364, on similar facts, the court found duress where the defendant's attachment of the plaintiff's goods was clearly in bad faith as the defendant knew that he had no claim.

24. (1868-9) L.R. 4 H.L. 226.

> being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him.[25]

One of the earliest cases in which relief from duress by a carrier was granted was *Parker* v. *Great Western Rlwy.*,[26] decided in the Court of Common Pleas in 1844. In that case, the defendant railroad was under a statutory duty to charge customers on an equal basis for the carriage of goods. It was held that the plaintiff could recover overcharges he had made. The court upheld the following argument of plaintiff's counsel:[27]

> [I]t was urged, that these could not be considered as voluntary payments; that the parties were not on an equal footing; that the defendants would not, until such payments were made, perform that service for the plaintiff which he was entitled by law to receive from them without making such payments; and that, consequently, he was acting under coercion . . .

This doctrine was later applied to all forms of public utilities.[28] The leading American authority is *City of Saginaw* v. *Consumers Power Co.*[29] In that case the defendant company charged higher rates for the supply of gas than it could lawfully charge. The consumers paid these overcharges because they feared that, otherwise, the gas supply would be terminated. It was held that these overcharges could be recovered. It did not matter that no explicit threats to cut off the gas were made. It was sufficient that the consumers knew that this would be the result of their failure to pay. The lack of protest was similarly not significant. The plaintiffs brought this action as soon as practically possible after the new rates had been enforced. The monopolistic position of the defendant precluded any suggestion that the plaintiffs' payments were voluntary. The court emphasized the fact that the parties were not dealing on equal terms. The latent threat of shutting off the gas was constantly before the consumer and the payments were made solely to secure future services.

4. Duress by Public Officials

There is a body of authority permitting recovery of charges wrongfully exacted by public officials. In particular, there are two Supreme Court of Canada decisions on point. In *George (Porky) Jacobs Enterprises* v. *The City of Regina*,[30] a wrestling promoter was able to recover excess licence fees paid to the City to enable him to put on periodic wrestling exhibitions. The contention that the excess charges were paid voluntarily was countered by the fact that the promoter was forced to pay the fees if he wanted to continue his business.

The *Jacobs* case was followed in *Eadie* v. *Township of Brantford*[31] where it appears to have been extended. In that case, Eadie wanted to subdivide and sell a parcel of land that he owned in the defendant municipality but was unwilling to comply with the defendant's conditions for the granting of planning permission. Subsequently, Eadie was in a

25. *Id.* at 237.
26. (1844) 135 E.R. 107 (C.P.).
27. *Id.* at 123.
28. *See* Dawson, *supra* n. 5 at 259 n. 17.
29. (1943) 304 Mich. 291, 8 N.W. 2d 149.
30. (1964) 47 W.W.R. 305 (S.C.C.).
31. [1967] S.C.R. 573. These two cases are discussed by Crawford, "Restitution: Mistake of Law and Practical Compulsion" (1967) 17 *U. of T. L.J.* 344.

position where he had to sell the land. He had been sick for some time and needed to move his wife into more suitable accommodations. He therefore acceded to the defendant's terms, which included a fee of $800.00 and the conveyance of part of the land for municipal purposes. In subsequent litigation between the defendant and another landowner it was established that the by-laws, under which the conditions were imposed, were invalid. It was held, *inter alia,* that Eadie could recover the fee and obtain a re-conveyance of the segment of land required for municipal purposes on the grounds of practical compulsion. The interesting aspect of this conclusion is that the compulsion derived very much from the plaintiff's own circumstances rather than from the municipality.

5. Duress by Threatened Breach of Contract

A breach of contract is undoubtedly a wrongful act and yet it is too early to conclude that duress by threatened breach of contract is an established category of duress. Nevertheless, various courts in the Commonwealth have been prepared to find duress from a threatened breach of contract—often by drawing an analogy with duress of goods.

The leading Canadian case is the decision of the Supreme Court of Canada in *Knutson* v. *The Bourkes Syndicate.*[32] The plaintiff Syndicate had agreed to buy certain land held by the defendant. The defendant refused to transfer the land unless certain payments, over and above what were due, were made to him. This refusal was made in good faith. The plaintiff made these payments so as to secure title to the land so that a further agreement to transfer the land could be carried out. It was held that these additional payments could be recovered. The court pointed out that the Syndicate had become the equitable owner of the land and relied upon the duress of goods cases, in particular *Shaw* v. *Woodcock*, where Holroyd J. stated:[33]

> Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary, but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore was compelled to make the payment in question in order to get the policies of insurance [the goods wrongfully detained by the defendant], whether there was a pressing necessity or not, he has a right to recover it back.

Knutson was followed in Australia in *Re Hooper & Grass' Contract*[34] where similar reasoning was applied to similar facts.[35] Again, the court used the duress of goods analogy and made no reference to any requirement of urgent necessity on the part of the defendant. Fullagar, J. said:[36]

> What the vendor was doing was not threatening to exercise a legal right unless he were paid a price for not exercising it: he was threatening to withhold that to which the other party was legally entitled unless he were paid a price which he had no right to receive. In such a case I think the true rule of law is that a payment under protest is not a

32. [1941] S.C.R. 419.

33. (1827) 108 E.R. 652, at 657 (K.B.).

34. [1949] Vict. L.R. 269.

35. A similar conclusion was reached in the earlier Australian case of *Nixon* v. *Furphy* (1925) 25 N.S.W. 151 where Long Innes, J. stated: "In the present case . . . there was not only a threat of an unauthorized interference with the property and legal rights of the plaintiffs, but the money was paid in order to have that done which the defendants were already legally bound to do."
Id. at 159-160.

36. *Supra* n. 34 at 272.

> voluntary payment, whatever the position may be where the payment is not made under protest. It makes no difference that the vendor honestly believed that he was legally entitled in any case to the price which he asked. In these cases there is very reasonably said to be a practical compulsion to pay a demand not justified by law.

The most important of the Commonwealth cases is *T. A. Sundell & Sons Pty. Ltd.* v. *Emm Yannoulatos (Overseas) Pty. Ltd.*[37] where relief in duress was extended to a threatened breach of a contract for the sale of goods. The court pointed out that duress was not limited to situations where the defendant refused to carry out some statutory duty or withheld some proprietary right from the plaintiff but that the doctrine also embraced a refusal to perform a contractual duty:[38]

> The authorities were reviewed by Long Innes, J. in *Nixon* v. *Furphy*[39] and his Hònour said:
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> " 'compulsion' in relation to a payment of which refund is sought . . . includes every species of duress or conduct analogous to duress, actual or threatened, exerted by or on behalf of the payee and applied to the person or the property *or any right* of the person who pays or, in some cases, of a person related to or in affinity with him."

There is now recent English authority to the effect that duress can be constituted by a threatened breach of contract. Mocatta, J. in *North Ocean Shipping* v. *Hyundai*[40] relied on a number of the Commonwealth authorities to reach the conclusion that relievable compulsion could take the form of economic duress and that economic duress included duress by threatened breach of contract.

One major hurdle for the victim to overcome, when pursuing a claim of duress by threatened breach of contract, is the general principle that a payment made in submission to an honest claim cannot be recovered. This doctrine has a special force in the area of duress by threatened breach of contract. The doctrine was raised in all of the Commonwealth decisions discussed above but in each one the court held that the plaintiff had not paid with the intention of closing the transaction but rather had intended to preserve his strict legal rights. The fact that the victim protests his payment will be one factor in the determination of whether or not his payment was made in submission to an honest claim.[41] A protest, however, is not required[42] and it must be effective.[43]

The American courts are particularly reluctant to find duress in this area, whether the threat be made in good faith or bad, in the absence of some urgent necessity on the part of the victim to have the contract performed and hence the absence of an adequate remedy for the victim. One of the leading decisions is that of the New York Court of Appeals in *Austin Instrument* v. *Loral Corp.*[44] In that case, the defendant was awarded a contract by the Navy for the production of radar sets. The

37. [1956] N.S.W. 323.
38. *Supra* n. 37 at 328.
39. *Supra* n. 35 at 160.
40. *Supra* n. 14.
41. *E.g.* Kerwin, J. in *Knutson* v. *The Bourkes Syndicate, supra* n. 32 at 425: "Here the evidence is plain that the payments were made under protest and that they were not voluntary. . . . The circumstance that O. L. Knutson [the defendant] thought that he had a right to insist upon the payment cannot alter the fact . . . that he had no such right. In order to protect its position . . . and to secure title to the lands which it was under obligation to transfer . . . the Syndicate was under a practical compulsion to make the payments in question and is entitled to their repayment.
42. *See Murphy* v. *The Brilliant Co., supra* n. 18.
43. *See* Rowlatt J., *Maskell* v. *Horner, supra* n. 19 at 111.
44. (1971) 29 N.Y.2d 124, 272 N.E.2d 533.

plaintiff was granted a subcontract to supply precision gear components for some of the sets. During the life of the subcontract, the plaintiff was able to "negotiate" a substantial price increase from the defendant by threatening to stop any further deliveries under the contract. The defendant was compelled to accede to the plaintiff's demand because of its commitments to the Navy. It was unable, within the short time available, to obtain the parts elsewhere. The primary contract with the Navy contained substantial liquidated damages clauses and there was the possibility of cancellation on default by the contractor. Furthermore, the defendant transacted a substantial portion of business with the Government and was naturally concerned that failure to perform this contract would jeopardize the chances for future contracts with the Government. The court held that the defendant could recover the excess payments made as having been conferred under duress. In reaching that conclusion, Fuld, C. J. made some interesting comments on the scope of duress by threatened breach of contract:[45]

> However, a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate.

It is, then, clear that the judge considered a breach of contract to be a sufficiently wrongful act for the purposes of duress, but he limited the availability of relief to situations where the victim urgently needed the contract to be fulfilled and where any action for breach of contract would be inadequate. This decision echoed the earlier statement of Mr. Justice Stone in *Hartsville Mill* v. *United States*:[46]

> But a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate.

Some cases simply deny the possibility of duress by threatened breach of contract even where it is established that the plaintiff urgently requires the contract to be performed.[47] In particular, there is a line of Michigan authority in this area. The starting point is the decision of the Michigan Supreme Court in *Hackley* v. *Headley*.[48] The defendants were indebted to the plaintiff under a logging contract. They took advantage of the plaintiff's precarious financial position to force a settlement whereby the plaintiff accepted part of the debt in full satisfaction. The court was certain that no relievable case of duress had been made out:[49]

45. 272 N.E.2d at 535.

46. (1926) 271 U.S. 43 at 49.

47. *See e.g.* the statement of Hanson, J. in *Sistrom* v. *Anderson* (1942) 51 Cal. App. 2d 213, 124 P.2d 372, at 376: "It is not, however, unlawful to threaten to refuse to proceed under a contract or to pay what is due under it or what is otherwise due. Hence a threat to stand suit is not in the category of unlawful threats.

48. (1881) 45 Mich. 569, 8 N.W. 511.

49. 8 N.W. at 514. This case was followed a year later in *Goebel* v. *Linn* (1882) 47 Mich. 489, 11 N.W. 284 where the threatened breach of contract consisted of a failure to deliver goods as contractually required to do. The defendant brewer made a contract with an ice company for the supply of ice during the 1880 season for, as it transpired, $2.00 a ton. The ice crop was a failure. In May the defendant was informed that he would be furnished with no more ice under the contract. He had a large amount of beer which would spoil if he did not receive the ice. Under that pressure, he agreed to pay $3.50 per ton for the ice. The ice was delivered and the defendant gave a note in payment. He then defended an action on the note, *inter alia*, on the ground that the extra $1.50 had been procured by duress. The court refused to find duress

> In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. . . . The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligations. But this, according to the plaintiff's claim would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need.

This authority was followed as late as 1948 in *Gill* v. *S.H.B. Corp.*[50] where the court rejected the plaintiff's claim of duress by threatened breach of contract:[51]

> To accept plaintiff's contention . . . would be, in effect, to hold voidable every contract renegotiation or compromise settlement resulting from one party's refusal to pay the full amount then claimed by the other party to be due, particularly if the latter were, at the time, financially embarrassed. Such is not the law.

Other jurisdictions have been far more prepared to find duress from a threatened breach of contract, although, usually, this finding has been based upon the urgent necessity of the plaintiff to have the contract fulfilled.[52] *Capps* v. *Georgia Pacific Corp.*[53] shows a refreshing change of approach to the problem of duress by threatened breach of contract. The material facts were the same as those in *Hackley* v. *Headley*[54] but the Oregon court determined that the plaintiff had the right to have this cause of action tried on its facts. The court rejected the ratio of the *Hackley* decision which it interpreted as follows:[55]

> The holding in *Hackley* is typical of other opinions, some old and some recent, which have held that the economic necessity of the claimant, coupled with the debtor's refusal to pay unless forced by law to do so, which together make it possible for the debtor to coerce an advantageous agreement from the claimant, are no basis for avoiding the agreement on the duress defense.

Goff and Jones[56] argue convincingly that, contrary to the majority of American decisions, relief for duress by threatened breach of contract should not be dependent upon a finding that the plaintiff urgently needed the contract to be performed and that, therefore, his normal contractual remedies were inadequate. The sole test should be whether the defendant's wrongful conduct in some way caused the plaintiff to act as he did. The plaintiff's necessity would, of course, be a factor in the determination of the issue of causation and, in particular, it would be relevant to the question of whether the plaintiff truly submitted to an honest claim by the defendant. It should not, however, be an essential component of duress.

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and for all intents and purposes rejected the concept of duress by threatened breach of contract. The court said that the defendant should have treated the plaintiff's refusal to supply the ice as a breach of contract, repudiated the agreement and sued for breach of contract, despite the fact that this course would have put him out of business.

50. (1948) 322 Mich. 700, 34 N.W.2d 526.
51. 34 N.W.2d at 528.
52. *E.g. Pittsburgh Steel Co.* v. *Hollingshead* (1916) 202 Ill. App. 177; *King Construction Co.* v. *W.M. Smith Electric Co.* (1961) 350 S.W.2d 940 (Tex.Civ.App.).
53. (1969) 253 Ore. 248, 453 P.2d 935.
54. *Supra* n. 48.
55. 453 P.2d at 938.
56. *Supra* n. 19 at 178-186.

The courts are reluctant to find that the plaintiff's payment is voluntary where the defendant has threatened to exercise, in breach of his contract, some right of forfeiture under the contract. The classic example is that of the life insurance policy which provides for waiver of premiums during the total and permanent disability of the insured. In this situation, if the parties disagree as to whether this condition of disability exists, the insured will be compelled to pay the premiums for fear that his policy will be cancelled and he will be without protection. The plaintiff is in a seriously unequal bargaining position. The inherent duress has been recognized a number of times. The leading decision is *Still* v. *Equitable Life Assurance Society*.[57] The difficulty of the plaintiff's position was put very well by the court. The fact that the insurance company was acting in good faith did not alter the position and did not render the plaintiff's payment voluntary. The insured had little choice but to pay:[58]

> However, if in fact the complainant had suffered total and permanent disability, and had furnished defendant with "due proofs" thereof in September, 1930, the defendant's refusal to waive the premium payments due in 1931 and 1932 was a breach of its contract and was therefore wrongful. And by this wrongful act the complainant was confronted with the alternative of paying the premiums when due, or by not doing so, assuming the risk of losing his right to continue his insurance in force until its maturity at his death, if he should be unsuccessful in proving his disability to be both total and permanent. That this was a real hazard, with the outcome uncertain, is inherently obvious in the nature of the issue in controversy. . . . This uncertainty, created by defendant's refusal to concede the disability and waive the premiums, was the compulsion which prompted and impelled the complainant to pay the two premiums, rather than risk his right to continue the insurance on the waiver contracted for.

Not all decisions, however, follow the approach taken in *Still* and many characterise the insured's payments as being voluntary where the insurance company is acting in good faith.[59]

6. Improper Application of Legal Process[60]

This is the one established category of duress where relief has never been dependent upon the unlawfulness of the threatened act. The courts look at the nature of the threat to determine whether there has been some abuse of legal process. It is submitted that the cases in this area point the way for future extensions of duress doctrines into other areas where the threatened act is not independently unlawful. It is for this reason that discussion of this category of duress will be undertaken in section III of this paper.

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57. (1932) 165 Tenn. 224, 54 S.W.2d 947.

58. 54 S.W.2d at 949.

59. *E.g. Sebastianelli* v. *Prudential Insurance Co.* (1940) 337 Pa. 466, 12 A.2d 113, at 115: "There is one item in plaintiff's claim which was improperly allowed. The policy provided that defendant, upon receipt of proof of total and permanent disability, would waive payment of premiums during the period of such disability. Plaintiff nevertheless paid the premiums during the four years which elapsed between the time of the happening of the accident and the bringing of suit. He seeks their recovery on the ground that they were not payable under the terms of the policy. They were paid by him without any compulsion which the law recognizes as constituting coercion or duress; the fact that he may have been in a practical dilemma, not wishing to risk the forfeiture of his policy in case he should fail to prove the total and permanent disability which he claimed, made the payments no less voluntary within the meaning of the law. Therefore, he cannot now recover them."

60. *See generally*, Dawson, "Duress Through Civil Litigation" (1947) 45 *Mich. L. Rev.* 571 and 679; Dalzell, *supra* n. 4 at 341-343; G. Palmer, *Law of Restitution* (1978) §9.7-9.11; R. Goff and G. Jones, *supra* n. 19 at 164-168.

B. The General Formula that "It is Never Duress to Threaten To Do What There is a Legal Right to Do."

Many judges have made the blanket assertion that duress is limited to situations where the threatened act is unlawful. This formula is stated to be a recognized limitation on relief in duress. In this segment of the paper authorities will be considered which support the general formula.

1. Canadian Authorities

The Canadian courts are adamant that duress consists of threats of unlawful acts. A good illustration is the British Columbia decision of *Sutherland* v. *Sutherland*.[61] Wilson, J. held that the exercise of a legal right, from whatever motive, could not amount to duress. In that case, the plaintiff was the owner of a delivery business. The goodwill of that business consisted of a contract, terminable at will, for the delivery of beer for a brewers' delivery agency of which the defendant, the plaintiff's brother, was manager. The plaintiff sold his business to a company controlled by the defendant as a result of threats by the defendant to terminate the beer delivery contract unless the sale was made. The plaintiff attempted to set aside the sale on the ground of undue influence. The court decided in favour of the defendant. He was legally entitled to terminate the contract and, therefore, he was legally entitled to threaten to terminate the contract. His motives for making such threats were not open to inquiry. There was no threat to do an unlawful act:[62]

> Pacific Brewers Agency Ltd. had an undoubted right, irrespective of motive, to cancel Regent Transfer's contract and since they had such a right, they had, flowing from it, a right to threaten to cancel the contract.

2. English Authorities

The most influential of the English cases has been the decision of the Court of Appeal in *Hardie and Lane Ltd* v. *Chilton*.[63] There, the plaintiff was a member of the Motor Trade Association. It sold a car below the list price. As a result of that the Association had the right, under its rules, to place the plaintiff on its "stop list", the effect being that members of the Association would not supply it with any further goods nor would the Association supply any other person who dealt with the plaintiff in violation of the stop order. The legality of this system had been upheld in earlier cases as being a genuine and reasonable protection of trade interests.[64] The Association had informed the plaintiff that if it paid 200£ and repurchased the car it would not be placed on the stop list. The plaintiff assented to this proposal and paid over the first instalment of 100£. It then tried to recover the money as having been paid under duress. The court held that it could not succeed. This was merely a threat to do what the defendant had the legal right to do. Scrutton, L. J. said:[65]

> I take it therefore to be clear law that if it is lawful to put a man on the stop list for breaking a rule, to say that you are going to put him on the stop list when he has broken that rule, cannot be illegal at common law. And I am quite unable to understand how it can be illegal to say I could lawfully put you on the stop list, but if you will do something which is not illegal, and is less burdensome to you than the stop list, I will not exercise my power.

61. [1946] 4 D.L.R. 605 (B.C.S.C.).
62. *Id.* at 613.
63. [1928] 2 K.B. 306 (C.A.).
64. *Sorrell* v. *Smith* [1925] A.C. 700; *Ware and De Freville* v. *Motor Trade Association* [1921] 3 K.B. 40 (C.A.).
65. *Supra* n. 63 at 315.

Scrutton, L. J. was even more explicit in the following sweeping statement:[66]

> [T]he direction [of the trial judge] is wrong if it assumes that to threaten to do what you have a legal right to do can ever be a ground for obtaining back money alleged to be paid under duress.

Part of the problem stems from the fact that there is no settled doctrine in England of abuse of rights. The fact that a legal act is carried out with an improper motive is irrelevant. The classic decision is that the House of Lords in *Mayor of Bradford* v. *Pickles*.[67] The court held that Pickles had the right to prevent water under his land flowing to the town whatever his motive might be. His motive was irrelevant. Lord Halsbury L.C. said:[68]

> This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant.

Lord MacNaghten expressed the principle even more strongly:[69]

> And it may be taken that his real object was to show that he was master of the situation, and to force the corporation [the town] to buy him out at a price satisfactory to himself. Well, he has something to sell, or, at any rate, he has something which he can prevent other people from enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a storeroom for a commodity which the corporation dispenses, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice?

3. Australian Authorities

The Australian courts also endorse the principle that duress can never be constituted by threats of lawful acts. The leading decision is *Smith* v. *Wm. Charlick Ltd.*[70] In that case the Australian Wheat Board demanded money from the respondent Charlick, a wheat dealer, under the threat of cutting off future supplies of wheat to the respondent. Charlick was forced to meet the demand to stay in business because the Wheat Board was the sole supplier of wheat. Charlick sued to recover the money as having been paid under duress. Respondent's counsel valiantly argued that the payment was involuntary because Charlick had "no election other than either to pay the money, which he did not owe, or to suffer great damage."[71] This argument, however, received short shrift from the court. Knox C.J. expressed the applicable principle in this way:[72]

> In the present case there was no mistake of fact, no threat of unauthorized interference with the person or the property or any legal right of the respondent, and no demand

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66. *Id.* at 317.
67. [1895] A.C. 587. This case is well discussed in Hale, *supra* n. 4 at 620-621.
68. *Id.* at 594.
69. *Id.* at 600-601. It is worthwhile contrasting the approach of Holmes, J. in *American Bank and Trust Co.* v. *Federal Reserve Bank of Atlanta* (1921) 256 U.S. 350, at 358: "But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. A man has at least an absolute right to give his own money as he has to demand money from a party that has made no promise to him; yet if he gives it to induce another to steal or murder the purpose of the act makes it a crime."
This case is also discussed in Hale, *supra* n. at 609-610.
70. (1924) 34 Commw. L.R. 38 (Aust. H.C.).
71. *Id.* at 45.
72. *Id.* at 51.

made under colour of office. The payment was made with full knowledge of all material facts. The respondent knew that the Board was not, and did not claim to be, legally entitled to demand the money. It was paid, not in order to have that done which the Board was legally bound to do, but in order to induce the Board to do that which it was under no legal obligation to do.

4. United States Authorities

The starting point is the statement of Holmes, J. in *Vegelahn* v. *Guntner* in 1896:[73]

> As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence.

As can be seen, Holmes, J. did not consider the general principle to be an all-encompassing rule. The formula was a useful guideline to be adopted by the courts but it was not sufficient to define the necessary wrongful pressure, for a claim in duress, in terms of the illegality of the threatened action.

Later judges have been more inclined to state the general formula as a cast-iron rule of law. A good example of this approach is the decision of the Supreme Court of Nebraska in *Carpenter Paper Co.* v. *Kearney Hub Publishing Co.*[74] The plaintiff paper company, through its monopolistic position, was able to increase the price of newsprint supplied to the defendant. The court quickly dismissed the defendant's claim that the price increases were paid under duress:[75]

> The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful, or the threat to do that which the demanding party has a legal right to do.

One of the most recent cases on point is *Bachorik* v. *Allied Control Co.*[76]The plaintiff was seeking rescission of a release of certain stock option rights on the grounds of duress. He was an employee at will of the defendant. He was informed that, if he did not sign the release, he would be involuntarily discharged without severance pay and that this fact might be disclosed to prospective employers. If, on the other hand, he signed the release, the defendant would give him the opportunity to resign voluntarily. The court dismissed the plaintiff's complaint in the following words:[77]

> What plaintiff relies upon is the fact that he was told that he would be involuntarily discharged, without severance pay and that this might be disclosed to prospective employers. This can neither be considered a threat, nor false advice, since defendants had the right to discharge plaintiff, who was an employee at will, were not under any duty to continue his salary and were privileged to inform prospective employers of the circumstances surrounding the termination of his employment. A threat to do that which one has the legal right to do does not constitute duress or fraud.

Numerous later authorities have applied this general principle.[78] It is true that in many of these cases relief in duress would not have been

73. (1896) 167 Mass. 92, 44 N.E. 1077, at 1081.

74. (1956) 163 Neb. 145, 78 N.W.2d 80.

75. 78 N.W.2d at 84 quoting from Taylor, J., *Newland* v. *Child* (1953) 73 Idaho 530, 254 P.2d 1066, at 1072.

76. (1970) 34 App. Div. 2d 940, 312 N.Y.S.2d 272.

77. 312 N.Y.S.2d at 275.

78. *E.g. Browning* v. *Blair* (1950) 169 Kan. 139, 218 P.2d 233, at 240; *Bond* v. *Crawford* (1952) 193 Va. 437, 69 S.E.2d 470, at 475; *Kohen* v. *H.S. Crocker Co.* (1968) 260 F.2d 790, at 792 (5th Cir.); *Manno* v. *Mutual Ben. Health and Accident Assoc.* (1959) 18 Misc.2d 80, 180 N.Y.S.2d 709, at 712; *Duckworth* v. *Allis-Chalmers Mfing. Co.* (1963) 150 So.2d 163 at 165 (Miss.); *Sanders* v. *Republic National Bank of Dallas* (1965) 389 S.W.2d 551, at 555 (Tex. Civ. App.); *Scutti* v. *State Road Department* (1969) 220 So.2d 628, at 630 (Fla. Dist. Ct. App.).

warranted because the "oppressor" was merely threatening to enforce his rights under a contract by suit or by private means.[79] Nevertheless, the general principle is embedded to such a degree that it is applied so as to deny recovery in cases where it is appropriate for the victim to have a remedy.[80] The general formula is dangerous because it does not offer a rational basis for determining when relief in duress should be available.

It has been seen, therefore, that numerous cases from all parts of the common law world can be cited for the general proposition that it is never duress to threaten to do what there is a legal right to do. It is now the purpose of this paper to investigate the inroads which have already been made into that general proposition. The greatest advance has taken place in the United States whilst the general formula still holds sway in the British Commonwealth.

III. RECOGNIZED INSTANCES OF DURESS INVOLVING THREATS OF LAWFUL ACTS

In two situations it is well established that threats of lawful acts can constitute duress. These are the improper application of the legal process and threats amounting to criminal blackmail. The courts are, therefore, not wedded to the view that the wrongful pressure must consist of threats of unlawful acts. They are prepared to abandon the traditional formula in favour of a more flexible approach. These cases show that the traditional formula is too rigid to be of ultimate assistance to a court in coming to a decision and they offer the scope for the expansion of the concept of wrongful pressure so as no longer to be dependent upon the unlawfulness of the threatened action.

A. Improper Application of Legal Process

1. Threat of Criminal Prosecution

It has long been recognized that a threat to institute criminal prosecution for the enforcement of a civil claim will generally constitute duress. The pressure is described as inherently improper because procedures intended for the vindication of public rights are being used for private personal advantage. One of the leading decisions is that of *Morse* v. *Woodworth*[81] in 1892 where the court dealt directly with the argument that there could be no duress because the oppressor was merely threatening to exercise his legal rights. The plaintiff sought to recover on several promissory notes made out to him by the defendant, his employer. The defendant pleaded a release of the notes but the plaintiff contended that this release had been secured through the threat of criminal prosecution for embezzlement. The court upheld the plaintiff's contention. It was an abuse of process to use the public remedy of a criminal prosecution for private advantage. Knowlton, J. said:[82]

> It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener, who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract

79. *E.g. Bond* v. *Crawford*; *Kohen* v. *H.S. Crocker Co.*; *Duckworth* v. *Allis-Chalmers Mfing Co.*; *Sanders* v. *Republic National Bank of Dallas.*

80. *E.g., Bachorik* v. *Allied Control Co., supra* n. 76.

81. (1892) 155 Mass. 233, 29 N.E. 525.

82. 29 N.E. at 528.

> may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way . . . .

Many cases have allowed restitution of payments made to avert the prosecution of a close relative of the payor. In *Great American Indemnity Co.* v. *Berryessa,*[83] a father signed a promissory note in favour of the plaintiff to prevent the threatened prosecution of his son for theft. The court determined that the note was invalidated on grounds of duress and, alternatively, that the note was illegal as being a contract to stifle the prosecution of a felony.[84]

2. Threat of Civil Suit[85]

It is far less common for the courts to find duress through the threat or the institution of a civil suit. There is a strong policy in favour of upholding settlements and compromises. Parties should not be compelled to litigate but should be allowed to settle their differences out of court without the fear of their agreements being impugned for duress.[86]

In this area in particular the courts, in denying relief, have relied heavily on the principle that it is not duress to threaten to do what there is a legal right to do. In *Rizzi* v. *Fanelli,*[87] for example, the plaintiff, a lawyer, obtained the defendant's signature to a promissory note to cover legal fees by threatening to sue the defendant should he fail to sign the document. The court held that threats could not constitute duress unless they were wrongful and it was not wrongful to threaten to file a lawsuit to collect a fee. The case can be heavily criticized for its blind allegiance to the traditional principle that duress consists solely in threats of unlawful acts. There was strong evidence of actual oppression in the case. The parties were in a seriously unequal bargaining position. The defendant was an Italian immigrant facing deportation and he had little appreciation of the English language. The plaintiff was a lawyer who specialized in immigration matters. The fees in question had been earned by the plaintiff in having a deportation order against the defendant set aside and the case reopened. The plaintiff did not merely threaten to sue the defendant but also intimated that the effect of such a suit would be the deportation of the defendant. His letter was in the following terms:[88]

> You force me to sue you in court. That I am going to do. As soon as I do, your deportation will follow—of this I am certain.

Nevertheless the court failed to find any relievable duress.

It has been recognized, however, that a person can abuse his right to bring a civil action if he institutes the suit in bad faith. A settlement will not be upheld if it is clear that the action or the threat to sue was not brought on a just claim but for the purpose of inflicting hardship or oppression on the victim. Such bad faith will be hard to prove and so only

83. (1952) 122 Utah 243, 248 P.2d 367.
84. *See also Williams* v. *Bayley* (1866) L.R. 1 H.L. 200.
85. *See generally,* Dawson, *supra* n. 60.
86. The policy considerations are discussed by Dawson, *supra* n. 60 at 573-578.
87. (1949) 63 A.2d 872 (D.C.Mun.Ct.).
88. *Id.* at 873.

in the clearest of cases will the courts intervene. *Wise* v. *Midtown Motors, Inc.*[89] was such a case. The court emphasized that a threat to institute civil proceedings can amount to duress even though there is a right to bring a civil action. That right was not absolute and it had been abused.

The evidence showed that the plaintiff had been employed by the defendant as an automobile mechanic. He was later discharged and he instituted proceedings to recover, on a *quantum meruit,* the reasonable value of his services. To that end, he garnisheed the defendant's bank account. Rexeisen, an officer of the defendant, undertook to secure a release of the plaintiff's claim. He arranged a meeting with the plaintiff at the offices of the plaintiff's new employer, the Sun Electric Company. Rexeisen with the aid of Schindler, the plaintiff's superior at Sun Electric, induced the plaintiff to sign a release of his claim for $200.00. Before the signing of the release, there had been a conference of about two hours, during which Rexeisen threatened the plaintiff that the defendant would sue to recover damages in the amount of $40,000 to $50,000 which the pending proceedings had cost it; that the trial would be very expensive; that the plaintiff would be paying off the judgment for the rest of his life; and that bankruptcy would be the only solution. In addition, Schindler told the plaintiff that he should sign the release or he, the plaintiff, was "through". The plaintiff was unable to contact his lawyer at any time during the conference. Under these circumstances, the plaintiff signed the release. He sought to have it set aside on the grounds that it had been procured under duress. The court granted a new trial on the issue of duress. Peterson, J. was clearly of the opinion that in appropriate circumstances a threat to institute a civil action could constitute duress:[90]

> Because a person has a right to threaten to do that which he has a right to do, a threat to bring an action to enforce a lawful demand, or one which he in good faith believes to be lawful, does not constitute duress. . . . But one has no right to threaten another, in order to accomplish an ulterior purpose, with a groundless action or with an action to enforce some just legal demand where the purpose is not to enforce the demand, but rather by exceeding the needs for enforcement thereof to so use legal process as to oppress his adversary and to cause him unnecessary hardship.

Despite this broad dicta, it is worth noting that the case involved more than a mere threat to bring a civil action which was known to be without basis. The evidence of oppression was strong. Nevertheless, the case does illustrate the fallacy of concluding that a person can always threaten to do what he has a legal right to do.

The courts are especially prepared to find duress from a threatened civil action where the oppressor is attempting to extort from his victim some benefit totally unconnected with the threatened proceedings. *Link* v. *Link*[91] is a modern example of duress in those circumstances. The wife brought the action to set aside a transfer of certain stock to her husband on the grounds of duress. The husband had procured the transfer of the stock by threatening to institute legal proceedings against his wife to obtain the sole custody of their children, after she had confessed that she had committed adultery. The court set aside the transfer. The husband had abused the legal process by employing it to secure a benefit for himself which was not related, in any way, with the threatened

89. (1950) 231 Minn. 46, 42 N.W.2d 404.
90. 42 N.W.2d at 407-408.
91. (1971) 278 N.C. 181, 179 S.E.2d 697.

proceedings. The court agreed that a wrongful act or threat was an essential element of duress and ordinarily it would not be wrongful for a person to secure the transfer of property by threatening to institute legal action to enforce a right which he believed, in good faith, that he had. Such a rule was necessary to uphold settlements. The court, however, continued:[92]

> The weight of modern authority supports the rule, which we here adopt, that the act done or threatened may be wrongful even though not unlawful, *per se;* and that the threat to institute legal proceedings, criminal or civil, which might be justifiable, *per se*, become wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.

These authorities dealing with duress by the improper application of the legal process, both criminal and civil, illustrate the bankruptcy of a definition of duress that is limited to threats of unlawful acts. In this area the courts have been prepared to depart from the general principle that it is never duress to threaten to do what there is a legal right to do.

B. Threats Amounting to Criminal Blackmail

It is interesting to note that the crime of blackmail is not dependent upon the threatened action being unlawful. Indeed, blackmail is often defined very widely as can be seen from the definition in section 21(1) of the English *Theft Act*:[93]

> A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief:—
> (a) that he has reasonable grounds for making the demand; and
> (b) that the use of menaces is a proper means of reinforcing that demand.

The criminal law, therefore, points out that a threat itself may be wrongful although the action threatened is quite lawful. If the criminal law can reach that conclusion, then there is no reason why the civil law concept of duress should be limited to threats of unlawful acts. It is at least certain that threats which amount to blackmail must also be sufficiently wrongful for the purposes of duress. This was the view of the court in *Brown* v. *American Federation of T.V. and Radio Artists*:[94]

> It is *not* true that one may threaten to do whatever he may do. One may not threaten to take lawful action, where the purpose of the threat is illicit. Thus, a magazine editor may lawfully publish the truthful facts concerning unsavory incidents in the life of a person who is prominent in the public eye, such as a movie star or politicians; but the magazine editor may not lawfully threaten to publish such facts unless the person concerned pays blackmail to the editor.

Broad general statements, such as those made by Scrutton, L. J. in *Hardie and Lane* v. *Chilton*,[95] that it is never duress to threaten to exercise legal rights must be read in the light of the crime of blackmail. In fact in the earlier case of *R.* v. *Denyer*[96] the English Court of Criminal Appeal held that an employee of the Motor Trade Association was guilty of blackmail in demanding money as the price for abstaining from

92. 179 S.E.2d at 705.
93. 1968, c. 60.
94. (1961) 191 F.Supp. 675, at 679 (N.D.Cal.).
95. *Supra* n. 63 at 317.
96. [1926] 2 K.B. 258 (C.A.).

placing the name of a dealer on the stop list. There, however, the court stated the applicable law too broadly in the other direction by asserting that a "person has no right to demand money . . . as a price of abstaining from inflicting unpleasant consequences upon a man".[97]

The true position was put, finally, by the House of Lords in 1937 in *Thorne* v. *Motor Trade Association*.[98] First of all, Lord Wright criticized the broad assertion in *Denyer*:[99]

> [T]he general proposition as stated cannot, I respectfully think, be justified. . . . There are many possible circumstances under which a man may say to another that he will abstain from conduct unpleasant to the other only if he is paid a sum of money. Thus he may offer not to build on his plot of land if he is compensated for abstaining. He is entitled to bargain as a consideration for agreeing not to use his own land as he lawfully may, and the other man may think it worth while to pay him, rather than have the amenities of his house destroyed by an eyesore. Or a valued servant may threaten to go to other employment unless he is paid a bonus or increased wages.

He then attacked the contention of Scrutton, L. J. that a person can always threaten to do what he has a legal right to do:[100]

> But there are many cases where a man who has a "right", in the sense of a liberty or capacity of doing an act which is not unlawful, but which is calculated seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining. . . . Thus a man may be possessed of knowledge of discreditable incidents in the victim's life and may seek to extort money by threatening, if he is not paid, to disclose the knowledge to a wife or husband or employer, though the disclosure may not be libellous. Such is a common type of blackmail.

It was, therefore, recognized that a threat to commit a lawful act could amount to blackmail and also, presumably, to duress.

IV. THE EXPANSION OF THE CONCEPT OF WRONGFUL PRESSURE AS AN ELEMENT OF DURESS

There are indications that some of the American jurisdictions are prepared to extend relief in duress to situations where there are no threats to commit actionable wrongs. This expansion goes beyond the two recognized categories which were discussed in section III. It must be stressed that this expansion has not been universal by any means and that the majority of courts are still inclined to dismiss a claim of duress on the ground that the oppressor was merely threatening to exercise his legal rights. It remains to be seen what influence these decisions will have in Canada and the rest of the Commonwealth.

A. Wrongful Pressure as a Broader Concept than Threats of Actionable Wrongs

In particular, there is a body of New Jersey authority to the effect that, to constitute duress, the threats do not have to be threats of unlawful acts. Reference is continually made in New Jersey[101] to the following comment in the *Restatement of Contracts* as to what constitutes wrongful pressure:[102]

97. *Id.* at 269.
98. [1937] A.C. 797.
99. *Id.* at 820.
100. *Id.* at 822.
101. *E.g. Miller* v. *Eisele* (1933) 111 N.J.L. 268, 168 A. 426; *Futurity Realty Corp.* v. *Passaic National Bank and Trust Co.* (1948) 2 N.J. Super. 175, 62 A.2d 706.
102. *Restatement of Contracts* (1932) §492(g).

> Acts or threats cannot constitute duress unless they are wrongful, even though they exert such pressure as to preclude the exercise of free judgment. But acts may be wrongful within the meaning of this rule though they are not criminal or tortious or in violation of a contractual duty. Just as acts contracted for may be against public policy and the contract vitiated for that reason, though the law imposes no penalty for doing them, so acts that involve abuse of legal remedies or that are wrongful in a moral sense, if made use of as a means of causing fear vitiate a transaction induced by that fear, though they may not in themselves be legal wrongs.

The New Jersey courts are adamant that duress must embody a greater variety of conduct than merely threats of actionable wrongs. Heher, J. in *Rubinstein* v. *Rubinstein* said:[103]

> But the pressure must be wrongful, and not all pressure is wrongful. And means in themselves lawful must not be so oppressively used as to constitute, e.g., an abuse of legal remedies. . . . The act or conduct complained of need not be "unlawful" in the technical sense of the term; it suffices if it is "wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse".

The statement, however, was *obiter* because the threats involved in that case were threats of personal violence. There have been very few cases where the courts have actually applied a broader concept of wrongful pressure. One such case, arguably, is *Hochman* v. *Zigler's, Inc.*[104] Hochman ran a store in premises leased for a term which expired on December 31, 1945. His landlord, Zigler's, refused to renew the lease but allowed him to remain as a tenant on a month to month basis. In February, 1946, Leo Zigler, the president of the defendant, informed Hochman that he would have to vacate the premises by April 1. Zigler suggested that Hochman find a purchaser for his business. If a satisfactory purchaser was found, then Zigler promised to grant that purchaser a lease. Hochman found the Darzentas as prospective purchasers and Zigler agreed to give them a lease for five years if they should buy the business. The Darzentas reached an agreement with Hochman to buy his business for $7,800. The next morning Zigler demanded that Hochman should pay him $3,500 of the purchase money and threatened, unless he received that amount, not to execute the lease as promised. Hochman consented as he knew that he could not complete the sale without the lease. He then claimed the return of his money as having been paid under duress. The court upheld the plaintiff's contention. Bigelow, V.-C. dealt with the concept of wrongful pressure:[105]

> It is also the law that to constitute duress, the threatened action must be unlawful or wrongful. "But acts may be wrongful within the meaning of this rule, though they are not criminal or tortious or in violation of a contractual duty." Restat.—Contr. §492(g). This language was quoted with approval in *Miller* v. *Eisele* and is in accord with New Jersey law. Judgment whether the threatened action is wrongful or not is colored by the object of the threat. If the threat is made to induce the opposite party to do only what is reasonable, the court is apt to consider the threatened action not wrongful unless actionable in itself. But if the threat is made for an outrageous purpose, a more critical standard is applied to the threatened action. So we need not inquire whether the promise which Zigler made to complainant that Zigler's Incorporated would lease to the purchaser, provided the purchaser was satisfactory to Zigler, was based on good consideration, was certain and was enforceable. The situation which arose the moment Zigler and the Darzentas had agreed upon the lease, and Hochman and the Darzentas had made their bargain, was such that Zigler and his corporation were under a moral obligation to execute the lease. The threat not to do so employed to extort a large sum from Hochman, constituted duress.

103. (1956) 20 N.J. 359, 120 A.2d 11, at 15.
104. (1946) 139 N.J.Eq. 139, 50 A.2d 97.
105. 50 A.2d at 100.

It was, therefore, totally immaterial whether or not the threatened acts were technically actionable. The New Jersey court was prepared to give a much broader interpretation to wrongful pressure. It was sufficient that there was a moral obligation on the defendant to execute the lease and that it threatened not to do so as a means of extortion. The court never inquired as to whether the defendant was in breach of any sort of contract.

Courts from other jurisdictions, on occasions, have also been prepared to construe "wrongful" liberally and not to limit duress to threats of unlawful acts.[106] Holmes, J., at the end of the nineteenth century, recognized the fallacy of limiting duress to threats of unlawful acts. He expressed his views in *Silsbee* v. *Webber*.[107] In that case the plaintiff's son was employed by the defendant and he was accused of theft. He signed a confession and agreed to give security for $1,500. A meeting was arranged between the plaintiff and the defendant and the defendant indicated that he would have to tell the plaintiff's husband. The plaintiff told the defendant that her husband was very melancholy and irritable and she feared that such knowledge could drive him insane. As a result of the defendant's pressure, the plaintiff executed, in favour of the defendant, an assignment of her share in her father's estate. Money was paid to the defendant pursuant to that assignment and the plaintiff was seeking to recover that money as having been paid under duress.

The defendant's main argument was that he had threatened only to exercise his legal rights. Holmes, J. agreed that, normally, such threats could be made without liability. "Ordinarily, what you may do without liability you may threaten to do without liability."[108] He pointed out that the issue is not whether the act threatened is itself unlawful but rather the totally separate one of whether a transaction induced by such threats should be set aside:[109]

> When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat. . . . If a contract is extorted by brutal and wicked means, and a means which owes its immunity, if it have immunity, solely to the law's distrust of its own powers of investigation, in our opinion the contract may be avoided by the party to whom the undue influence has been applied.

There has, then, been some judicial support in the United States for a broader notion of wrongful pressure for the purposes of duress. The difficulty, of course, lies in isolating the circumstances in which pressure has been regarded and should be regarded as sufficiently wrongful, although it does not consist in threats of unlawful acts.

B. Threats to the Victim's Employment

The courts have been fully prepared to find duress when threats have been made to the victim's employment status. There is a recognition of the extremely coercive effect of a threat to the victim's livelihood and, as a result, the courts have been willing, in this context, to move away from the general principle that duress must consist in threats of unlawful acts.

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106. *E.g., Kaplan* v. *Kaplan* (1962) 25 Ill.2d 181, 182 N.E.2d 706; *Regenold* v. *Baby Fold, Inc.* (1977) 68 Ill.2d 419, 369 N.E.2d 858; *Fowler* v. *Mumford* (1954) 48 Del. 282, 102 A.2d 535; *Eckstein* v. *Eckstein* (1978) 38 Md.A. 506, 379 A.2d 757.

107. (1898) 171 Mass. 378, 50 N.E. 555.

108. 50 N.E. at 556.

109. *Id.*

The abandonment of the general principle in this area has been carried out very smoothly and with remarkable ease. The courts are thus able to depart from the general formula when there is a perceived need.

Many of the cases have arisen where a threat has been made by the defendant to terminate the plaintiff's employment in a lawful manner. One such case is *Laemmar* v. *J. Walter Thompson Co.*[110] The plaintiffs were employees at will of the defendant. They purchased a number of shares in the defendant. All of these purchases were subject to an option retained by the defendant to repurchase such stock if the plaintiffs' employment should be terminated for any reason. The plaintiffs alleged that various officers of the defendant solicited them to sell their stock and that, upon refusal of such solicitations, they were told that they would be discharged unless they executed a sale in accordance with the defendant's offer. The plaintiffs contended that they sold their stock through the fear of losing their jobs. They sought rescission of that sale on the grounds of duress. The court held that duress could be constituted on the alleged facts and that the trier of fact had to resolve the issue. It was no bar that the defendant was merely threatening to exercise its legal rights:[111]

> The question thus becomes whether a threat to pursue an action to which one is legally entitled may constitute duress under Illinois law if made as an inducement to execute an agreement. We conclude that it may. The Illinois case law amply illustrates the proposition that pressure generated by noncriminal acts and threatened acts of a party may constitute duress where their undoubted effect was to undermine the ability of another to refuse to execute an agreement.

Often a threat to terminate the victim's employment is accompanied by a further threat to prevent the victim becoming employed anywhere else in the same occupation. In these circumstances the courts are readily prepared to find duress. The classic decision is *Perkins Oil Co.* v. *Fitzgerald.*[112] The plaintiff lost both arms from an accident suffered in the course of his employment. He settled his claim against his employer for $5,000. He sought to have that settlement rescinded on the ground of duress and claimed damages of $45,000. The pressure consisted in threats by the employer to discharge the plaintiff's stepfather and to prevent the stepfather being employed by any other oil company. The stepfather was the sole means of support for the plaintiff and his mother. The settlement was set aside.[113]

C. Other Threats to Victim's Economic Livelihood

Threats to the victim's employment directly affect the victim's economic livelihood. For that reason, the courts have been prepared to find duress even where the oppressor had the legal right to terminate the employment. Some courts, however, have extended relief in duress to other threats which attack the victim's economic livelihood even though these are not threats of actionable wrongs. Threats in the employment context are just part of a much wider concept of duress by threats to the victim's economic survival. A good example of such a threat is provided

110. (1970) 435 F.2d 680 (7th Cir.). *See also Gerber* v. *First National Bank of Lincolnwood* (1975) 30 Ill. App.3d 776, 332 N.E.2d 615; *McCubbin* v. *Buss* (1966) 180 Neb. 624, 144 N.W.2d 175; *Mitchell* v. *C.C. Sanitation Co.* (1968) 430 S.W.2d 933 (Tex. Civ. App.) There are cases to the contrary, *e.g. Bachorik* v. *Allied Control Co., supra* n. 76.

111. *Id.* at 682.

112. (1938) 197 Ark. 14, 121 S.W.2d 877.

113. *See also Bayshore Industries* v. *Ziats* (1963) 232 Md. 167, 192 A.2d 487.

by *Fuerst* v. *Musical Mutual Protective Union.*[114] The plaintiff, a member of the defendant union, was threatened with expulsion from the union unless he paid an illegal fine. It was clear that union membership was essential for the practice of the plaintiff's profession. It was held that the plaintiff could recover the fine as having been paid under duress.

As pointed out above, the New Jersey courts have been especially ready to find duress from otherwise lawful threats. A full discussion of the concept of wrongful pressure is contained in *Wolf* v. *Marlton Corporation.*[115] The plaintiffs sued to recover a deposit made pursuant to a contract to buy a house to be built by the defendant. The sale was never consummated and the defendant sold the house to a third party. The plaintiffs argued that, at all times, they were ready, able and willing to buy the house and that the defendant had terminated the contract unjustifiably and had not returned the deposit. The defendant contended that the purchasers had breached the agreement for sale by preventing performance through certain threats they had made.

The plaintiffs had been undergoing marital difficulties and they wanted to avoid the purchase of the house. To ensure the return of their deposit, they threatened to complete the transaction and to resell to an undesirable, thus devaluing the defendant's development and ruining its business. The builder withstood the plaintiffs' pressure, advised the plaintiffs that they had breached their contract and refused to return their down payment.

The court upheld the defendant's contention. The plaintiffs were guilty of duress and the builder was entitled to terminate the contract of sale. The defendant was not obliged to run the risk that the owners could carry out their threats. The plaintiffs relied on the formula that duress could not be constituted by threats of lawful acts. The court, however, did not subscribe to that view. It was true that the threats had to be wrongful but they did not have to be unlawful. A threat could be wrongful in a moral or an equitable sense. Freund, J.A.D. dealt with the wrongful character of the threat concerned in the following words:[116]

> The sale of a development home to an "undesirable purchaser" is, of course, a perfectly legal act regardless of any adverse effect it may have on the fortunes of the developer's enterprise. But where a party for purely malicious and unconscionable motives threatens to resell such a home to a purchaser, specially selected because he would be undesirable, for the sole purpose of injuring the builder's business, fundamental fairness requires the conclusion that his conduct in making this threat be deemed "wrongful", as the term is used in the law of duress.

V. DENIAL OF FUTURE CONTRACTS—AN APPROPRIATE AREA FOR THE EXTENSION OF DURESS

It has been seen in Section II that a number of jurisdictions have now recognized that, in certain circumstances, a threat to breach a contract can constitute duress. These cases can be rationalized, within the traditional approach, on the basis that a breach of contract is an unlawful act. There is, however, still some judicial reluctance to find duress in this context. That reluctance is even more marked where analogous forms of pressure are used which do not involve any technical

114. (1905) 95 N.Y.S. 155.

115. (1959) 57 N.J. Super. 278, 154 A.2d 625.

116. 154 A.2d at 630. *See also Ross Systems* v. *Linden Dari-Delite, Inc.* (1961) 35 N.J. 329, 173 A.2d 258; *Jamestown Farmers Elevator, Inc.* v. *General Mills, Inc.* (1977) 552 F.2d 1285 (8th Cir.).

breach of contract and therefore no unlawful act. The situation to be considered is that where one party threatens to terminate future business relations with the other, such as threats to deny any further contracts with that other. The courts have quite consistently denied relief in duress by relying on the principle that duress cannot be constituted by threats of lawful acts and that the oppressor is merely threatening to exercise his legal privileges for which no sanction is available. It is submitted, however, that there is scope for judicial intervention in this situation. Such cases should be considered on their merits and should not be dismissed from the outset by saying that it is never duress to threaten to exercise legal rights.

A. Commonwealth Authorities

The leading Canadian case is the decision of the Ontario Court of Appeal in *Morton Construction Co. Ltd.* v. *City of Hamilton.*[117] The plaintiff Company built sidewalks for the defendant Municipality under contracts which required the Company to maintain the sidewalks in complete repair for twelve months from the date of completion. The Company was later informed by the City that a number of the sidewalks were so badly damaged that they would have to be replaced at the Company's expense. Some of these sidewalks fell outside of the one year maintenance agreement. The Company took the position that the damage to the sidewalks was due to the effect of the salt which had been used by the City to melt the snow on the roadways and which had splashed up on the sidewalks. The Company claimed that it was not responsible for the salt damage because it had followed the City's specifications. The Company was informed that it would not be considered for future contracts unless it replaced the damaged sidewalks at its own expense. The Company replaced the sidewalks and then sued on a *quantum meruit* to recover the reasonable value of its services claiming that the City had been unjustly enriched at its expense. That claim was quickly rejected by the court:[118]

> The plaintiff's consent to do the work in question was not deprived of its voluntary character by reason of the threats made by certain members of the City Council to the effect that the plaintiff would receive no further contracts from the City unless it effected the repairs at its own expense. The defendant was legally entitled to make a threat of that nature and, indeed, to carry it out and, fixed with this knowledge, the plaintiff in its letter of August 3, 1957 stated: "Accordingly since the committee at the city had put it the way they did we have no choice, if we are to stay in business, but to do the work."

There was the added factor in the case that the City was contemplating putting the matter before the courts contending that the damage to the sidewalks was caused by the shoddy workmanship of the plaintiff. It could be argued, therefore, that the parties had merely agreed to compromise a disputed claim. The case, however, was not decided on that ground. Most of the evidence centred around the City's threat to deny future contracts to the plaintiff. In effect, it was held that the City was just exercising a legal privilege and was not doing anything wrongful.

On the facts of the *Morton Construction* case and on the assumption that there was no disputed claim by the City, relief in duress should be

117. (1961) 31 D.L.R. (2d) 323 (Ont. C.A.).
118. *Id.* at 330.

available. The City should not be permitted to extort free maintenance work from the plaintiff by threatening the parties' future business relations. It is no answer to say that the City had the legal right not to contract with the plaintiff in the future. The question raised is whether the City can infringe the parties' present relationship by using threats as to their future relationship. Sutton[119] is clearly of the view that such threats should fall within the sphere of duress. It is his opinion that such demands by the City conflict with a general duty of good faith owed by the City to the plaintiff on account of the existing contract between the parties.

The *Morton Construction* approach had been taken earlier in British Columbia in *Sutherland* v. *Sutherland*,[120] which has been discussed above in section II. The Court held that one party could, for his private advantage, threaten the future business relations with the other party and his motive for so doing was totally irrelevant.

The most striking of the Australian decisions is *Smith* v. *Wm. Charlick Ltd.*[121] which has also been discussed above. The fact that the oppressor was the monopoly supplier of wheat and that the respondent wheat dealer needed the supplier's business to survive was not a relevant consideration for the court. The Wheat Board had the legal right to stop dealing with the respondent and any payments the respondent made to continue the business relationship were treated as purely voluntary. Isaacs J. said:[122]

> [I]t is plain that a mere abstention from selling goods to a man except on condition of his making a stated payment cannot in the absence of some special relation, answer the description of "compulsion" however serious his situation arising from other circumstances may be . . .

B. United States Authorities

The American courts are equally reluctant to find duress in these circumstances. In *Eggleston* v. *Humble Pipe Line Co.*,[123] for example, the plaintiff alleged that his contract with the defendant had been discontinued after the defendant threatened, *inter alia,* to remove the plaintiff from its bidding list for future contracts. The court was clear that such threats could not constitute duress:[124]

> [W]e are cited to no Texas authority which recognizes duress in a threat to remove a contractor from one's future bidding list. It is still a rule of general application in this state, with only a most limited possible modification, that a threat to do that which an individual has a legal right to do will not form duress, unless it is a threat of criminal prosecution.

One of the most recent cases on the topic is *Business Incentives Co., Inc.* v. *Sony Corporation of America*.[125] The plaintiff acted as an independent salesman for Sony goods on a commission basis. The contract between the parties contained a termination clause empowering either party to terminate the contract on fifteen days' notice. It was held

119. *Supra* n. 4 at 581-585.
120. *Supra* n. 61.
121. *Supra* n. 70.
122. *Supra* n. 70 at 56.
123. (1972) 482 S.W.2d 909 (Tex.Civ.App.).
124. *Id.* at 916.
125. (1975) 397 F.Supp. 63 (S.D.N.Y.).

that economic duress could not be constituted by Sony threatening to terminate in accordance with the clause and refusing to deal with the plaintiff in the future. Sony's use, however selfish, of its legal rights under the contract could not be characterized as duress.

Pompton Stationery Corp. v. *Passaic County News Co.*[126] is one of the few cases where the courts have been ready to find duress in these circumstances. It is interesting to note that it is a New Jersey decision because, as seen above in Section III, New Jersey stands apart from other jurisdictions on the question of duress. The plaintiff, a retail news dealer, alleged that the defendant, the sole distributing agent in the plaintiff's territory of the leading Eastern newspapers, delivered newspapers in excess of the plaintiff's requirements and against the plaintiff's orders. The plaintiff contended that the defendant compelled him to pay for the extra papers by threatening to cut off future supplies. The court upheld the plaintiff's claim of duress because the defendant had abused its monopolistic position.

VI. CONCLUSIONS

Traditionally, the courts have confined duress to situations where the oppressor has threatened to perform some unlawful act such as a crime, a tort or a breach of contract. "Wrongful pressure" has been equated with "unlawful pressure". It was seen in Section II that there is still a large body of authority to the effect that it is never duress to threaten to do what there is a legal right to do.

Duress, however, has for a long time not been limited solely to threats of unlawful acts. It has been recognized since the nineteenth century that duress can be constituted by an improper application of the legal process where the oppressor is merely threatening to exercise his legal rights. The right to bring a civil action or to institute a criminal prosecution is qualified and not absolute and must not be abused. In determining whether the right is being abused, the courts will look at the purpose for which the threat is being made. If the threat is being made for an improper purpose, then the pressure exerted will be characterized as wrongful and sufficient to amount to duress. It is submitted that a similar approach must be used with other types of threats of lawful acts to determine whether such pressure is wrongful. The courts must go behind the simple determination of whether the oppressor is threatening an actionable wrong and discover the purpose for which the threat is being made.

The criminal law, through the crime of blackmail, has refused to sanction certain threats although they are not threats of unlawful acts. A threat of a lawful act can amount to blackmail depending upon the purpose for which the threat is used. The fact that a person has the legal right to do an act does not automatically give him the right to threaten to do that act.

It is submitted, therefore, that duress can and should be constituted by threats of lawful acts. Instances of duress in such circumstances will be rare but should not be non-existent. In determining whether relief in duress should be available, the courts must look not merely at the threats made but also at the purpose behind those threats. This is the basis for duress by the improper application of the legal process and the basis for

126. (1941) 127 N.J.L. 235, 21 A.2d 849.

the crime of blackmail and hence duress constituted by criminal blackmail. It must also be the determinative factor in the question of when duress can be constituted by threats of lawful acts.

This point was very clearly made by Bigelow, V.-C. in *Hochman* v. *Zigler's, Inc.*,[127] discussed above in Section IV, when he said that the question of whether "the threatened action is wrongful or not is colored by the object of the threat."[128] The test to be employed by the courts must be very similar to the test employed to a finding of blackmail. Is the object of the threat a reasonable one and is the use of that particular threat a reasonable way of achieving that object? Bigelow, V.-C. made this point, again in the *Hochman* case:[129]

> If the threat is made to induce the opposite party to do only what is reasonable, the court is apt to consider the threatened action not wrongful unless actionable in itself. But if the threat is made for an outrageous purpose, a more critical standard is applied to the threatened action.

It was seen in Section IV that the American courts have made the policy decision that it is rarely reasonable to threaten the victim's economic livelihood by threatening to terminate his employment as a means of extorting some peculiar private gain. That is too serious a threat to be judicially sanctioned. An analogous form of pressure was condemned in *Wolf* v. *Marlton Corp.*[130]

It is submitted that the courts should pay special attention to threats to deny any future contracts to the victim when the victim is in need of such contracts for his economic livelihood because of the oppressor's monopolistic position. Such threats should be closely examined to determine what precisely the oppressor is attempting to gain and whether his object is a reasonable one. In particular, as Sutton points out,[131] such threats should not be countenanced where their purpose is to alter quite unfairly an existing contract between the parties. Duress should be available as a remedy on the facts of *Morton Construction* v. *City of Hamilton*[132] and *Smith* v. *Wm. Charlick Ltd.*[133] The approach taken in *Pompton Stationery Corp.* v. *Passaic County News Co.*[134] is the preferable one.

127. *Supra* n. 104.
128. 50 A.2d at 100.
129. *Id.*
130. *Supra* n. 115.
131. *Supra* n. 4 at 581-585.
132. *Supra* n. 117.
133. *Supra* n. 70.
134. *Supra* n. 126.