

A Note on Byle v. Byle

A 1990 decision of the BC Court of Appeal. It is a genuine case of a court refusing to enforce a contract by reason of duress. Several law suits were consolidated (ordered to form one combined law suit) and went to trial in the BC Supreme Court. The 'Plaintiffs' are the people doing the suing and the Defendants are the people being sued. The Judgments of the trial judge were appealed to the BC Court of Appeal. The Appellants are the people doing the appealing. The Respondents are the people defending the trial judgments.

The case report is a jumble of financial arrangements between the parents and their children. Tolstoy's *Anna Karenina* begins "*Happy families are all alike; every unhappy family is unhappy in its own way.*" Maybe; but there is a sort of sad familiarity to Mr. Byle's attempt to build a little empire with his sons only to have it end in recrimination and bitterness, and Mrs. Byle's private tragedy is instantly understandable.

Mr and Mrs Byle had 3 sons, Tom, Bill and Dan and a daughter Eleanor. Various companies were incorporated by family members both for tax purposes and because shareholding is a means of fixing the share of ownership; but behind the corporate veils the larger plan was for the children to develop land in Surrey owned in whole or in part by Mr. and Mrs. Byle.

Things got acrimonious as they got more complicated.

About 10 years after the first incorporations Jim got so mad that he allegedly told his brother Dan that if things didn't get settled he was going to blow his other brother Bill's head off. This threat of violence or cry of frustration gets conveyed to their parents and shortly thereafter they (the parents) sign an agreement that is intended to settle all disputes about who owes what to whom. That agreement is called the Watts Agreement, named after Mr. and Mrs. Byle's solicitor, Mr. Watts.

By the time of the Watts Agreement, Mr. Byle was 78 and Mrs. Byle was 72 and in constant pain from cancer. In the year subsequent to the signing of

the Watts Agreement Mr. and Mrs. Byle failed to follow through with aspects of the Agreement and so litigation was re-commenced.

At trial Mr. Byle's (Mrs. Byle had died) defence to failing to complete the Watts Agreement was that it was **unconscionable**, and, pointedly, that it was **induced by 'duress'** - as in a threat of physical violence.

Notice that the threat does not have to be made against the person alleging duress. It is enough if the threat was made against a third party but influenced the second party to enter the contract. Here, it is alleged that the aging and ailing parents felt pressured into signing the Watts Agreement to avoid the prospect of physical violence threatened by one of their children and directed against another.

If you start reading carefully on page **7/24** under the heading **First Action** and read through to half-way down page **9/24** you will have the factual picture.

I will walk you through those pages and then we talk about the legal significance of it all.

At trial Mr. Byle alleged that the Watts Agreement was unconscionable and entered into under duress. Jim's reply was that his parents had affirmed the Agreement by receiving some of the benefits of the Agreement after the fact. The legal argument respecting affirmation is that sometimes people may enter into an agreement for the wrong reasons, but then decide that they will live with it anyway because of the benefits it provides. In such circumstances, goes the argument, the maybe dubious reasons for entering the agreement are less important than the conduct afterwards.

The trial judge (TJ) found the Watts Agreement to be both **Void** for duress and **Voidable** for unconscionability. What is the distinction between a contract that is declared to be void and one that is declared to be voidable. A contract that a court declares to be void is one that never was. The event that made the contract void is an event that prevented the contract from ever existing. In contrast, a contract that is voidable is one which the court declares existed but which may be set aside by the courts because of an event (or events) that raise the question for the court, 'Should this contract

continue to exist?' Affirmation is no defence to a contract dispute where the court decides it is compelled to declare that the contract is void, because how the parties behaved after the agreement was formed is of no significance if there is no contract to affirm.

Beginning at the bottom of page 7/24 the Court of Appeal Judge (JCA) quotes from the judgment of the TJ, and you should read that through to the bottom of page 9/24. Note that evidence is what the judge hears from the witnesses, but facts are what he finds to be true, having listened to the evidence. He must apply the law that he finds to be relevant to the facts that he finds to be true.

Upon the issue of whether or not Jim did make the threats, what was the, perhaps unconscious, hill that Jim had to climb if he was to persuade the TJ that it did not happen. One factor may have been this:- parents know their children, and so when Dan told Bill and their parents about what he alleged that Jim had said, the reaction of the parents and Bill (who stayed away from the meeting) to that message told the TJ several things in addition to the plain words of Jim's threat. The reaction of Mr. and Mrs. Byle suggested that such an allegation about Jim, had credibility; that their understanding of their son Jim and his personality did not foreclose acts of violence against his brother. So the reaction of the parents to what Dan told them was like testimony from Jim's parents to the effect that 'Well, that's Jim for you!' In a parallel universe the Byle family might be quite different. In that Byle family, Dan has a reputation for being sneaky - he makes up malicious stories - and Jim is slow to anger and very gentle - all of which might have portended a different result in court. What I want you to notice is that is that there is always more going on in the room and in our heads than is at first apparent and that this background mentation, which we may or may not be aware of in ourselves and others, has much to do with who and what we believe. The speed, complexity and stealth of human reasoning, in turn, presents challenges to a TJ. He or she must articulate why one witness is believed and another is disbelieved, but it must often be that the conclusion as to a person's truthfulness comes without the reasons plainly attached in the judge's mind. Then the judge must ask, 'Why do I feel that way. What is it that persuades me of the witness' truthfulness or lack thereof?

So, sometimes judges, in trying to reverse engineer why they believe or disbelieve a witness, are unconvincing - it is as if they cannot bring into consciousness the light speed calculations that they were making as the conclusion was being built and now, the publicly articulated reasons (which are an honest attempt to recover the process of calculation) seem inadequate.

In other cases it may be the judicial conclusion itself that fails to convince. The judge, required by law to articulate reasons for his or her conclusions of fact, gives the impression that the conclusion is not what he or she deeply believes but what is instead the final resting point after articulating a list of consciously appreciated factors. The judge is declaring, 'If I cannot say precisely how I got there, then I am not allowed to be there?' Is the judge right or wrong to take that view? And, once you have answered that question in your mind, ask what implications, for our system of justice, flow from each answer to that question.

Once you have reached the bottom of page 9/24, you will have noted that the TJ found that:

- a) The Byles entered into the Watts Agreement because, in part, they feared what Jim might do to Bill, if they did not enter the agreement;
- b) That constituted duress, and;
- c) Duress rendered the contract void

At the top of page 10/24 to the top of 11/24 the JCA goes on to quote the TJ's reasons on the alternative claim of unconscionability.

On this subject the TJ's findings are that:

- i) There was an inequality of bargaining power arising from Jim's threats;
- ii) That inequality of bargaining power was reflected in an unfair outcome. Jim got about twice as much as a fair accounting would have suggested he was owed;

iii) That the Agreement, being therefore unconscionable, was voidable.

On appeal, Jim argued that (the analysis begins under the heading 'Error in Law' on page 11/24):

a) Duress required a threat to a party to the agreement, and given that, whatever Jim said, he said it to Dan and not Bill or their parents, there was no threat sufficient to establish duress. Jim also argued that there was no evidence from which the TJ could conclude that Jim had any intent to cause his parents to do anything. The Court of Appeal upholds the TJ on this and necessarily finds that it is enough if a threat by A to B about hurting C influences D, who is a party to the agreement. What the court fails to answer is whether or not there must be an intention that the threat be communicated to a party to the agreement.

Suppose Harry said to his brother that if their cousin did not repay what Harry was demanding, in Harry's words, "I'll kill the bastard!". Suppose further, that while Harry was forever using inflammatory language (another brother had testified that not a month goes by without Harry threatening to kill someone and half the time he's laughing when he says it) he had never ever used violence on anyone.

Suppose further that the TJ found that Harry had no intention of causing his brother to convey his 'cry of exasperation' to his cousin. What should the result be? Should the agreement that the Cousin speedily made to repay Harry be set aside:

a(i) Only if Harry intended that his cousin hear of the 'threat';

a(ii) Also if Harry was negligent in not being careful to advise his brother that he was not serious and that the 'threat' was not intended to be conveyed to the cousin;

a(iii) In any circumstances if the Cousin came to hear of and was influenced by the threat - even if Harry clearly did not want the threat to be conveyed to the cousin.

What I want you to notice is that while Byle.v. Byle answers some questions about the nature of duress, it leaves other questions unanswered.

The general rules are that

1. a court should not answer questions of law that are not necessary to its decision; and
2. If it does nonetheless provide answers to legal questions that are not posed by the case, lower courts are not bound to follow those aspects of the higher court's decision.

But on page 11/24 of Byle v. Byle, it seems to me that the court did not answer a question that was squarely before it; to wit, what was Jim's necessary intent in order that his words might be used as the basis for a claim of duress.

- b) That duress required a vitiation of consent, which was not present. The Court of appeal found that it was present (as did the TJ) and that was the end of that argument.
- c) That duress makes a contract voidable and not void. With an analysis of the cases that commences at the bottom of page 11/24 and continues to mid 12/24, the Court of Appeal concludes that the Appellant (Jim) is right. Duress makes a contract voidable and not void and therefore the Court of Appeal must consider whether, by their subsequent conduct, Mr. and Mrs. Byle affirmed the contract. That analysis commences mid 12/24 and ends mid 16/24. It is hard slogging and what I want you to draw from it is the common-sensical result that the court reached. Under the influence of the threat, Mr. and Mrs. Byle moved to comply with the agreement, but before long they were dragging their feet and failing to follow through. As affirmations go it was unenthusiastic. They acted more like people who felt they had been bullied than people who set aside the circumstances in which they had entered into the Agreement. What is key to the analysis is that there must be facts from which the

court can infer that it is not the duress (or the behaviour that constituted duress) that is commanding behaviour any longer.

Of course you are free to continue reading the case, but I do not need you to continue reading it beyond mid 16/24.

In saying what they will not be a part of, the Courts are influencing the boundaries of what is proper commercial behaviour. There is a difference, the courts are saying, between being a business person where square dealing and honesty matter, and being a gangster. At the margin, where matters are never clear, some people may cross the line, but they cannot ask the courts to follow them to enforce what they have made. Duress, undue influence and unconscionability are tools that the courts employ to help draw those lines, that the rest of us may see them more clearly. We should also recall that most people are not walking contract law scholars¹, but their continued commitment to employ quiet courtrooms instead of bats and guns depends on the average person thinking they can get a fair shake from the courts. Judges are properly concerned that there should not be an unexplainable gap between judge-made law and the average person's sense of fairness. Fairness, a quality most people feel they can recognize even if they cannot define it, is the court's stock in trade.

SDMW

¹ You are among the privileged few.