



**Sexually Transmitted Debt:
Credibility, Culpability and the Burden of
Responsibility**

Ainsley J. Harper

**Thesis submitted for the degree of
Doctor of Philosophy
in the
Department of Social Inquiry
University of Adelaide**

May 2001

TABLE OF CONTENTS

ABSTRACT	iii
DECLARATION	iv
ACKNOWLEDGMENTS	v
INTRODUCTION	1
CHAPTER ONE: BACKGROUND TO THE STUDY	11
Introduction	11
Aims of the Research	16
Research Design	17
Sample Groups	24
Control Group	29
CHAPTER TWO: THE LEGAL CONSTRUCTION OF SEXUALLY TRANSMITTED DEBT	30
Introduction	30
Special Protection for Married Women	33
Special Protection for Neither All Women nor All Men	45
Special Protection for All Cohabitees	60
Conclusion	67
CHAPTER THREE: FAILING TO TAKE THE DIFFERENCE OF THE 'PRIVATE' SERIOUSLY	69
Introduction	69
Protection of the 'Public' from the 'Private'	70
Mapping the Economic Subordination of Women	71
Challenging the 'Unreflective' Public/Domestic Dichotomy	73
The Household Economy	81
The Family as 'One'	82
The Division of Money Within the 'Black Box'	84
Reversing the Rules of Relevance	102
Conclusion	105

CHAPTER FOUR: TO SIGN OR NOT TO SIGN	107
Introduction	107
Trust and Confidence	110
Debtor's Expertise	110
Commitment to a Romantic and Business Partnership	112
The 'Caring Partner'	114
Dependence and Control	117
Financial Responsibility	117
Financial Authority	125
Coercion	131
Emotional Abuse	133
Economic Abuse	134
Refusing to Sign	137
Conclusion	143
CHAPTER FIVE: THE CONSEQUENCES	145
Introduction	145
Financial Consequences	147
Bankruptcy	147
Negotiation	152
Credit Reference	155
Familial Support and Advice	157
Non-Financial Consequences	161
Emotional	161
Health	166
Opposing Views	167
Conclusion	170
CHAPTER SIX: RECOMMENDATIONS BASED ON BANKS' ADVANTAGE	171
Introduction	171
Statistics That Count	172
Independent Advice	180
Prudent Lending	194
Economic Sterilisation of the Home	196
Post-Contractual Information and Costs	200
Conclusion	204
CONCLUSION	205
APPENDICES	209
BIBLIOGRAPHY	230

ABSTRACT

This thesis examines the causes and consequences to women who, as a result of their marital or de facto relationship incur debt from their spouse/partner. First, it aims to describe the legal and social construction of sexually transmitted debt through a feminist analysis of the 1998 Australian High Court legal case of *Garcia v National Australia Bank Ltd*. It aims, second, to contribute to feminist understanding of financial decision-making within households by focussing on those decisions that lead to the accumulation of debt within the domestic sphere.

This study is based on semi-structured interviews of forty-seven women within South Australia who had experienced or were currently experiencing sexually transmitted debt. I have drawn on three intersecting major theoretical influences: the public sphere/private sphere dichotomy, the sameness/difference debate, and the sociology of money. This analysis finds that the existing definition of what constitutes sexually transmitted debt excludes many women. It demonstrates that the reasons why women sign, or refuse to sign loan contracts for their spouses/partners are closely linked to domestic power relations and the emotional influences that permeate intimate relationships. Financial impacts can be extreme, while women also suffer other consequences. The thesis also demonstrates that economic abuse remains of peripheral concern in existing research on domestic violence despite the continued inequitable division of money within households.

This thesis concludes that the use of women's disadvantage as a point of reference throughout the sexually transmitted debt discourse has been instrumental in the continued assumption that household debt is a woman's problem. Very different solutions to this social phenomenon are presented when the bank's advantage is identified as the problem.

DECLARATION

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

I give consent to this copy of my thesis, when deposited in the University Library, being available for loan and photocopying.

SIGNED:

DATE: 23/5/01

ACKNOWLEDGMENTS

To the women who participated as interviewees in this study, I owe an enormous debt of gratitude. They consistently attributed their decision to be involved to the need for greater community awareness so women would not experience sexually transmitted debt in the future. I hope that this thesis speaks for them.

This work would not have been possible without the professionalism of my supervisors, Professor Chilla Bulbeck and Dr Jenny Burley. Both have been unstintingly supportive throughout my candidature. In particular, I am extremely grateful to Chilla Bulbeck for her invitation into the Department of Social Inquiry and her continued faith in this project. I would also like to thank Francis Regan for his initial supervision and ongoing interest. I am also indebted to Dr Margie Ripper for her co-supervision while Chilla was on study leave.

I wish to thank Melissa Ballantyne of the Women's Legal Service of South Australia for her enthusiasm for the project and for enabling me to access interviewees from the Service's database. Thank you also to many friends and colleagues who provided emotional succour and intellectual stimuli so generously throughout this journey.

I am very grateful to the Commonwealth government for the assistance of an Australian Postgraduate Award throughout my candidature.

Finally, to my family, my husband Bruce and my daughters, Brit and Sophie. You have been, as always, my abiding source of inspiration, love and faith. Thank you.

INTRODUCTION

Household debt in Australia is now almost equivalent to annual disposable income. Australians now owe approximately \$69 billion in personal household debt, which is in addition to \$252 billion in home loans¹. Personal household debt includes both consumer debt and personal business debt. At October 1999 outstanding debt on bank credit cards was around \$13 billion². The level of household debt more than doubled in the 1990s and continues to rise faster than household income³. Although women appear to have been guarantors for debt for over 2000 years, only recently has 'sexually transmitted debt' (STD) become a social issue. Monitoring of the social and economic impact of these trends in gross debt on household vulnerability has, until the past decade, primarily focussed on the effect on the economy as a whole⁴. Within the past ten years through increased concern amongst consumer groups, government agencies, academics and the popular press, the focus has shifted from an assessment of the impact outside the household to one within this domestic sphere⁵.

'STD' is the term commonly used to describe the circumstances that occur when individuals within a relationship, most often wives or de facto wives, accept responsibility or are held responsible for their partner's debt/s because of that

¹ *Australian Financial Review* 6 May 2000, p. 3

² New South Wales Law Reform Commission Submission to the Australian Bankers' Association, *Review of the Code of Banking Practice*, July 2000, p. 4

³ *Business Outlook*, *Business Review Weekly*, Vol 21 No 4, p. 7

⁴ For example see Economic Planning Advisory Council, *Economic and Social Implications of Consumer Debt*, Australian Government Publishing Service, Canberra, 1989

⁵ For example see Report of the Expert Group on Family Financial Vulnerability, *Good Relations, High Risks: Financial Transactions Between Families and Friends*, Federal Bureau of Consumer Affairs, 1996

relationship. If their partner becomes unable or unwilling to pay the debt/s because of bankruptcy or divorce, the debts are 'transmitted' to the dependent party. The lender then seeks to enforce the repayment of the loan from these women.

Sexually transmitted debt has been specifically defined by an Australian Bank Ombudsman as

The transfer of responsibility for a debt incurred by a party to his/her partner in circumstances in which the fact of the relationship, as distinct from an appreciation of the reality of responsibility for the debt, is the predominant factor in the partner accepting liability⁶.

The debt that is transmitted is generally assumed to have been incurred for the purpose of running a personal business. In this circumstance, a spouse or partner provides third party loan 'security' over the family home mortgage, to a financial institution, for the business liabilities of their spouse or partner⁷.

In legal terms, a guarantee is a promise by one person who is called the 'guarantor' or 'surety' to answer for the present or future debt of another person who is called the 'principal debtor'⁸. Over time the following situations have also been recognised as STD. A person acts as a 'guarantor' for a personal loan provided to a partner. In the case of default by the debtor, the lender has a legal right to the guarantor's house, savings and any other assets. Moreover, the lender can sue both the borrower and

⁶ G. McDonald, 'Sexually Transmitted Debt – Can it Affect You?', The Australian Banker, April 1991, p. 72

⁷ *ibid.*; B. Fehlberg, Sexually Transmitted Debt: Surety Experience and English Law, Clarendon Press, Oxford, 1997b, p. 1

⁸ W. Weerasooria, Bank Lending and Securities in Australia, Butterworths, Australia, 1998, p. 169

guarantor together but must try to retrieve the money from the borrower before making the guarantor pay. In another situation, a person could agree to guarantee a loan made to a partner and later discover that he or she has signed the relevant document as a co-borrower⁹. This establishes a contractual obligation of liability from the time the loan is taken out. Usually the proportion of debt is at least fifty per cent though some co-borrowing contracts make each party responsible for the entire debt¹⁰. A lender can choose which co-borrower to sue in the event that payments cease. The lender usually chooses the co-borrower who has the higher income or more assets, or the one who can be found at the time. In any of these situations, where a person acts as a surety, guarantor or co-borrower, if the primary debtor is not able to repay the debt the co-signatory becomes legally responsible to a financial institution for money owed by the partner or the business. This is despite having received no benefit from the loan. Ultimately the consequence will in all likelihood be financial difficulty, which can range from a loss of assets to the loss of the family home¹¹.

The origin of the term has been attributed to a group of financial counsellors, lawyers and community workers. In the late 1980s they identified the need to distinguish, from other cases of unconscionable involvement in loans, the 'special unconscionability of signing women up on loan contracts' simply because of the existence of a 'married-like' relationship between the primary debtor and the woman¹². Women in this situation were not recognised as having separate interests to their partner. Thus, as 'his "appendage" ... any benefit he received from funds borrowed was imputed (legally) to

⁹ N. Howell, 'Sexually Transmitted Debt: Where Emotion Meets the Law', Consumer Rights Journal, Vol 2 No 3 1998, p. 3

¹⁰ G. McDonald, *loc. cit.*

¹¹ *ibid.*

¹² J. Lawton, 'Sexually Transmitted Debt: The Distortion of Equality Between the Sexes', St Kilda Community Centre, 1992, p. 1

be a benefit to her¹³. Although the term can be used to describe the transmission of debt from women to men or vice versa, existing case law suggests that, in the context of intimate personal relationships, women are more likely than men to act as guarantors or sureties¹⁴. This is reflected by the fact that up until the end of 1994 there were no reported legal cases in England involving a male surety spouse and only one in each of Canada and Australia¹⁵. By comparison, in an eight-year period from 1986 to 1994 in Australia, there had been a total of eighteen decided cases involving women who had assumed liability for the debts of others¹⁶. The 1994 Australian Law Reform Commission's *Equality Before the Law: Women's Equality Report* identified STD as causing extreme disadvantage for women in their economic dealings. When women looked to the law to have their liability set aside, legal remedies have not adequately addressed the issue¹⁷.

The popular press, government agencies, academics, financial counselling organisations and financial institutions have variously applied the term when discussing the problems women face as consumers of financial services. More recently, the terms 'emotionally transmitted debt' (ETD) and 'relationship transmitted debt' (RTD) are often used by commentators to describe the same financial circumstances. Those who adhere to the use of the term ETD assert that the bond that exists in close relationships, and

¹³ *ibid.*

¹⁴ B. Fehlberg, *op. cit.*, 1997b, p. 3

¹⁵ *ibid.*, p. 3-4. These cases are; *Money v Westpac Banking Corporation* (1988) ASC 55-664 (Fed Ct of Aust) and in Canada *Manulife v Conlin* (1994) 20 OR (3d) 499 (CA). It is however possible that this phenomenon could be explained by the fact that perhaps settlement occurred before a court case or that male partners may not wish to admit to STD. Nonetheless, it would appear that women rather than men experience STD more frequently.

¹⁶ Australian Law Reform Commission (ALRC), Chapter 13: 'Sexually Transmitted Debt', in *Equality Before the Law: Women's Equality*, Report No 69, Part II, Australian Government Printing Service, Canberra, 1994, p. 243

¹⁷ *ibid.*

influences the acceptance of responsibility by one partner for the other, is based on trust and confidence within the relationship¹⁸. The focus is therefore on the 'emotional, rather than the sexual bond'¹⁹. Others recognise the term RTD to encompass other types of relationships where, for example, parents may sign for their children's debts, a person may sign for a friend's debt or same-sex cohabitees may agree to sign for either partner's debt²⁰.

However, in the case of the use of the term ETD, the downplaying of a sexual bond through reference solely to emotional dependence masks the fact that financial interdependence in marriage or a 'marriage-like' relationship is also a major determinant of the experience of STD. The sexual relationship that exists involves societal assumptions about 'commonality of interests and the roles of women in heterosexual relationships that do not arise in RTD's'²¹. Women in intimate relationships are more likely to be financially dependent on their husband or partner if they are the primary caregiver to the children of the relationship rather than the major breadwinner within the relationship. Even if women do have an external income from paid work, the dynamics of financial decision-making within the intimate relationship may contribute significantly to the experience of STD.

While the term RTD is impliedly more encompassing of a wider group of vulnerable

¹⁸ P. Baron, *The Free Exercise of Her Will: Women and Emotionally Transmitted Debt*, Law In Context, Vol 13 No 1, 1995

¹⁹ *ibid.*, p. 24

²⁰ K. Keating, Australian Finance 2000 Conference, Relationship Debt & Comparison Rates: A Caseworker's Perspective, Financial Counselling Services (Qld) Inc., February 2000, p. 2-4; J. Lawton, 'What is Sexually Transmitted Debt?' in Ministry of Consumer Affairs (Victoria), Summary of Proceedings – Women and Credit – A Forum on Sexually Transmitted Debt, 1991, p. 7-8; N. Howell, 'Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers'. The Australian Feminist Law Journal, Vol 4, 1994, p. 96; Report of the Expert Group on Family Financial Vulnerability, *op. cit.*, p. 4

²¹ N. Howell, *loc. cit.*

people, it tends to blur the distinctions between, for example, the non-sexual bond of parent to child and the sexual bond of same-sex partners. The term STD in my view remains crucial in drawing attention to the vulnerability of partners, in a marriage or marriage-like relationship, in household financial decision-making involving debt. Moreover, its use ensures a continued focus on women: the group currently most likely to sign loan contracts on behalf of their partners. I believe the term sexually transmitted debt should also encompass other types of debt such as credit card and personal loan debt, as against much of the existing literature that uses the term as a general description of third party guarantees for family businesses only.

The literature on sexually transmitted debt (STD) falls within two distinct categories, that by the popular press and the academic literature. The former includes non-academic articles, newspaper and magazine articles, and popular literature on 'how to' or self-help subjects. The popular literature that purports to reveal the 'secrets of money' within personal relationships or presumes to teach 'how to' save relationships and resolve household financial affairs recommends readers resist STD²². Consumer credit services such as Financial Counselling Services and Consumer Credit Legal Services have, since the late 1980s, produced guides and run conferences highlighting the issue of STD. As against the 'just say no' to STD literature, employees of credit services adopt the position that women's experiences do not fit the male model. Thus, contract law is inadequate to deal with STD. This body of law assumes that parties to a contract enter that contract with equal bargaining power in the absence of domestic influences. Consequently, the law ignores the emotional context of intimate relationships.

Within the academic literature, four major approaches have emerged. The first encompasses the legal construction of STD, which includes the analysis of relevant

²² For example see V. Wilson, The Secret Life of Money: Exposing the Private Parts of Personal Money, Allen & Unwin, 1999; M. Kaplan, For Love Not Money, Bantam, Sydney, 1999

cases and critiques of the development of an equitable principle in Australia and the United Kingdom that affords special protection to married women. The second and third approaches include feminist critiques of this legal construction and are based around two major theoretical discussions. The first issue concerns the separation and opposition between the two spheres of 'public' and 'private' in liberal theory and practice. The second deals with the difference/sameness/subordination debate which constructs women and men as homogenous within each gender but different between genders. The final approach is sociological and involves the reformulation of the sociological analysis of money and money relations. This literature identifies a shift from a traditional economic model that positions money as belonging to the market only, to the recognition that money acquires very different meanings upon entering the household.

The literature revealed that legal and social policy interventions to protect women from the experience of sexually transmitted debt have been instrumental in defining women as incapable in particular circumstances of financial decision-making. Women's actual experiences of household debt have not been explored within Australia. Yet the number of complaints made to financial counsellors, consumer organisations, and consumer protection agencies suggests that STD is a significant problem in the community²³. It is likely, and the findings of this thesis suggest, that an understanding of women's experiences of and responses to household debt will produce radically altered policy recommendations.

Chapters one to three form the literature review. Chapter one first discusses the construction of women as financially irresponsible in media reporting of sexually transmitted debt. Second, the methodology used in my research is discussed. During

²³ A. Taylor, How to get out of sexually transmitted debt: a guide for workers assisting women in debt. The Women and Credit Task Group, n.d, p. 6; K. Keating, *op. cit.*, p. 3; D. Eccles, '20,000 STD Female Callers', *Eastern Courier Messenger* 11 June 1997, p. 7

1999 and 2000, in-depth interviews using a semi-structured interview schedule were carried out with forty-seven women in South Australia. The aims, design and rationale for the research, the techniques I used to recruit the sample, the development of the questionnaire, methodological problems encountered, and the conduct of interviews are each discussed.

In chapter two I explore the legal construction of sexually transmitted debt through the examination of decided legal cases, and academic analysis and critiques of the judicial reasoning in each. I document the development of equitable principles during a sixty year period from the application of a 'special equity' principle enunciated in *Yerkey v Jones* in 1939 to the validation of that principle by the High Court of Australia in *Garcia v National Australia Bank* in 1998. Judicial decisions as to the legality of setting aside a guarantee or third party mortgage have varied significantly during this period. This chapter traces these changes through three possible applications under the law. The first affords special protection to women. The second affords neither women nor men special protection, that is, argues there should be no special category to provide relief in cases of sexually transmitted debt. The third affords special protection for married women and perhaps in the future, all cohabitees, heterosexual or homosexual, male or female.

Chapter three takes as its foundation the concept of financial dependence. I canvass four major theoretical influences in the experience of STD: the 'public' sphere/'private' sphere dichotomy; different key feminist jurisprudence theories that consider the subordination of women and, the 'different' moral voice; and the sociology of money. The analysis of these influences highlights the pervasiveness of an adherence to dualisms that serve to separate and oppose the market economy and the household economy thereby sustaining a theoretical impasse when considering how women can obtain equality under the law. I argue that the experience of STD contests the simplistic

categorising of strict analytical boundaries within these dualisms which only serve to perpetuate women's status as 'other' through the emphasis of a mismatch between the public world of the law and the private world of the home.

Chapter four focuses on emotional dependence within intimate relationships and explores the reasons why women agree or refuse to sign loan contracts for their partners. In this chapter, three differing groups of interviewees emerged: those who had agreed, those who had first agreed and subsequently refused and those who had refused. Though women now have full legal personhood through their freedom to contract and to alienate their property as they see fit, this does not ensure their right to that freedom and choice. My findings suggest that women experience a complex range of motivations when deciding whether or not to sign loan contracts. Women sign for emotive reasons of 'love and trust' but they also sign knowing they are unable to challenge the inequality of financial decision-making within their relationships.

Chapter five presents an analysis of the research data in relation to the consequences of women's signing or refusing to sign loan contracts. My research reveals that the effects on women of sexually transmitted debt are extreme and far-reaching. They include marriage breakdown, economic impoverishment, and related health issues. The post STD financial situation can be worse for women than divorce.

In chapter six the influence of the promotion of 'guarantor disadvantage' in the STD discourse as opposed to 'banks' advantage' is explored. The literature's persistent focus on the third party presumes that the commercial contract functions of the lender are impliedly normal and therefore not deemed to be in need of reform. Yet, the experiences of the forty-seven women in this study revealed otherwise. The way in which responsibility for payment is drafted and administered by financial institutions appears to be manifestly unfair to guarantors. Recommendations based on banks'

advantage are suggested.

The conclusion summarises proposed reforms, legal and otherwise, if one takes seriously that gender is a key factor in all aspects of the experience of sexually transmitted debt.

CHAPTER ONE

BACKGROUND TO THE STUDY

Women must take responsibility for knowing both where they stand financially in the relationship and the consequences for one or both partners if something goes awry²⁴.

Introduction

Government and company debt is a regular feature of 'business' news expressed in discussion of economic market concepts of Gross National Product, Gross Domestic Product, inflation and company receivership. World debt, the debt position of the nation and the financial health of our leading corporations and institutions is staple fare for the media. But a significant portion of the nation's debt appears to lie within households through the many thousands of debts held by individuals and secured by domestic partners. However, media reporting of the circumstances of these debts, and the size, impact and consequences of such debts is at best sporadic²⁵. When it is reported, discussion focuses on the nexus between romance and money and the term is used to describe repercussions from any form of joint borrowing. Moreover, the partner portrayed as most responsible for the financial decisions involved in the experience of STD is the woman.

²⁴ C. Webb, 'Sexually Transmitted Debt': Money and Investment Supplement, *The Age* 14 February 2000, p. 7

²⁵ Between May 1996 and May 2000, a national total of nine newspaper and magazine articles that specifically used the term STD were found.

In this chapter I first examine the way the issue of women and STD is represented in the mass media and popular culture. Second, I discuss the methodology employed in my research. I outline the aims of the research, then discuss the rationale for the research design, and the various stages of the study including the methodological problems encountered in eliciting a sample group.

When reported in newspapers or magazines, STD recurrently takes the form of a feature article that is often run during the month of February in conjunction with 'Valentine's Day' relationship advice²⁶. A typical example of an introductory paragraph states

You've had the Dear Joan letter. It's over. And as if the emotional wrench of parting wasn't bad enough, your ex-to-be has left you with a \$50,000 debt on his dream sports car. You co-signed on the loan years ago, during that honeymoon period when you thought love would last forever. You now realise that he spent the money meant for payments on the pokies and his new girlfriend. He's broke. The bank is snapping at your heels. Your financial counsellor meets you with grim news. You have contracted sexually transmitted debt²⁷.

With accompanying graphics of broken hearts and embracing couples, the message is constructed to convey the dangers for women in love. The emotion of love is consistently presented as the primary influence in the financial decision-making process of STD, and ownership of this emotion is always attributed to the female partner in all the articles.

Expert advice by financial counsellors and legal service personnel is used to support

²⁶ For example see J. Kavanagh, 'Love & Money', *The Weekend Australian* 21-22 February 1998, p. 6-7; M. Lyons, 'The Perils of Partners', *House and Garden*, February 1997, p. 149; C. Webb, *op. cit.*, p. 7-8

²⁷ C. Webb, *ibid.*, p. 7

accusations of women's irresponsibility when making financial decisions within their intimate relationships. In the majority of instances reporters suggest the problem arises because women do not understand the implications of their signatures and sign because they are 'naive and trusting'²⁸. They allow 'emotions to cloud what is essentially a business relationship'²⁹. Moreover, there is an assumption that women cede control of their finances to their partners because they believe that their partners will provide for them. In the 'Money Matters' section of a popular lifestyle magazine marketed to women, under the title 'The Perils of Partners', the circumstances of STD are explained thus:

The trouble with falling in love is that it tends to turn even the smartest of us into a twittering fool – usually for a couple of months, but sometimes for years. In the first throes of passion we tend to believe that this relationship will last forever and that the object of our deep affections would never abscond, leaving us with the kids, the mortgage and not much else³⁰.

Yet in a number of cases the newspaper or magazine articles are headlined in a way that implies both genders are equally responsible and in the same way for their financial decisions. But the text of the 'sad' stories of women's experiences of sexually transmitted debt, and often the accompanying graphics, send a message that the issue really only concerns one gender. There is only ever minor discussion of the male partner's behaviour. The following example illustrates behavioural contradictions inherent within reporting. In an accompanying illustration depicting a couple

²⁸ D. Eccles and R. Palmer, 'Breaking Up Leaves Lasting Financial Scars', *Eastern Courier Messenger* 11 June 1997, p. 6; C. Webb, *loc. cit.*, p. 7; A. Lampe, 'Ex-wives Face Debt Collectors': Money Supplement, *The Sydney Morning Herald* 6 August 1997, p. 1

²⁹ A. Lampe, 'Keep 'em Honest': Money Supplement, *The Sydney Morning Herald* 9 February, 2000, p. 7

³⁰ M. Lyons, *loc. cit.*, p. 149

experiencing STD, 'he' is dressed in old, worn clothing and holds an image of his partner in the form of a voodoo doll complete with pins. In opposition, 'she' is shown dressed in 'designer' clothing and sporting expensive jewellery. This representation of the woman having 'transmitted' the debt to her partner is in stark contrast to the wording of the article that positions STD as more likely to affect women.

The general infrequency of reporting assumes that this is a problem encountered by few within the community; despite this often within articles reference is made to STD as a 'common problem'. Financial counsellors quoted by reporters suggest 'numbers can't accurately be measured – current services are only dealing with the tip of the iceberg' and 'as many as one in five of their clients suffer from the syndrome'³¹. The age group of women affected is variously quoted as predominantly 'under 35'³² or 'women in their sixties'³³.

There has been no empirical research undertaken to explain the characteristics and experiences of women and sexually transmitted debt in Australia. Indeed internationally, to date, only Belinda Fehlberg in her English study has undertaken empirical research in this area to analyse the circumstances in which women have provided security for their partner's debts. Between 1993 and 1994 she completed a total of forty-nine interviews, with a sample group comprised of twenty-two sureties, five debtors, nine lenders, and thirteen lawyers³⁴. The sample group was drawn from members of a bank pressure group founded to agitate for changes in relation to a wide range of banking issues, including suretyship. Fehlberg concludes that a disparity exists

³¹ D. Eccles, '20,000 STD Female Callers', *loc. cit.*; C. Webb, *loc. cit.*, p. 7

³² D. Eccles, 'Love Trap: Can of Worms', *Eastern Courier Messenger* 11 June 1997, p. 7

³³ G. Miller, 'In Love and Debt: When the Law Hurts Women', *The Northern Herald* 6 June 1996, p. 20

³⁴ B. Fehlberg, *op. cit.*, 1997b, p. 92

between the experiences described by most sureties, and the perception and translation of their experiences by others, in particular by lawyers and lenders. The degree of actual involvement in the business, and understanding of the financial situation of the business contributed significantly to women's vulnerability when consenting to act as sureties.

There have been no other studies in Australia that have specifically examined the experiences of women and household debt, although the New South Wales Law Reform Commission is currently undertaking a review of the law relating to third party guarantees³⁵. Their involvement was triggered by a growing concern in the community about the consequences of the widespread use of third party guarantees³⁶.

Where Belinda Fehlberg and other legal commentators have sought to ask how women could avoid being held responsible for sexually transmitted debt under the law, my research asks how women could avoid an outcome of sexually transmitted debt when signing loan contracts for their husbands or partners. Also, and more significantly, my focus is how these women experience the process including the outcomes of household debt. In an attempt to discover the degree and extent of sexually transmitted debt amongst women, my research set out to explore this issue in South Australia. In general the academic literature has focussed on the legal consequences of STD. There has been no consideration of what the consequences for women are when they, through their economic circumstances, are unable to access the legal system or choose not to because the amount involved is considered insufficient to justify that action. This thesis is concerned with the gendering of sexually transmitted debt through the mapping of distinctions between male and female seen through patterns of 'advantage and

³⁵ New South Wales Law Reform Commission Review, *Guaranteeing Someone Else's Debts*, Issues 17, April 2000 [Online, accessed 25 July 2000] URL: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip17>

³⁶ *ibid.*, p. 2

disadvantage, exploitation and control, action and emotion, and meaning and identity'³⁷.

Researching the issue of money within marriages and married-like relationships is likely to present methodological problems because of the very private nature of the topic³⁸. While eliciting information about financial arrangements within intimate relationships poses a significant problem, seeking information from people about their household debts could be considerably more difficult. The very limited number of research studies in this area reflects a lack of interest for researchers. No attention has been paid to intra household cash equity before Meredith Edwards' research undertaken in the early 1980s. A search of library databases relates the term 'domestic debt' to 'public' sphere economic examinations of money and economic stability generally through Gross Domestic Product, fiscal policy and the International Monetary Fund (IMF). Keywords such as domestic, debt, household debt, marriage debt, money, money and law, household credit, domestic credit, and women and credit provided a very limited literature.

Aims of the Research

The principle aim of the research is to examine the involvement of South Australian women in sexually transmitted debt. The research aims to answer the following questions, questions that a literature review revealed had not been adequately addressed. These questions were refined as a result of exploratory interviews undertaken.

³⁷ J. Acker, 'Hierarchies, Jobs and Bodies: A Theory of Gendered Organizations', Gender and Society, Vol. 4 No 2, 1990, p. 146 cited in L. Adkins, Gendered Work: Sexuality, Family and the Labour Market, Open University Press, Buckingham, 1995, p. 1

³⁸ M. Edwards, Financial Arrangements Within Families, National Women's Advisory Council, Canberra, 1981, p. 32; S. Singh, Marriage Money: The Social Shaping of Money in Marriage and Banking, Allen & Unwin, 1997, p. 31; V. Wilson, *op. cit.*, p. 35

- 1) What are the contributing factors that cause women to incur potential debt by signing loan contracts from which they receive no benefit?
- 2) What are the consequences of signing?
- 3) To what extent are there circumstances other than those suggested by the literature that would explain why women in married or married-like relationships allow debt to be incurred?
- 4) Does STD adequately describe the experiences of all women who sign loan contracts or does the term only acknowledge family business debt and so excludes the experiences of many women?

Studies of household financial relations, those few that have been undertaken, have almost exclusively focused on the distribution of assets within households in the form of monies and not liabilities in the form of debts³⁹. The most recent sociological study is Supriya Singh's Australian study undertaken between 1991 and 1992. This focuses on the meanings of money in marriage and banking and identifies how these monies shape both non-economic and economic values⁴⁰. However, as with the other studies, Singh does not discuss specifically, except briefly, the nature of money as a liability.

Research Design

In order to establish the relevant questions and issues, a series of unstructured exploratory interviews were undertaken with solicitors and financial counsellors from

³⁹ M. Edwards, *op. cit.*; J. Pahl, Money and Marriage, Macmillan, London, 1989; S. Singh, *ibid.*

⁴⁰ S. Singh, *ibid.*

community agencies who had dealt with women who were experiencing or had experienced STD. These agencies were the Legal Services Commission⁴¹, Adelaide Central Mission Inc⁴², Wesley Uniting Mission Inc⁴³, Women's Legal Service SA Inc⁴⁴ and the Office for the Status of Women⁴⁵. The interviews had two further purposes. The first was to ascertain the extent and degree of sexually transmitted debt and the second to gain access to a sample group for the research study.

A questionnaire for these unstructured interviews was not prepared but a general guide was produced in the form of a checklist of issues to be discussed. Questions were defined from the key issues reported in the 1994 Australian Law Reform Commission's Report on Sexually Transmitted Debt in *Equality Before the Law: Women's Equality*⁴⁶. Interviewees were questioned on the extent of their knowledge of the term STD, whether they were dealing with women who were or had experienced STD, if they believed that STD was a significant problem within the community, and if they had seen an increase or decline in the number of women involved in STD during this decade. These interviews revealed that STD was considered to be far-reaching within the community and that further research was necessary. Despite the policy reform recommendations made by the Australian Law Reform Commission's 1994 Report, and implemented in part in South Australia, all of those interviewed believed that the incidence of STD had not declined and was currently as high as it had been prior to the report. Further, interviewees could not foresee any decrease in the incidence of STD in

⁴¹ Janet Maughan, Interview [29/5/98]

⁴² Rosie Atkinson, Interview [27/5/98]

⁴³ Hugo Antezana, Interview [17/6/98]

⁴⁴ Melissa Ballantyne, Interview [3/7/98]

⁴⁵ Alanna Crossey, Interview [10/7/98]

⁴⁶ Australian Law Reform Commission, *op. cit.*

the near future.

From these interviews, a sample group from the Women's Legal Service (WLS) was selected. The Women's Legal Service was chosen for two reasons. First, they provide a free legal service throughout the metropolitan area and rural South Australia, through the provision of telephone advice and information and face-to-face advice. This allowed access to women of all ages, education, marital status, location and income. Second, since its establishment in South Australia in 1996, approximately 45 women had sought advice from WLS regarding their liability for debts incurred by their partners within domestic relationships. This sample allowed a qualitative study using a purposive sampling procedure⁴⁷. This sampling technique was considered to be more appropriate than stratified random sampling. Random sampling requires a large sample size, usually widely scattered, and it would have been expensive, time consuming and relatively complicated⁴⁸. Although the WLS sample was not a statistically representative sample of Australian women, my sample includes women from all socio-economic groups. WLS offered to notify the researcher of further clients as staff were contacted by women who sought advice regarding their liability for debts. The sample therefore was expected to expand during the course of the research period.

From the case notes of the WLS sample I realised that, although STD was defined in relation to women's liabilities for the business debts of their partners, many of the sample group were liable for debts that, while they were still incurred by their partners, were not related to family businesses. This realisation was instrumental in widening the research question to include women's experiences of household debt, including personal

⁴⁷ S. Sarantakos, *Social Research*, MacMillan Education Australia Pty Ltd, Australia, 1993, p. 138. Purposive sampling is the technique whereby researchers purposely choose subjects who, in their opinion, are thought to be relevant to the research project.

⁴⁸ *ibid.*, p. 126

loans, gambling and credit card debts as well as commercial business debts. From my discussions with the Women's Legal Service, it became clear that a significant number of women had experiences in this broader definition of household debt. An interview schedule was developed that would reflect this diversity of experience.

In the literature many commentators had claimed to *know* why women experienced STD. In order to challenge or confirm these assumptions a method that would allow women to speak for themselves was necessary. A questionnaire or a formal interview would have perpetuated assumptions of women's experiences derived from the literature, by framing questions around a response to those assumptions. The 'closed' approach of both methods does not allow the opportunity for respondents to engage in the process of research through clarification or expansion of their experiences⁴⁹. Such an approach would be neither 'exploratory' nor 'investigatory' for it assumes that

the researcher is already sufficiently familiar with the phenomenon being investigated to be able to specify, in advance, the full range of experiences studied and how these can be encapsulated, categorized and measured⁵⁰.

Oakley argues that sociological research has been instrumental in the separation of the researcher from the 'subject' of the researched through its objective, detached and hierarchical approach to the collection of data through interviews⁵¹. The 'proper' role of the interviewer, according to methodology texts, has been to define the role of the

⁴⁹ S. Sarantakos, *ibid.*, p. 159

⁵⁰ M. Maynard, 'Methods, Practice and Epistemology: The Debate about Feminism and Research' in M. Maynard and J. Purvis, (eds.), Researching Women's Lives from a Feminist Perspective, Taylor and Francis, London, 1994, p. 11

⁵¹ A. Oakley, 'Interviewing Women: A Contradiction in Terms' in H. Roberts (ed.), Doing Feminist Research, Routledge & Kegan Paul, London, 1981, p. 37-38

interviewees as subordinates, thereby rationalising inequality⁵². By using a feminist methodology that promotes non-exploitative and inclusive methods trust can be established between interviewer and interviewee. However, as Maynard states, 'it is not always so easy to reduce the power dynamics that are likely to be present in research'⁵³. Feminist researchers may deny that they have knowledge and skills in order to minimise differences between women or encourage women to discuss aspects of their lives concerning which, on reflection, they might have preferred to remain silent⁵⁴.

As the aim of the interview was to hear the women tell the stories from their perspective, a semi-structured interview was deemed the most suitable approach. This structure would allow a schedule that incorporated issues appropriate to the aims of the research while accommodating flexibility of question order, wording and range⁵⁵. While interviewees would be encouraged to speak in their own terms, their responses would still address the research questions⁵⁶. The questions devised for the interview schedule (See Appendix I) were derived from the initial exploratory interviews and the literature review. While the schedule appears overly detailed and lengthy, it was used as an aide memoire⁵⁷. As described in sociological methods of research⁵⁸, this method allows respondent-oriented direction within the interview. The researcher is reminded of certain areas that need to be discussed during the interview.

⁵² *ibid.*, p. 40

⁵³ M. Maynard, *op. cit.*, p. 16

⁵⁴ *ibid.*

⁵⁵ *ibid.*, p. 179

⁵⁶ W. Lawrence Neuman, Social Research Methods: Qualitative and Quantitative Approaches, 3rd edn, Allyn and Bacon, Sydney, 1997, p. 262

⁵⁷ R. Burgess, In the Field: An Introduction to Field Research, Allen & Unwin, London, 1984

⁵⁸ See for example V. Minichiello, R. Aroni, E. Timewell, L. Alexander, In-Depth Interviewing: Researching People, Longman Cheshire, 1995, p.115

The questions were grouped into seven categories: personal details, relationship to debtor and their personal details, knowledge of the debt/s, reasons for signing the contract, actions of financial institution/s involved, experiences of money and debt within the relationship and consequences of the debt/s (See Appendix I). As I would be eliciting information from these women that was of a very private nature, the beginning of the interview took on particular significance. The purpose of the research was explained, confidentiality reiterated and advice given that the interviewee had a right to abandon the interview at any time should she wish. All were advised that pseudonyms would be used in any future publications, that tape recordings would be destroyed immediately after transcription and that transcripts would be held in a secure location.

The respondent was also told the headings of the seven categories. This meant that respondents immediately had an overview of the interview 'shape'. This would provide clarity for interviewees of the interview content thereby avoiding a presumed shared definition of sexually transmitted debt⁵⁹. For example, some of the women had heard the term STD previously and understood it to only mean acting as a surety for a husband's/partner's business debt. The other aim was to allay any fear that questions and issues may be too personal to discuss⁶⁰. Many of the women had not previously discussed their private lives with an 'outsider'. Some had expressed concern prior to the interview that it would be difficult to discuss the amounts of money involved for they perceived these issues to be very private. The category headings allowed them to foresee that it was unnecessary to give exact details of amounts. However, during the course of the interviews forty-two of the women ultimately disclosed these figures voluntarily.

⁵⁹ L. Kelly, Surviving Sexual Violence, University of Minnesota Press, Minneapolis, 1988, p. 9

⁶⁰ T. Miller, 'Shifting Layers of Professional, Lay and Personal Narratives' in J. Ribbens and R. Edwards (eds), Feminist Dilemmas in Qualitative Research: Public Knowledge and Private Lives, Sage Publications, London, 1998, p. 61

In addition, the term 'sexually transmitted debt' or 'household debt' was used in preference to the use of 'third party guarantees' to allow the topic to be meaningful to these women's experiences. As De Vault asserts, 'by speaking in ways that open the boundaries of standard topics, we can create space for respondents to provide accounts rooted in the realities of their lives'⁶¹.

Within each category an introductory sentence was used to allow the respondent to have a clear understanding of the format of that section. This would allow her to tell her story freely and without interruption⁶². The phrases, 'I would like to hear about your experiences of ...' and 'Now I would like you to talk about ...' were included in these sentences. The questions within each category were then used as a guide to either probe for further detail or used as a checklist for me to ensure certain issues had been covered and, if necessary, to ask supplementary questions. In this way, the interview schedule allowed for flexibility in the order of categories discussed within the interview and the inclusion or exclusion of categories that were not relevant to respondents⁶³. After the first three interviews the interview schedule was revised slightly to address a major concern identified by these respondents. One of the respondents had been forced to declare bankruptcy, and the husband of another respondent had been able to avoid bankruptcy for the couple's own debts. The inclusion of the questions, "Was bankruptcy an option?" and "If so, why or why didn't you take that option?" were added to the schedule in order to elicit reasons for declaring or avoiding bankruptcy.

⁶¹ M. DeVault, Liberating Method: Feminism and Social Research, Temple University Press, Philadelphia, 1999, p. 63

⁶² S. Reinharz, Feminist Methods in Social Research, Oxford University Press, Oxford, 1992, p. 25

⁶³ V. Minichiello, *et al.*, *loc. cit.*

Sample Groups

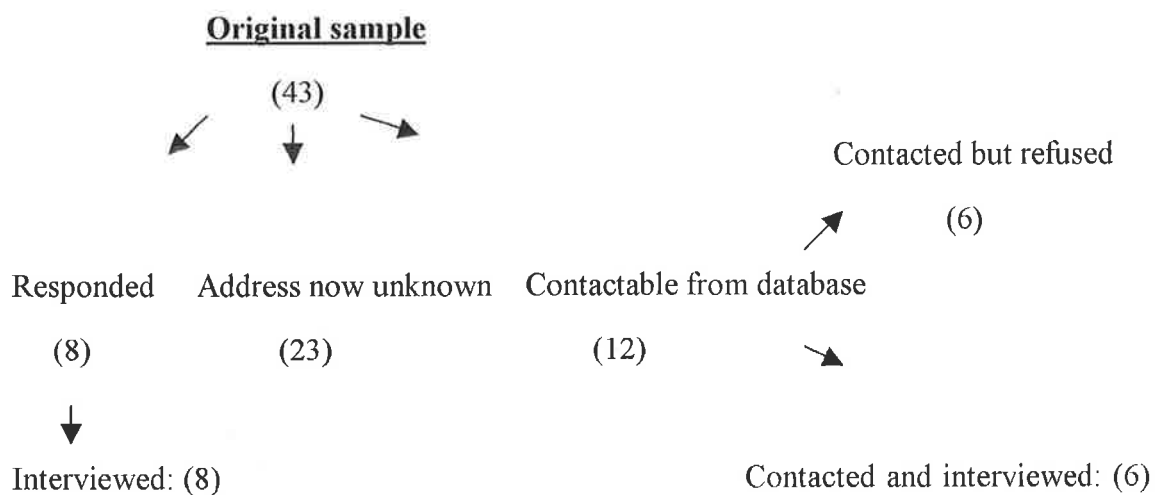
Group A: Women's Legal Service

Prospective interviewees were initially contacted through a letter from the Women's Legal Service, which introduced the research and me. The letter explained the purpose of the study, urged the reader to become involved and stressed an assurance of strict confidentiality. Interested prospective interviewees returned an authority form to the WLS giving me permission to access their files and agreeing to be interviewed for the study. Respondents' files were then examined in order to provide background information as to the circumstances of the debts incurred. This proved extremely useful during the subsequent interviews. Sometimes the women had forgotten the exact details of transactions and correspondence with the particular financial institutions involved and I was able to clarify the history of events for them.

Of the forty-three women contacted by mail, only eight agreed to be involved in the study. Another woman wrote to explain that she would have liked to have been involved but asserted that "it was all too raw at this time" although she stated contact at a later time was still an option but did not specify when that could occur. A further three letters were returned with 'addressee unknown' or 'has left this address'. After further discussions with the WLS they provided me with the database list of the forty-three women. This enabled me to contact by telephone those women who had not responded to ask whether they wanted additional information about the study before considering again whether they wished to be involved.

However, this presented some difficulties. Many of these women had separated, were in the process of separation or were now divorced. As this experience meant that many had moved addresses, they were no longer contactable at the telephone numbers from

the WLS database. A search of the White Pages listings on the World Wide Web and of the current hardcopy 1999 Telephone Directory White Pages provided only two relevant telephone numbers to contact. Of those who I contacted but who refused an interview, two women are still in the marriage in which the debt occurred and felt that being interviewed may cause difficulties of privacy and trust within their marriages. Another three felt that their experiences were too private to discuss with me. Two other women agreed to be interviewed but, despite making appointments with me to discuss their experiences, were not available at the prearranged time. When contacted again, one elected to decline being interviewed and the other rescheduled the time and subsequently was interviewed. By the end of November 1999 eleven interviews had been undertaken. Of the remaining nine potential interviewees, three agreed to an interview, producing a total of fourteen interviewees from the Women's Legal Service sample group.



Group B: *The Messenger* Newspaper

A control group, described below, was also sought to allow for a comparison of the circumstances, attitudes and consequences between women who signed and did not

sign. In order to increase the sample size, and to include a control group, I placed an article in the local "free" suburban newspaper, *The Messenger* briefly explaining my research and asking for respondents⁶⁴. I contacted the Chief of Staff of *The Messenger* Newspapers in early December 1999 to gain approval for the inclusion of an article and advice as to when the article could be included in the newspaper. The Chief of Staff advised that Messenger Press would print an article that I submitted to them and that they would send it to print, including a photograph of me, at a time of my choosing. Accordingly, I compiled the following article.

"SEXUALLY TRANSMITTED DEBT RESEARCH"

Have you been held responsible for your spouse's/partner's debts even though you had no benefit from the loans made to your partner?

Or have you refused to sign a loan contract with your partner/spouse because you felt that the loan would benefit your spouse and not you? Or for any other reason?

Adelaide University PhD student Ainsley Harper is researching the experiences of women and domestic debt. This has become known in the media as 'STD' or 'sexually transmitted debt'. It is very often wives or other female partners who support their male partners and so become involved in STD or domestic debt.

Some women co-sign loan guarantees over the family home to secure finance for a partner's business. When their spouses/partners are unable or unwilling to pay the debts because of bankruptcy or separation/divorce the bank seeks repayment of the loan from these women. Some women act as guarantors for their spouse's/partner's personal loans for vehicles and are held responsible for all the repayments. Some women leave bills and money with partners to be repaid only to find he has spent the money on something

⁶⁴ There are eleven *Messenger* newspapers circulated throughout Adelaide: *The City Messenger*, *East Torrens Messenger*, *News Review Messenger*, *Hills & Valley Messenger*, *Portside Messenger*, *Southern Times Messenger*, *The Weekly Times Messenger*, *Standard Messenger*, *Guardian Messenger*, *Leader Messenger* and the *Eastern Courier Messenger*.

else and the electricity has been cut off. Some women with credit cards in joint names are held responsible for all the debts incurred when their partners are unable or unwilling to repay their share.

This research is important in understanding the degree and extent of difficulties experienced by women in their domestic financial arrangements and dealings.

Ms Harper is seeking to contact women who have become involved in domestic debt, as well as those who have refused to. If you would like to tell your stories explaining why you signed, or did not sign loan contracts and the consequences of your decisions, please contact Ms Harper from the Department of Social Inquiry on XXXX XXXX. Your name and story will be treated with strict confidentiality.

The Messenger is circulated throughout the metropolitan area of Adelaide. Eleven different suburban groupings produce this weekly newspaper under the umbrella of *The Messenger*. Each of these groupings had a circulation ranging from approximately 15,000 to 70,000 at the time of publication and the combined *Messenger* circulation at the time was listed as 502,500. In order to elicit a maximum response it was anticipated that my article would be printed in each of these eleven editions some time in January 2000. The Chief of Staff advised that individual editors would choose when they would print the article depending on the availability of their 'local' news. On 12 January 2000 four of the eleven areas included the article in their copy. A further two areas printed on 17 January. Within the first five working days I had a total of thirty-five responses. In the following five days a further twenty-three women contacted me.

From the article an Adelaide radio station rang me to discuss my research and to offer their inclusion of my call for respondents on their mid-afternoon talkback show. This generated two more respondents. The Australian Associated Press interviewed me and

subsequently extracts of my article, minus the phone number, appeared on 17 January 2000 in *The Advertiser*, *The Canberra Times*, *The Age (National Edition)*, *The New Zealand Herald*, and *The Dubbo Liberal*. The National Edition of *The Age* article generated contact from the ABC in Melbourne for a pre-recorded interview for talkback radio. From this circulation, another two respondents from Adelaide and one from Dubbo, New South Wales, contacted me via the University. Although the Dubbo respondent was outside my sample boundary and could not therefore be included in the total number, occasional references are made in the thesis to her shared experiences with the women in the sample.

By the third week in January and prior to the printing of my article in the remaining six *Messengers*, I withdrew the article from circulation. Although this meant that I would not be adding to the representativeness of the sample group, the radio and additional newspaper coverage generated far more respondents than could be realistically included in the research. Of those who responded to the media exposure of the article, thirty-three were interviewed, yielding a total number of respondents for the study of forty-seven. The selection of the thirty-three was based on their willingness to be included in the study, and their availability for interview.

As Table 2.1 (See Appendix II) indicates, respondents were located throughout metropolitan Adelaide with one from Woomera in the Lower North of South Australia. Eleven of the thirty-three were interviewed over the telephone. In all cases they had expressed their desire to either remain anonymous or to disclose their identity but refrain from becoming involved in a face-to-face interview. All were asked for, and gave, their consent to the inclusion of their stories in the study. Five agreed to provide their addresses and were sent consent forms. The remaining twenty-two respondents gave their written consent before being interviewed. Appointments were made a few days in advance and respondents were interviewed in either their own homes, at their

place of work, at my place of work or in a local park. All interviews were taped and transcribed by me, a commitment I gave to interviewees prior to tape-recording. The tapes were edited from a speaking voice made with its frequent use of 'ums', 'ahs' and 'you knows' to allow for a more easily read written form. All the respondents from *The Messenger* sample group were interviewed by the end of March 2000. Interviews ranged in length from one to three hours, but on average took one and a half hours.

Control group

I also sought women in *The Messenger* article who had refused to sign loan contracts for their partners, friends or relatives. This would allow a comparison between women who signed and did not sign in terms of their attitudes, circumstances and consequences. Two of the seven categories from the interview schedule were changed to reflect a 'refusal to sign' decision. In Section four (See Appendix I), the women were asked their reasons for not signing the loan contract, and in Section five, the women were asked about the reactions, if any, of financial institutions to their not signing. A comparative group of approximately ten was sought. Of the thirty-three interviewees, ten indicated that they had refused to sign loan contracts. But it became clear in their interview responses that seven of those had both agreed and refused to sign on separate occasions. Profiles of respondents are included in Appendix II.

In the following chapter I examine key legal judgements that have influenced the remedies available to women who have challenged their liability for debts 'contracted' through an intimate relationship.

CHAPTER TWO

THE LEGAL CONSTRUCTION OF SEXUALLY TRANSMITTED DEBT

What is in issue is the important question of principle as to whether the law's protection should be offered on the basis of assumptions about a dependent relationship as described 50 years ago or grounded in a more discriminating principle which can be adapted to the facts of the relationship proved⁶⁵.

Introduction

This chapter explores the development of equitable principles during a sixty year period from the application of a 'special equity' principle enunciated in *Yerkey v Jones*⁶⁶ in 1939 to the validation of that principle by the High Court of Australia in *Garcia v National Australia Bank*⁶⁷ in 1998. Each of the cases examined during this period deal with the circumstances of women assuming liability for their husband's commercial debts. Judicial decisions in these cases both within Australia and the United Kingdom have varied significantly. When married women have sought relief from their guarantee liabilities they have, by some courts, been deemed to require special protection under the law because of the nature of their relationship and the potential for impropriety on the part of their husbands. Other courts have considered special protection to be inappropriate to the requirements of women's equality in contemporary society and have applied different equitable principles. Yet in other cases judicial members consider that

⁶⁵ *Warburton v Whiteley* (1989) 5 BPR 11,628 at 11,630

⁶⁶ (1939) 63 CLR 649

⁶⁷ (1998) HC 72 ALJR 1243

both men and women require special protection. These three variants will be traced in order to reveal how the law currently protects women from sexually transmitted debt.

Under the criteria of the law, a contract is a legally binding agreement or promise between two or more parties, which gives rise to rights and obligations. The modern law of contract assumes freedom of contract, that is, freedom to decide whether to enter into a contract and freedom to negotiate contractual terms. The law of contract also assumes that parties to the agreement will seek to maximise their individual outcomes and will have equal bargaining power⁶⁸. To relieve or soften the technical strictness and deficiencies of the common law, equitable principles were formulated and developed as a separate body of law, by the English Court of Chancery⁶⁹. This concept of *fairness* has been described thus:

Equity is but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, ... assists the law where it is defective and weak and defends and protects the law from crafty evasions of justice (per Sir Nathan Wright in *Lord Dudley v Lady Dudley* (1705) Pree Ch 241 at 244)⁷⁰.

The law of equity evolved in the thirteenth century in England by way of the King referring certain classes of petitions of litigants to the Lord Chancellor for consideration for equitable relief. While the Chancellor initially gave his rulings in the King's name, over time he did so through a special court called the Court of Chancery⁷¹.

Several grounds for relief developed by this Court of Chancery have been used to set

⁶⁸ J. Carter and D. Harland, *Contract Law in Australia*, 3rd edn, Butterworths, Australia, 1996, p. 7

⁶⁹ W. Weerasooria, *op. cit.*, p. 144

⁷⁰ *ibid.*, p. 145

⁷¹ *ibid.*, p. 144

aside contracts that involve mortgages of the matrimonial home given as security to banks by third parties. These grounds include the equitable principles of misrepresentation, unconscionability, duress and undue influence. Misrepresentation is defined as the giving of a 'false statement of a material fact by one person to another' so as 'to induce the other party to enter into the contract and which has this effect'⁷². In circumstances where this misleading statement has led someone to enter the contract, that person should be permitted to withdraw from the contract. Relief on the ground of unconscionable conduct refers to cases where a stronger party, by means of exploitation of the other party's weakness, has obtained an advantageous contract. That weakness may be due to special disadvantages such as 'poverty or need of any kind, drunkenness, sickness, age, inexperience, illiteracy, ill-health and eccentricity' and the other party knowingly took unfair advantage of the complainant⁷³. The concept of unconscionability is derived from that which is 'contrary to conscience and not right or reasonable'⁷⁴. While unconscionable dealing relates to the conduct of the stronger party in attempting to enforce the contract, undue influence relates to the quality of the consent or assent of the weaker party⁷⁵.

In cases of undue influence, though the weaker party has been willing to enter into the contract, her or his lack of 'freedom of judgement', either because of the 'particular circumstances or the relationship of the parties', is ground for relief⁷⁶. Undue influence is interpreted to mean a subtle form of pressure that is 'usually exercised over some period of time' and plays on the 'psychological weakness of the victim'⁷⁷. By contrast,

⁷² J. Carter and D. Harland, *op cit.*, p. 349

⁷³ W. Weerasooria, *op. cit.*, p. 543

⁷⁴ The Concise Oxford Dictionary, 9th edn, Clarendon Press, Oxford, 1995, p.1519

⁷⁵ Deane J in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474

⁷⁶ W. Weerasooria, *op. cit.*, p. 512

⁷⁷ *ibid.*

the doctrine of duress provides relief because of overt pressure exercised by one party through threatening behaviour⁷⁸. Duress is a 'coercion of the will so as to vitiate consent' and traditionally has meant actual violence or threats of violence directed to the personal safety or liberty of the other party to the contract or his or her family⁷⁹. Duress does not involve an effective choice of whether to enter into the contract or not. Though undue influence and duress differ in form, often duress is included under the doctrine of undue influence because of the fine line between coercion, force and compulsion.

Special Protection for Married Women

The general rule at common law prior to the enactment of the married women's property legislation was that a married woman had no legal personality separate from that of her husband and so lacked contractual capacity. Thus her contracts were void⁸⁰. While a woman was unmarried she was *feme sole* and during the period of her marriage (coverture) she was a *feme coverte*⁸¹. According to Blackstone in his eighteenth century Commentaries on the Laws of England

By marriage the husband and wife are as one person in law. The very being or legal existence of the woman is by the common law suspended during marriage, or, at least, it is incorporated and consolidated into that of the husband, under whose wing protection and cover she performs everything. (Vol I at 442)⁸².

⁷⁸ *ibid.*

⁷⁹ *ibid.*, p. 525

⁸⁰ J. Carter and D. Harland, *op. cit.*, p. 319

⁸¹ J. Mackinolty, 'The Married Women's Property Acts' in J. Mackinolty and H. Radi (eds.), *In Pursuit of Justice: Australian Women and the Law 1788-1979*, Hale & Iremonger, Sydney, 1979, p. 68

⁸² *ibid.*

Consequently, the husband was entitled to the whole of the income from his wife's land (real property) during coverture and could alienate or mortgage, but not sell, this interest in the income without his wife's consent. At common law, the wife could not deal with the land or the income from it⁸³. Moreover, any personal property such as money and furniture of the wife, including land, was vested absolutely in the husband during coverture⁸⁴. Therefore, without property, married women were contractually disadvantaged. They were not only unable to contract to dispose of or acquire property but they were precluded from providing contractual liabilities necessary when obtaining credit⁸⁵.

During the late sixteenth and early seventeenth centuries rules in equity partially mitigated the position at law by developing the doctrine of the married woman's separate estate. Equity required that in the event of the title of property being transferred to a husband, if the title wording indicated that it was for her sole and separate use then he must act as trustee of her real property for her⁸⁶. Further, he must allow her to sell the property, pledge it for credit, or bequeath it as she wished⁸⁷. This separate estate of a married woman allowed her limited contractual capacity to the extent of proprietary liability rather than personal liability. Thus, the married woman was not subject to an absolute and unlimited contractual liability but 'to a liability qualified and limited by reference to particular property which she had owned at a particular moment of time'⁸⁸. If property had been given to the married woman without

⁸³ *ibid.*, p. 69

⁸⁴ *ibid.*

⁸⁵ J. Carter and D. Harland, *op. cit.*, p. 320

⁸⁶ *ibid.*

⁸⁷ M. L. Shanley, 'Suffrage, Protective Labor Legislation, and Married Women's Property Laws in England', *Signs*, Vol 12 No 1, 1986, p. 73

⁸⁸ *ibid.*

the specificity of her 'sole and separate use', and her husband chose to use the income as he pleased, then she would need to establish her right in equity through the Chancery Courts. If she did take her case to court it was likely that the husband could defeat her, by showing that he was living with her and suitably maintaining her and their children⁸⁹. As John Mackinolty asserts, this avenue of redress remained the privilege of the wealthy with their access to money and time⁹⁰.

The proprietary contractual capacity of married women was further expanded through the Married Women's Property Act of 1870 legislated by the British Parliament. The Act specified that all the property of a married woman, no matter when acquired, should be her separate estate and subsequently she should be capable of suing and being sued under contract⁹¹. Reform in Australia followed the English Act with the New South Wales Married Women's Property Act in 1879 and subsequent acts in all other States⁹². Under this first New South Wales act the status of married women as *feme coverte* remained unchanged, with the exception of specified property. Wives were not given any general power to enter into contracts. The specification of particular types of property allowed her to contract to bind her separate estate. This only included wages earned through her labour; savings bank accounts; shares, debentures and stock in joint stock companies; and funds in Friendly Building, and Co-operative Societies⁹³. Otherwise she required the agreement of her husband.

Prior to the Married Women's Property Acts, under the common law a wife could not

⁸⁹ J. Mackinolty, *op. cit.*, p. 71

⁹⁰ *ibid.*

⁹¹ J. Carter and D. Harland, *loc. cit.*

⁹² For a list of the Acts in Australia see *ibid.*

⁹³ J. Mackinolty, *op. cit.*, p. 73

will her real estate. This was to 'protect her heirs by stopping the husband influencing her to make a will in his favour'⁹⁴. Having made provision for the wife's separate estate, the Chancery Court deemed it necessary to protect a wife from her husband 'who might, by undue influence or persuasion, overbear her will and force her to deal with her separate estate to his benefit'⁹⁵. This distinguishing feature termed 'restraint upon anticipation'⁹⁶ allowed the insertion of a 'clause by conveyancers prohibiting a married woman from anticipating her entitlement' under the marriage settlement thereby restraining her from 'assigning to her husband her interest in the settlement'⁹⁷. These equitable rules were formulated to allow the wife's father's family to protect their property. This ensured that the daughter's property descended to her children, or in the absence of children, reverted to her father's family⁹⁸. Under its second major Married Women's Property Act, the New South Wales Parliament in 1893 moved to assign full legal capacity to the married woman. This allowed her, without the consent of her husband, to take action to defend her property, to enter into contracts, make wills and, to sue and be sued⁹⁹. The doctrine of restraint upon anticipation remained.

A married woman's right to assume personal liability for her contracts was only secured by the British Parliament after 'almost three decades of agitation' by feminists' campaigns¹⁰⁰. Mary Lyndon Shanley points out that the legal profession has largely attributed married women's property law reform to a natural progression of

⁹⁴ *ibid.*, p. 69

⁹⁵ *ibid.*, p. 70

⁹⁶ J. Carter and D. Harland, *op. cit.*, p. 321

⁹⁷ J. Mackinolty, *op. cit.*, p. 71

⁹⁸ S. Fredman, Women and the Law, Clarendon Press, Oxford, 1997, p. 45

⁹⁹ *ibid.*, p. 74

¹⁰⁰ M. L. Shanley, *op. cit.*, p. 74

civilisation¹⁰¹. This, she asserts, masks the 'convergence and conflict between feminists and political and judicial authority'¹⁰². Lawyers sought to get rid of the 'legal contradiction and confusion between law and equity' while feminists 'sought a deep and broadly significant change in domestic relations'¹⁰³. Linda Speth notes the failure of legal historians to recognise the women's rights movement in their discussions of the married women's property act reforms. Instead, they attribute the acts to 'attempts to regulate debtor-creditor relations' thereby making 'the law better fit the needs of a commercial market economy'¹⁰⁴. Mackinolty attributes married women's property law reform in England to the recognition by the British Parliament of the inherent class bias that allowed only the wealthy to contest the doctrine of coverture¹⁰⁵.

However, he does recognise, through the passage of the bill in the New South Wales Parliament at the time, the threat to men's political and interpersonal dominance of the public sphere by women's entry into this sphere. Extracts of parliamentary debate from the Sydney Morning Herald of 1878 and 1879 illustrate the paternalistic reasoning of politicians¹⁰⁶:

J. Leary MLA: the legislation 'might have the effect, in a large number of instances, of severing the ties of affection between husband and wife by giving to the wife a position of independence apart from her husband';

¹⁰¹ *ibid.*, p. 73

¹⁰² *ibid.*, p. 75

¹⁰³ *ibid.*, p. 74

¹⁰⁴ L. Speth, 'The Married Women's Property Acts, 1839-1865: Reform, Reaction or Revolution?' in D. K. Weisberg (ed.), *Women and the Law*, Schenkman, Cambridge, Massachusetts, 1982, p. 71

¹⁰⁵ J. Mackinolty, *loc. cit.*

¹⁰⁶ Mackinolty notes that there was no NSW Hansard at that time.

W. J. Foster MLC: 'Suppose some drudge in a government office, or a merchant's office, got married to some young lady, and she suddenly came into say £50,000, and that she thought fit to allow her husband to continue to go about his drudgery, while she went and spent the money. The children were hers as much as the husband's, and she had a right to contribute to support them. The clause would introduce a complete revolution in social affairs. He did not think that this power should be given to ladies, who were not generally educated in the manner of the control of money as men were'.¹⁰⁷

Given the history that constructs married women, until very recently, as incapable of legal personhood, what has been the law's subsequent response to women who seek legal relief to protect their property?

In contesting the validity of security documents to which married women have signed as guarantors, married women have had various pleas available to them in Australian courts. In order to avoid liability for the loan, they have argued that they did not read and understand the security documents as the documents were not read or explained to them; that they did not appreciate the nature and extent of the personal liability they were undertaking; that they had no independent legal advice about the transaction; that they were unduly influenced or pressured by the husband or by the bank or by both to give such an undertaking; that the transaction as a whole was unconscionable and improvident in relation to them and therefore, the bank could not enforce the debt¹⁰⁸.

Furthermore, aside from the more general equitable principles of misrepresentation, unconscionability, duress and undue influence as described earlier, a special equity

¹⁰⁷ *ibid.*, p. 74

¹⁰⁸ W. Weerasooria, *op. cit.*, p.581

principle has frequently been invoked by wives who have been persuaded by their husbands to provide guarantees for their husbands' debts without understanding the nature and effect of their guarantees. This rule was formulated by Dixon J in the 1939 Australian High Court case of *Yerkey v Jones*¹⁰⁹. Mr Jones agreed to purchase a farm property in Adelaide from the plaintiffs, Mr and Mrs Yerkey, for the total sum of £3,500. Only a small deposit was required and the balance of £3,300 was to be paid at the end of three years. However, the Yerkeys included a further condition. As Mr Jones had limited means, he was required to procure his wife's signature on a second mortgage of her property at Walkerville (valued at £2,500) to secure £1000 towards the final payment. He had agreed to buy the farm property before he had succeeded in obtaining his wife's assent to his doing so and before he had explained to her the proposal that she should give the mortgage. Mr Yerkey's solicitors wrote up the appropriate documents and Mr Jones signed them, giving effect to the terms and conditions of the purchase. After signing these documents he told Mrs Jones that 'if she did not sign the mortgage he would or might get into trouble'¹¹⁰. He also assured her that 'if anything went wrong and she lost the Walkerville house he would still have the Payneham property' and that 'the mortgage for £1000 would not fall due for three years'¹¹¹.

Mr Jones was keen to continue to run the property as a poultry farm in order to provide an income for the family, but Mrs Jones was doubtful as to the wisdom of this. However, she accepted his assurance of success. Mr and Mrs Yerkey engaged the solicitor and, together with Mr and Mrs Jones, met at the solicitor's office to sign the documents. At the meeting the solicitor explained the various clauses of the mortgage to

¹⁰⁹ 63 CLR 649

¹¹⁰ *ibid.*, at 650

¹¹¹ *ibid.*

Mrs Jones, including a specific clause described as a 'common surety clause', before she and Mr Jones signed. This clause is used 'whenever a wife joins with her husband in mortgaging the wife's estate'¹¹². In Halsbury's Laws of England this is defined as meaning that

Although a surety only undertakes for the default of another, the practice in mortgage deeds is to make him contract and become bound as a principal ... to the mortgagee, and remain a surety so far as concerns the mortgagor. Accordingly the borrower and surety usually enter into joint and several covenants for payment of principal and interest, with a proviso that although, as between the borrower and the surety, the latter is only a surety, yet, as between the lender and the surety, the latter is to be deemed a principal debtor and not to be released by any indulgence given to the borrower¹¹³.

So, although Mrs Jones was a guarantor for her husband's debt, as mortgagor, she was also considered to be the principal debtor and therefore liable for all principal, interest and other monies secured. The release of her husband, the true borrower, from the debt would not have the effect of discharging her personal liability¹¹⁴. The mortgage also contained a provision making the principal immediately payable upon default in payment of interest for twenty-one days.

When the business failed the Yerkeys sought to enforce the mortgage by bringing an action in the Supreme Court of South Australia against Mr and Mrs Jones. Mrs Jones contended that she had been subjected to undue influence by the Yerkeys and her

¹¹² *ibid.*, at 661

¹¹³ *ibid.*

¹¹⁴ In the event that the husband paid the debt she would be released from any obligation.

husband jointly, and on the part of her husband alone. Further, she alleged that the mortgage she signed was misrepresented to her and 'created a personal liability on her part instead of merely charging her property with a liability ... enforceable only after three years'¹¹⁵. Thus, Mrs Jones believed her liability to be limited to £1000, the value of the second mortgage, when in fact her liability was for the entire £3,500 plus interest. At first instance Napier J found that Mr Jones was liable, but Mrs Jones was not, on the grounds of undue influence, misrepresentation and unilateral mistake¹¹⁶. Mrs Jones was entitled to equitable relief against the personal covenants in the mortgage. This decision was reversed by the High Court of Australia on appeal, on the basis that there was no evidence of the equitable principles applied. That Court reasoned that Mrs Jones had been fully aware of the intentions of her husband and the requirements of the mortgage. Mr and Mrs Yerkey had not exercised undue influence or misrepresented information to Mrs Jones and the conditions of the mortgage had been explained to Mrs Jones by the solicitor prior to her signing the mortgage. She was therefore also liable.

However the High Court did find that within the equitable grounds, Napier J had established that Mr and Mrs Yerkey knew that Mrs Jones was not aware of her husband's initial offer to purchase. The Yerkeys knew that he had no means of his own and therefore the only way for him to secure the money was by getting his wife to finance his purchase. By this action, Mrs Jones was to become her husband's surety. Because of the creditors' (Mr and Mrs Yerkey) knowledge of the facts and their subsequent failure to deal directly with the debtor (Mrs Jones), Napier J had concluded that the explanation given by the solicitor to Mrs Jones was not sufficient for her to have obtained 'an understanding of material aspects of the obligations she was

¹¹⁵ *ibid.*, at 656

¹¹⁶ A unilateral mistake refers to a misunderstanding by one party about some matter of fact (for which the law may make an allowance) or some matter of law (for which no allowance will be made at common law although equity may make exceptions). Ordinarily this principle would not be grounds for avoiding the validity of a liability. See *Yerkey v Jones* at 662.

undertaking¹¹⁷. She had 'erroneously supposed' that the solicitor was acting both in her interests and in the Yerkeys', and in fact been led to believe by the Yerkeys that this was true¹¹⁸.

In his High Court judgment, Dixon J asserted that the case for Mrs Jones must depend upon some special rules applying to a wife who becomes a surety for her husband. She must rely on a rule that 'is a rather vague and indefinite survival' from the days prior to the Married Women's Property Acts¹¹⁹. Referring to Halsbury's Laws of England, Dixon J reasons that there is authority for a rule that states

Where creditors of the husband procure the wife's signature to a security for his debt through the agency of the husband, they must, in order to succeed in an action on the security, be in a position to prove that a proper explanation of the effect of the document was given to the wife¹²⁰.

Relying on the authority of two cases in particular, namely *Bank of Victoria Ltd v Mueller* (1925) VLR 642 and *Turnbull & Co. v Duval* (1902) AC 429, Dixon J formulated certain equitable principles favourable to wives when they act as sureties for their husbands' debts.

Under the law of equity the relationship of husband and wife is not one of influence; just because a wife confers a voluntary benefit upon her husband by a gift or by becoming surety a presumption of undue influence does not exist. Even so, he argues,

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*, at 670

¹¹⁹ *ibid.*, at 663

¹²⁰ *ibid.*, at 664

the character of the relationship 'has never been divested completely of what may be called equitable presumptions of an invalidating tendency'¹²¹. The Court of Chancery had recognised that undue influence could arise as the result of the relationship of husband and wife. Dixon J asserts that this was based on the reasoning that in a relationship of marriage it should not be 'natural to expect the one party to give property to the other'¹²². Despite the accepted possibility of a wife, through affection or prudence, providing a guarantee in respect of her husband's debts, there should be 'suspicion of confidence abused'¹²³. Courts should be attuned to believe that a disposition by a wife in favour of her husband had been improperly procured¹²⁴.

For Dixon J, the 'rules of equity governing the voidability of instruments of suretyship entered into by married women for debts of their husbands' have 'left the state of the law somewhat indefinite, if not uncertain'¹²⁵. He suggests that there are three rules or presumptions that relate to equity that need to be considered when a wife binds her separate property with a liability for her husband's debts. The first is that, if the husband's influence is called into question, it is his responsibility to prove otherwise. The second relates to the position of strangers who deal with the wife through the husband in a contract that is to the husband's advantage. The third rule is the wife's degree of understanding of the actual nature and consequences of the transaction¹²⁶. Hence, the following principle clarifies the essential aspects of the propositions from the cases examined in *Yerkey v Jones*:

¹²¹ *ibid.*, at 675

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ W. Weerasooria, *op. cit.*, p. 582

¹²⁵ *Yerkey v Jones, op. cit.*, at 683

¹²⁶ *ibid.*, at 675-676

if a married woman's consent to become a surety for her husband's debts is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima-facie right to have it set aside¹²⁷.

When the facts of the case were tested against this principle, Dixon J concluded that Mrs Jones was not entitled to equitable relief. The facts were based on the respondent's understanding of the transaction when she went to the solicitor's office to sign the mortgage, the actual provisions it contained, the explanation she received and her final comprehension of the matter. Mrs Jones did substantially understand the document prior to signing it. The fact that there was no separate independent advice was not fatal to the plaintiff's claim because the solicitor had explained the mortgage sufficiently to ensure Mrs Jones' understanding of it¹²⁸.

From the decision in *Yerkey v Jones* and subsequent cases the following minimum conditions have emerged for the rule. It can only have authority when a wife has provided a guarantee or third party mortgage in respect of her husband's debts and without her having obtained any tangible benefit from it. The husband must have procured her consent. Further, the wife must not have been given a full explanation of the transaction and must not have understood its effect 'in essential respects'. Finally, the explanation does not necessarily need to be provided by a third party who the creditor believes on reasonable grounds to be 'competent, independent and disinterested'

¹²⁷ *Yerkey v Jones, loc. cit.*

¹²⁸ *ibid.*, at 685

but can be given by a party engaged and remunerated by the creditor¹²⁹.

The development of the special principle in *Yerkey v Jones* represents a paradigm shift in the law. Prior to *Yerkey v Jones* the courts applied a different treatment of married women through their non-capacity to contract, and therefore supported a position that ensured wives' dependence on their husbands. After *Yerkey v Jones*, married women have been given capacity to contract but are protected by the law because of their perceived dependence on their husband. Thus married women are deemed vulnerable under the law in the lead up to, and signing of, guarantees for their husband's debts, in a way that married men are not. It is the combined category of being married and a woman that makes them vulnerable.

Special Protection for Neither All Women nor All Men

Despite the fact that *Yerkey v Jones* is a High Court decision, it has not been uniformly followed or applied in Australia¹³⁰. Since this decision, where a wife has sought to avoid liability for guaranteeing her husband's debts, Australian courts have resorted to other legal and equitable principles and not always relied on the *Yerkey* principle. In some instances they have based their decisions on the principle of unconscionable conduct as enunciated in 1983 by the High Court in *Commercial Bank of Australia Ltd v Amadio*¹³¹. In other instances courts have concluded, on the evidence, that the transaction was not incautious and that the wife had benefited from the guarantee. For

¹²⁹ See J. O'Donovan and J. Phillips, *The Modern Contract of Guarantee*, 3rd edn., LBC Information Services, North Ryde, New South Wales, 1996, pp. 199-207; B. Collier, The Rule in *Yerkey v Jones*: Fundamental Principles and Fundamental Problems, *Australian Property Law Journal*, No 4, 1996, pp. 186-195

¹³⁰ See B. Collier, *op. cit.*, 1996, pp. 211-222 for a comprehensive list of cases where the rule has been considered.

¹³¹ 151 CLR 447

instance, in the 1985 case of *European Asian of Australia v Kurland*¹³², Rogers J avoided resorting to *Yerkey v Jones* 'on the basis that the wife's guarantee and mortgage had benefited a company in which she held a half interest'¹³³.

The High Court decision in *Amadio* represents the leading Australian authority on the liability of a bank for misrepresentation, unconscionable conduct and failure to disclose material information¹³⁴. While this case does not focus on the relationship between a married woman and her husband, the case is important in showing how the law has resorted to general equitable principles when considering the vulnerability of parties to a contract of guarantee. In this case the inequality of bargaining power was seen by the High Court to exist between the parents and the bank 'so much so that the respondents stood in a position of special disadvantage vis-à-vis the bank'¹³⁵. In *Amadio* an elderly Italian migrant couple (Mr & Mrs Amadio) with limited knowledge of written English acted as guarantors for an overdraft given by the bank to their son's company that was at the time almost insolvent. They executed a mortgage of their residential property in favour of the Commercial Bank of Australia Ltd.

The bank was aware that when the couple signed the documents they had been misinformed by their son about their liability. The branch manager obtained the parents' signatures on the documents by visiting their home. As the parents were signing the document, the bank manager became aware that they had been misinformed about the duration of their liability. Mr and Mrs Amadio believed that their personal liability was limited to a six month duration and to a maximum amount of \$50,000 but

¹³² 8 NSWLR 192

¹³³ *ibid.*, at 200

¹³⁴ W. Weerasooria, *op. cit.*, p. 471

¹³⁵ *Commercial Bank of Australia Ltd v Amadio*, *op. cit.*, at 464

in fact it was unlimited. After the execution of the mortgage guarantee the son had asked the bank to selectively dishonour cheques issued by the company in favour of its creditors in order to preserve the appearance of the company's solvency. Therefore, it was held that the bank manager knew of the company's insolvency. The bank was also aware that, from the parents' point of view, the transaction was improvident and that they had received no independent advice about it. As the bank manager's knowledge was the knowledge of the bank, the bank was guilty of unconscionable (that is unconscientious) conduct¹³⁶.

In the event of

A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable¹³⁷.

The general rule of unconscionability in *Amadio* relates to all transactions of all persons, while the special rule in *Yerkey* relates specifically to transactions of the wife in the husband's favour. However, the overlap in the two rules has caused considerable uncertainty in the application of the law post *Amadio*. Berna Collier perceives this overlap to include the

concept that the guarantor is suffering from a disadvantage; that independent advice, which will assist the guarantor understand the transaction, prevents the

¹³⁶ *Yerkey v Jones, op. cit.*, at 479

¹³⁷ *Akins v National Australia Bank* (1994) 34 NSWLR 155, at 171

guarantor avoiding liability under the guarantee; and the concept that the creditor is taking advantage of the situation and obtaining a benefit¹³⁸.

In the 1994 case of *Akins v National Australia Bank*¹³⁹, Clarke JA asserted that, when distinguishing the circumstances in which it will be found that a person is at a special disadvantage, the fact that it is a wife who is guarantor is only crucial in particular circumstances. That position of special disadvantage arises when a bank asks the husband to procure the execution of the guarantee but takes 'no steps to ensure that the wife understands the responsibility and liability' involved 'or that she is independently advised'¹⁴⁰. Mr and Mrs Akins had jointly purchased their family home on 22 October 1985. On 31 October 1985 Mrs Akins signed two guarantees in favour of the National Australia Bank. This security was provided for a total of \$80,000 for her husband's debts in relation to two separate importation companies in which he was involved. Mrs Akins signed a further five guarantees and one mortgage in a three year period between 1986 and 1988 to the value of \$600,000. Mrs Akins had sought relief under the *Yerkey* principle, the unconscientious use of the superior position of National Australia Bank as expressed in *Amadio*, and the provisions of the Contracts Review Act 1980 (NSW)¹⁴¹.

However her appeal was not allowed. It was decided that where a wife signed a guarantee in respect of her husband's debts, the principles of unconscionability propounded in *Amadio* furnished adequate grounds of relief to her. These grounds apply where the wife demonstrates that in signing the guarantee she was the subject of her husband's improprieties and the creditor knew, or must be taken to have known, of

¹³⁸ B. Collier, *op. cit.*, 1996, p. 209

¹³⁹ *op. cit.*

¹⁴⁰ *ibid.*, at 171

¹⁴¹ This Act offers wider protection than the common law to women who are at a disadvantage in contractual relations. The Act gives a court a discretion to set aside a contract that it finds to be unjust.

the risk that such improprieties might have occurred or of facts raising a possibility of such improprieties in the mind of a reasonable person¹⁴². Further, when considering all of the occasions when Mrs Akins signed mortgages and guarantees, it was held she did gain an adequate understanding of her obligations and liability¹⁴³. Accordingly, the Court of Appeal reasoned that the *Yerkey* principle 'ought no longer be applied in New South Wales'¹⁴⁴.

A further¹⁴⁵ Court of Appeal decision in New South Wales that challenged the *Yerkey* principle was *National Australia Bank Ltd v Garcia*¹⁴⁶. The Bank, on appeal from a decision by the trial judge in *Garcia v National Australia Bank*,¹⁴⁷ submitted that the High Court decision in *Amadio* had impliedly overruled or subsumed the principle that derived from *Yerkey*¹⁴⁸. The question then was whether the plaintiff was under a special disability, as required by the doctrine of unconscionability stated in *Amadio*.

In 1971 Mrs Jean Garcia, a physiotherapist, as sole proprietor, bought a block of land in Sydney after her marriage to Mr Garcia. After acquiring the land, Mrs Garcia transferred a half-interest in the property to her husband and they subsequently built a house on that land. In 1979 Mr and Mrs Garcia mortgaged the jointly owned home to the National Australia Bank to secure "all moneys" which might be owing under future guarantees by either of the mortgagors. Initially the couple received an advance for

¹⁴² *ibid.*, at 155

¹⁴³ *ibid.*, at 173

¹⁴⁴ *ibid.*, at 155

¹⁴⁵ There is an additional case, *Teachers Health Investments Pty Ltd v Wynne* 1996 169 ANZ Conv R 40, the details of which are not necessary to the discussion.

¹⁴⁶ (1996) 39 NSWLR 577

¹⁴⁷ (1993) NSWSC 5 BPR 11,996

¹⁴⁸ *National Australia Bank Ltd v Garcia*, *op. cit.*, at 583

\$5000 to be used in the husband's business and a further \$10,000 as a personal loan for both husband and wife. Mr Garcia was a foreign exchange broker.

Between 1985 and 1987 Mrs Garcia signed four guarantees in order to allow her husband's company to buy gold bullion. At the time of the initial overdraft Mr Garcia told Mrs Garcia that the money would be repaid within the near future. Although the bank officers had explained the general effect of the documentation to Mrs Garcia, they did not explain that the guarantees were secured and linked to the mortgage of the couple's property by the all moneys clause in the 1979 transaction¹⁴⁹. Mrs Garcia believed that all the debts that had been secured by that transaction had been repaid as at 1985. In September 1988 she separated from her husband and two months later she notified the bank of her separation. The bank continued to advance money to Mr Garcia for his business, despite the business recording a loss the previous year of \$418,000, until in May 1989 the husband's company was wound up.

Mrs Garcia was divorced on 1 January 1990. As part of the matrimonial settlement the Family Court ordered the husband to transfer his interest in the property to the wife, albeit subject to the mortgage in favour of the bank. At this point the bank sought to enforce the guarantee over the property. Mrs Garcia then sought relief under *Yerkey v Jones*, *Amadio* and the Contracts Review Act 1980 (NSW) to claim possession of the matrimonial home. The trial judge granted relief on the basis of *Yerkey*. His Honour reasoned that Mrs Garcia had not benefited in any way; the wife was only a director and the company's profits were not sufficient as a household income¹⁵⁰. Thus the *Yerkey* rule applied. He rejected the claim based on *Amadio* because the bank was not on

¹⁴⁹ As B. Collier observed, in 'All Debts Clauses in Commercial Contracts of Guarantee', *Monash University Law Review*, Vol 24 No 1, 1998, pp. 7-37, 'all moneys' or 'all debts' clauses are common in contracts of both guarantee and mortgage and are intended to ensure that the party providing the mortgage or guarantee will be liable for all sums owed by the debtor or other nominated party to the creditor.

¹⁵⁰ W. Weerasooria, *op. cit.*, p. 586

notice of the existence of any unconscionability. The bank officer who witnessed Mrs Garcia's signature to the guarantee of November 1987 said she would have, as a matter of bank practice, explained the provisions of the guarantee. Mrs Garcia remembered differently, describing the signing as a process that took less than a minute and did not involve an explanation of the transaction. The court identified a number of inaccuracies in the bank's record of the interview between the bank officer and Mrs Garcia. This suggested that the document did not represent a genuine record of the interview. Mrs Garcia's version was accepted as accurate by the trial judge¹⁵¹.

The Court of Appeal held that the decision in *Yerkey v Jones* was not a decision of all of the Justices of the High Court but a set of principles propounded by Dixon J alone, which relied on general assumptions about the capacity of married women¹⁵². An extensive analysis was undertaken in *Garcia* as to the validity of *Yerkey* based on the supposed lack of support for Dixon J's decision. Sheller JA concluded that Clarke JA was correct in his view in *Akins* that

it is difficult to support the existence of a special rule applying to wives who sign guarantees in respect of their husband's debts. On the contrary, as it seems to me, the principles of unconscionability propounded in *Commercial Bank of Australia Ltd v Amadio* furnish adequate grounds of relief to a wife who claims to have been the subject of her husband's improprieties, and in circumstances where, for instance, a creditor knew or must be taken to have known of the risk that might have occurred¹⁵³.

¹⁵¹ *Garcia v National Australia Bank Ltd* (1993), *op. cit.*, at 12,010

¹⁵² *National Australia Bank Ltd v Garcia*, *op. cit.*, at 598

¹⁵³ *Akins v National Australia Bank Ltd*, *op. cit.*, at 172

In a cross-appeal Mrs Garcia sought relief under *Amadio* because National Australia Bank had acted unconscionably. However, the circumstances of this case differed because

there was nothing of which NAB was aware that might reasonably have led it to suspect that Mr Garcia was bringing pressure on her to execute the documents or that she was doing so other than voluntarily.

Therefore the absence of knowledge on the part of the bank did not meet the requirements within the principles of *Amadio*¹⁵⁴. As the bank was unaware of the husband's unconscionable conduct, undue influence and pressure exerted on his wife, or of any special disadvantage she suffered, it could not be blamed. To the bank, Mrs Garcia was a 'capable and presentable professional', who called at the bank voluntarily and signed the necessary documents¹⁵⁵. On the face of those documents, she was a director and shareholder of the company.

In England, the House of Lords in the 1994 case of *Barclays Bank Plc v O'Brien*¹⁵⁶ unanimously decided that the principle should not be applicable. Their reasoning followed the view that a married woman who provides security for her husband's debts should not necessarily be assumed to be vulnerable by equity. The court drew no distinction between married women and cohabitees, whether heterosexual or homosexual. Provided that the 'invalidating tendency', as stated in *Yerkey*, is properly recognised general equitable principles should provide adequate protection for wives as it would in cases where one cohabitee stands surety for the other cohabitee's debts.

¹⁵⁴ *National Australia Bank Ltd v Garcia* (1996), *op. cit.*, at 599

¹⁵⁵ *Garcia v National Australia Bank Ltd* (1993), *op. cit.*, at 12,005

¹⁵⁶ 1 AC 180

Barclays Bank agreed to allow overdraft facilities to a company in which the husband Mr O'Brien, (but not his wife, Mrs O'Brien) had an interest. Security was to be provided by an unlimited guarantee by Mr O'Brien of the company's liability and a legal charge of the matrimonial home, which was in joint names. The branch manager sent the documents to another branch for Mr and Mrs O'Brien to sign. The documents were sent with express instructions to ensure that Mr and Mrs O'Brien were made fully aware of the conditions stated within the documents and that if they were 'in any doubt they should contact their solicitors before signing'¹⁵⁷.

The receiving branch did not follow these instructions and instead the clerk produced the documents for signing and witness to Mr O'Brien only. He duly signed them and the next day Mrs O'Brien accompanied him to the branch to provide her signature on the documents. While she was given the documents to sign with an attached letter detailing the conditions of the guarantee and the need for independent advice, she did not read either but signed both assuming that the overdraft was limited to £60,000. Within three months the company's overdraft debt to the bank had risen well beyond the prescribed limit. The bank sought possession of the house from Mr and Mrs O'Brien. Mrs O'Brien sought relief from her liability based on undue influence by Mr O'Brien and his misrepresentation of the facts. She alleged that she was persuaded to provide the matrimonial home as security by her husband.

Both the trial judge and the Court of Appeal rejected the claim based on undue influence. However the Court of Appeal did find that Mr O'Brien had falsely represented to Mrs O'Brien that the guarantee was limited to £60,000 and would last only three weeks. It had in fact reached a total of £154,000 before the bank sought possession of the house. The Court of Appeal allowed an appeal by Mrs O'Brien

¹⁵⁷ *ibid.*, at 180

concluding that she was entitled to special protection in equity and she was only to be held responsible for the amount of £60,000 that she thought she was agreeing to secure. The bank appealed to the House of Lords, arguing for its total claim of £154,000. The question for decision by the House of Lords was whether a bank is entitled to enforce against a wife an obligation to secure a debt owed by her husband to the bank where the wife has been induced to stand as surety for her husband's debt by the undue influence or misrepresentation of the husband¹⁵⁸.

Lord Browne-Wilkinson noted that this question had 'given rise to reported decisions of the Court of Appeal on no less than 11 occasions in the last eight years'¹⁵⁹. In his leading judgement in the Court of Appeal, Scott LJ found that two divergent judicial views had emerged to establish the responsibility of the bank. The first he referred to as the "agency theory" because it asserts that the husband's misconduct towards his wife would only adversely affect the case for the bank (creditor) if the bank had used the husband to procure the wife's signature knowing the relevant facts¹⁶⁰. The husband would therefore be acting as the agent of the bank. The second approach was referred to as the "special equity theory" which recognises that 'equity allows special protection to a protected class of surety'¹⁶¹. As previously stated, this *ratio decidendi* from *Yerkey v Jones* dictates that a prima facie right exists to have a security, provided by a wife for her husband's debt, set aside if 1) the relationship between the debtor and the surety was known to the creditor, 2) the husband had procured her signature through undue influence, misrepresentation or without her understanding the nature and effect of the transaction, and 3) the creditor had failed to take reasonable steps to ensure that the wife

¹⁵⁸ *ibid.*, at 186

¹⁵⁹ *ibid.*, at 185

¹⁶⁰ *ibid.*, at 187

¹⁶¹ *ibid.*

had given 'a true and informed consent to the transaction'¹⁶². In *Barclays Bank v O'Brien* the Court of Appeal had applied this 'special equity theory'. However, Lord Browne-Wilkinson rejected this theory and noted that only two of the eleven cases supported it.

In making this decision, he presented two justifications. The first relies on 'good' economic practice within society. Jointly owned homes have become a main source of security to raise funds

for the business enterprises of one or other of the spouses.... It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest viz., the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile¹⁶³.

Policy that interferes with market needs, in his view, is problematic. Banks will be unwilling to accept matrimonial homes as security 'thereby reducing the flow of loan capital to business enterprises' if the law renders these loans vulnerable¹⁶⁴.

His second consideration refers to 'society's recognition of the equality of the sexes' and subsequent 'rejection of the concept that the wife is subservient to the husband in the management of the family's finances'¹⁶⁵. Counsel for the bank argued that to give women a different treatment from that afforded to other sureties is wholly incompatible

¹⁶² *ibid.*, at 188

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

with modern concepts of the status of women. In response, Lord Browne-Wilkinson concurred with Scott LJ that, although the concept of the 'ignorant wife leaving all financial decisions to the husband is outmoded, the practice does not yet coincide with the ideal'¹⁶⁶. In many marriages the husband is still the one with the business experience and many women accept their husband's advice 'without bringing a truly independent mind and will to bear on financial decisions'¹⁶⁷. He argues the high number of recent cases supports the reality that many wives are still subjected to, and yield to, undue influence by their husbands. They should be able to 'reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them'¹⁶⁸.

Lord Browne-Wilkinson preferred to rely on the proper application of the doctrine of notice rather than to special equity. In his view a financial institution should be able to rely on a guarantee from a wife, and the law should be restated 'in a form which is principled, reflects the current requirements of society and provides certainty'¹⁶⁹. This doctrine, that is based on knowledge of a fact, whether of something actually known (actual notice) or of something that a person is deemed or ought reasonably to know (constructive notice), can be applied to financial institutions to put them on notice. With the number of wives extending trust and confidence in their husbands in relation to their financial affairs, financial institutions should be put on inquiry to take 'reasonable steps' to satisfy themselves that the wife's agreement to act as surety has been properly obtained¹⁷⁰. This represents constructive notice of the wife's rights to the

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*, at 195

¹⁷⁰ *ibid.*, 196

financial institution.

In order for creditors to avoid being fixed with constructive notice, Lord Browne-Wilkinson asserted that they must

insist that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice¹⁷¹.

The wife will not have any right to disown her obligations just because subsequently she proves that she did not fully understand the transaction if she has been warned of her potential liability, the risk of acting as surety and advised to take independent advice. When applying the facts of the case to the principles, Lord Browne-Wilkinson concluded that, because the bank branch had not carried out the instructions to advise Mrs O'Brien of her obligations and liability, the bank is 'fixed with constructive notice of the wrongful misrepresentation made by Mr O'Brien to Mrs O'Brien'¹⁷². Mrs O'Brien was therefore able to avoid liability for the guarantee.

The judgment in *Barclays Bank v O'Brien* accepts that married women who act as guarantors for their husbands are vulnerable but circumvents applying *Yerkey*. Where Dixon LJ in *Yerkey v Jones* alerts creditors to 'examine every transaction between husband and wife with an anxious watchfulness and caution and dread of undue influence', the House of Lords imposes a duty on creditors to take 'reasonable steps' by advising the wife, as guarantor for her husband, to take independent advice. This

¹⁷¹ *ibid.*

¹⁷² *ibid.*, at 199

advice would 'ensure that a comprehensible explanation is given of the ordinary terms of routine transactions'¹⁷³. In *Yerkey v Jones* a wife may have a guarantee set aside even if the guarantee has been obtained without a legal wrong by her husband. By contrast, the guarantor could only be successful under *Barclays Bank v O'Brien* if the husband had committed a legal wrong against his wife and either the husband acted as the agent of the creditor or the creditor was fixed with notice of that wrong.

This move towards the removal of special protection for married women is underwritten with abundant legal commentary. Claims of historical anachronism are central to criticisms of the *Yerkey* principle. In 1989 the New South Wales Court of Appeal in *Warburton v Whiteley*¹⁷⁴ reluctantly held that it was bound to apply the *Yerkey* principle as a decision of the High Court until the time when that Court itself overruled that decision¹⁷⁵. Kirby P noted that it 'was based upon a stereotyped perception of the dependent position of wives' and as such 'was out of harmony with today's society' and ultimately 'preserved the unequal position of women'¹⁷⁶. Moreover, he asserts

the advance in the status and education of women, the increasing role of women (including wives) in business and commercial affairs and the variety of personal relationships today all make a principle, fashioned in terms of a wife's disadvantageous position vis-à-vis her husband, unsafe when stated as a general rule of universal application. Even as a statement of prima facie position, the statement is now unsound and objectionable in principle. It is also of dubious

¹⁷³ S. Cretney, 'The Little Woman and the Big Bad Bank', *The Law Quarterly Review*, Vol 109, 1992, p. 536

¹⁷⁴ 5 BPR 11,628

¹⁷⁵ Kirby P states at 11.633 that where the High Court of Australia has authoritatively expounded the Constitution, expressed a rule of the common law or of equity as applicable in Australia, or has construed legislation that remains relevantly unchanged, it is the duty of this court to apply that court's decision.

¹⁷⁶ *Warburton v Whiteley*, *op. cit.*, at 11,629

accuracy in practice¹⁷⁷.

Similarly in *European Asian of Australia Ltd v Kurland* Rogers J asserted that he felt

compelled to say that in the year 1985 it seems anachronistic to be told that being a female and a wife is, by itself, a sufficient qualification to enrol in the class of persons suffering a special disadvantage ... counsel for Mrs Kurland submitted that the iron grip of precedent requires me to submit to such a finding. Were this to be correct it would affix a badge of shame to this branch of the law. ... That being a female spouse should place a person shoulder to shoulder with the sick, the ignorant and the impaired is not to be tolerated¹⁷⁸.

Rogers J here alludes to the special equity rule that a person does not have the mental or emotional capacity to appreciate the incidents of the transaction in question because they are 'an infant, an alcoholic, a mentally disturbed person or the like'¹⁷⁹.

Legal academic James O'Donovan also discredits the rule when he argues that it is not that the principle is anachronistic in the sense of being representative of a bygone age, but that it is discriminatory because it 'pays no regard to the wife's intelligence, educational background, qualifications or business experience'¹⁸⁰. As a 'lack of understanding' is the focal point of the rule, O'Donovan appears to take issue with the 'absolute' authority this engenders. His views replicate those of Rogers J in *European Asian of Australia v Kurland* where he states that, based on Mrs Kurland's evidence, he

¹⁷⁷ *ibid*

¹⁷⁸ *op. cit.*, at 200

¹⁷⁹ *National Australia Bank v Garcia* (1996) *op. cit.*, at 578

¹⁸⁰ J. O'Donovan, 'The Retreat from *Yerkey v Jones*: From Status Back to Contract', Western Australian Law Review, Vol 26, 1996, p. 326

found it difficult to accept that in present day Australia one can find a university graduate, in her thirties, with such a restricted view of the world and her place in it. I was suspicious that it was an assumed role for the purposes of the case. Rereading the transcript still left me uneasy. In the end, I concluded that I should accept the picture the defendants painted. To hold otherwise would require me to find that Mrs Kurland had an ability as an actress which I am not prepared to attribute to her¹⁸¹.

O'Donovan builds on his theme of discrimination by labelling as 'narrow and sexist' the failure of the rule to extend to de facto wives or cohabitees¹⁸². However the House of Lords in *Barclay's Bank v O'Brien* held that the defence would extend beyond married women to any cohabitee, either heterosexual or homosexual, male or female¹⁸³. In their view, where there is 'an emotional relationship between the cohabitees' or any other relationships where 'the creditor is aware that the surety reposes trust and confidence in the principal debtor' the same principles would apply¹⁸⁴. No Australian Court has made a ruling which protects all those cohabitees in emotional relationships.

Special Protection for Married Women and Perhaps All Cohabitees, Heterosexual or Homosexual, Male or Female

In the recent cases on the obligations of guarantors there has been a reluctance to apply *Yerkey*. On the other hand, there has also been recognition by the judiciary that some married women are vulnerable. In noting that the Court of Appeal had dealt with 11 cases in the eight years prior to 1994, Lord Browne-Wilkinson asserted that this 'shows

¹⁸¹ *European Asian of Australia v Kurland, op. cit.*, at 199

¹⁸² J. O'Donovan and J. Phillips, *op. cit.*, p. 200

¹⁸³ *Barclays Bank v O'Brien Plc, op. cit.*, at 198

¹⁸⁴ *ibid.*

that in practice many wives are still subjected to, and yield to, undue influence by their husbands'¹⁸⁵. In *Warburton v Whiteley* Kirby P states that it is not in doubt that 'there are cases, even today, where wives in our society are in a position of special disability with respect to their husbands'¹⁸⁶. Clarke JA also asserts that while this may 'appear less frequently today there are still to be found women in the community who are overborne by their husbands'¹⁸⁷. However these sentiments have been countered with the general assumption that any imbalance of power between husband and wife is rare and therefore each case should be decided on general equitable principles rather than *Yerkey*. The adherence to these gender-neutral rules allows the supplanting of 'different' treatment for married women with 'same' treatment in what O'Donovan describes as a preferable move 'from status back to contract'¹⁸⁸.

The general consensus that the rule in *Yerkey v Jones* would be adjudged invalid when subjected to review by the High Court of Australia was put to the test in 1998¹⁸⁹. Mrs Garcia appealed to the High Court¹⁹⁰. The main issues before the court were:

- 1) Whether the Court of Appeal had erred in law in holding that the rule in *Yerkey v Jones* no longer represented the law in Australia
- 2) Whether Dixon J's judgment represented a binding authority for the court
- 3) Whether *Amadio* had subsumed the rule

¹⁸⁵ *ibid.*, at 188

¹⁸⁶ *Warburton v Whiteley*, *op. cit.*, at 11,629

¹⁸⁷ *ibid.*, at 11,644

¹⁸⁸ J. O'Donovan, *op. cit.*, p. 309

¹⁸⁹ See *ibid.*, p. 329; B. Collier, *op. cit.*, 1996, p. 211; S. Cretney, *op. cit.*, p. 538

¹⁹⁰ *Garcia v National Australia Bank Ltd* (1998), *op. cit.*

- 4) Whether the exposition of such doctrine in *Amadio* sufficiently met the particular problems of sureties who are emotionally vulnerable or dependent on the debtor¹⁹¹

The majority held that the rule in *Yerkey v Jones* remains good law in Australia. Relief was granted on the grounds that¹⁹²:

- 1) The appellant did not understand the purpose or effect of the transaction although she knew it was a guarantee; nor did she understand that her obligations under the guarantee were secured by the mortgage she had given over her home;
- 2) The bank took no step to explain the transaction to her, nor did it take steps to ensure she obtained independent advice. The bank knew the guarantor and the principal debtor were husband and wife;
- 3) Notwithstanding the fact that she was both a director of, and a shareholder in the company, she nevertheless was not 'directly involved' in the running of the company and she obtained no real benefit from her entering into the transaction.

In applying the *Yerkey* principle, Gaudron, McHugh, Gummow and Hayne JJ discounted any notion of discriminatory practice by arguing that

the marriage relationship is such that one, often the woman, may well leave

¹⁹¹ H. Su-King, 'From *Yerkey* to *Garcia*: 60 Years on and Still as Confused as Ever!', Australian Property Law Journal, No 7, 1999, p. 58

¹⁹² *ibid.*

many, perhaps all, business judgements to the other spouse. In that kind of relationship, business decisions may be made with little consultation between parties and with only the most abbreviated explanation of their purport or effect. Sometimes, with not the slightest hint of bad faith, the explanation of a particular transaction given by one to the other will be imperfect and incomplete, if not simply wrong. That this is so is not always attributable to intended deception, to any imbalance of power between the parties, or, even, the vulnerability of one to exploitation because of emotional involvement. It is, at its core, often a reflection of no more or less than the trust and confidence each has in the other¹⁹³.

The rationale of *Yerkey* 'is not to be found in notions based on the subservience or inferior economic position of women'¹⁹⁴. Rather, they state, it is 'based on trust and confidence, in the ordinary sense of those words, between marriage partners'¹⁹⁵.

This judgement represents a shift in the status of women from a position of exploitation and inequality to one of perceived equality. The majority's decision relies on an analysis of the essential qualities of the relationship and thus deems 'mutual' trust as the defining notion. In ruling this way, the High Court has attempted to move the debate forward. Rather than the principle being about an ideology of marriage that once existed or women's lack of intellectual or business acumen due to discrimination, or ignorance, the notion of 'trust and confidence' reflects a timeless and potentially genderless characteristic of emotional relationships. This avenue of redress lays the foundations for the principles applied in *Yerkey* to 'find application to other relationships'¹⁹⁶, 'to long term and publicly declared relationships short of marriage

¹⁹³ *Garcia v National Australia Bank Ltd* (1998), *op. cit.*, at 1246

¹⁹⁴ *ibid.*, at 1243

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*, at 1246

between members of the same or of opposite sex'¹⁹⁷. But, as this was not a question for the High Court, the majority did not discuss it further.

The recognition by the majority of the core features of 'trust and confidence' within marriage formally acknowledges prior judicial assertions that 'stereotyped' views of 'one, often the woman may well leave many, perhaps all, business judgments to the other spouse', are indeed a reality in many, if not most marriages¹⁹⁸.

For instance, Young J in *Garcia v National Australia Bank Ltd*¹⁹⁹ asserts that

there are still in the community a large number of women who ... trust their husbands to carry out the business from which the family will receive benefit in the way in which the husband thinks best.

Further, in *Barclays Bank v O'Brien* Lord Browne Wilkinson states that

society's recognition of the equality of the sexes has led to a rejection of the concept that the wife is subservient to the husband in the management of the family's finances. ... although the concept of the ignorant wife leaving all financial decisions to the husband is outmoded, the practice does not yet coincide with the ideal²⁰⁰.

Similarly, legal commentators support this claim. In her 1994 study of the experiences

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ *Garcia v National Australia Bank Limited* (1993), *op. cit.*, at 12,005

²⁰⁰ *Barclays Bank Plc v O'Brien*, *op. cit.*, at 188

of sureties in England, Belinda Fehlberg found that the strategic decision-making role of sureties in family businesses was negligible or non-existent²⁰¹.

The High Court, in defining and clarifying the rationale in *Yerkey*, have effectively ensured that special protection for married women continues to have application. They acknowledge the arguments presented that assert there have been significant changes in both Australian society and the role of women within it. But the majority considered there is 'still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties'²⁰². Any prior attempt by lower courts to invalidate the rule in *Yerkey*, and thereby withdraw special protection for married women, was dismissed as unwarranted by the High Court.

However, Kirby J, in the High Court dissented. He expressed the rule in *Yerkey v Jones* as a 'historical anachronism that is unacceptably discriminatory, treats marriage as a suspect category and fails to consider the potential economic effects in the marketplace'²⁰³. Central to his dismissal of the rule is the assertion originally made by Lord Browne-Wilkinson in *O'Brien* who argued that 'legal wives are not the only group which are now exposed to the emotional pressure of cohabitation'²⁰⁴. In Kirby's view other categories of persons are also vulnerable, such as a 'de facto spouse, an unmarried child in a position of dependence, a parent who is vulnerable to pressure from a child or a companion of either sex having a long-term domestic relationship with the borrower'²⁰⁵. Kirby asserts that 'to select marriage as a criterion of vulnerability appears

²⁰¹ B. Fehlberg, *op. cit.*, 1997b, p. 267

²⁰² *Garcia v National Australia Bank Limited* (1998), *op. cit.*, at 1246

²⁰³ *ibid.*, at 1257-1261

²⁰⁴ *Barclays Bank Plc v O'Brien*, *op. cit.*, at 1980.

²⁰⁵ *Garcia v National Australia Bank Limited* (1998), *op. cit.*, at 1258

inappropriate at this stage in the evolution of personal relationships in this country'²⁰⁶.

Further,

other cohabitees of a borrower may, in particular circumstances, be in a position at least as vulnerable as some wives. Some may be more so. Given the very significant number of Australians who now live in relationships of potential dependence and vulnerability outside marriage, it [the *Yerkey* principle] is inappropriate to affirm as a binding principle of Australian law²⁰⁷.

Hence, in keeping with his desire to effect an additional or different basis for relief, other than marriage and being the female member to a marriage, Kirby J chose to reformulate the rule set down in *Barclays Bank v O'Brien* as

where a person has entered into an obligation to stand surety for the debts of another and the credit provider knows, or ought to know, that there is a relationship involving emotional dependence on the part of the surety towards the debtor

1) the surety obligation will be valid and enforceable by the credit provider unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor;

2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy

²⁰⁶ *ibid.*, at 1259

²⁰⁷ *ibid.*

itself that the surety entered into the obligation freely and in knowledge of the true facts, the credit provider will be unable to enforce the surety obligation because it will be fixed with notice of the surety's right to set aside the transaction;

3) unless there are special exceptional circumstances or the risks are large (that the guarantor and the borrower are, or have been cohabitantes), a credit provider will have taken such reasonable steps to avoid being fixed with constructive notice if it warns the surety (at a meeting not attended by the principal debtor) of the amount of the surety's potential liability, of the risks involved to the surety's own interests and advises the surety to take independent advice. Out of respect for economic freedom, the duty of the credit provider will be limited to taking reasonable steps only.²⁰⁸

Thus the rule 'is 1) expressed in non-discriminatory terms; 2) is addressed to the real causes of the vulnerability; and 3) recognises the credit provider's superior powers to insist that volunteers (guarantors) in a vulnerable position are afforded access to relevant information and, where necessary, independent advice'²⁰⁹.

Conclusion

The examined cases, through the development of equitable principles, show the changing construction of gender over a sixty-year period. In *Yerkey v Jones* women were constructed in law as irrational, ignorant and in need of special protection under the law. In *Barclays Bank v O'Brien* women are constructed as equal to men for they

²⁰⁸ *ibid.*, at 1262

²⁰⁹ *ibid.*, at 1263

are deemed to be rational, autonomous beings. If they are provided with the full facts in relation to a commercial transaction and give their 'informed consent' then any issue of coercion, dependence or control is not relevant to the interpretation of the law. Lower courts within Australia have sought to enunciate principles that rely on all cases being judged on their facts within the ordinary doctrine of contract. While the High Court decision in *Garcia* accepted that some wives are vulnerable, the dissenting voice of Kirby J endorsed a principle that would apply to the risk of one cohabitee exploiting the emotional dependence of the other. Thus, the construction of gender by the law throughout the sixty-year period shifts from women are different because they are weak; to neither men nor women are weak; to both men and women, in some cases, can be weak. This sameness-difference issue is explored in feminist jurisprudence, the subject of the next chapter.

CHAPTER THREE

FAILING TO TAKE THE DIFFERENCE OF THE 'PRIVATE' SERIOUSLY

The complicity of the law in the process of women's subordination has been achieved through the pervasiveness of the ideological construct of the public/private divide²¹⁰.

Gender neutrality is ... simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both²¹¹.

Introduction

Superficially, the decision of the High Court in *Garcia* validates a seemingly more equitable status for married women who experience sexually transmitted debt. It appears benevolent and protective of the rights and freedoms of individuals. However, in examining the decision from a feminist perspective, a number of fundamental deficiencies and difficulties are unmasked. In defining and recognising 'trust and confidence' within marriage relationships as the key determinant of a marriage partner's experience of STD, the High Court has continued the legal tradition of sanctioning the invisibility of the 'subservience or inferior economic position of women'²¹². The

²¹⁰ R. Owens, 'The Peripheral Worker: Women and the Legal Regulation of Outwork' in M. Thornton., (ed.) Public and Private Feminist Legal Debates, Oxford University Press, Melbourne, 1995, p. 63

²¹¹ C. MacKinnon, Feminism Unmodified: Discourses on Life and Law, Harvard University Press, Cambridge, Massachusetts, 1987, p. 34

²¹² *Garcia v National Australia Bank Ltd* (1998), *op. cit.*, at 1246

judicial decision, by underplaying gender differences, ignores issues of power and conflict that may characterise decision-making about money in intimate relationships.

This chapter will consider three important theoretical influences in the experience of sexually transmitted debt; the 'public' sphere/'private' sphere dichotomy; several key feminist jurisprudence theories that consider the subordination of women including the 'different' moral voice; and the sociology of money. Underwriting the decision in *Garcia* are two considerations espoused by Kirby J that are of particular importance to the theme of this chapter: the undesirability of the law rendering the matrimonial home unacceptable as security to financial institutions, balanced against the undesirability of judicially divesting a married woman's legal capacity to execute a guarantee²¹³. These considerations exemplify the interaction between sureties and debtors (occurring in the 'private' sphere) and lenders and debtors, and lenders and sureties (occurring in the 'public' sphere). They provide a useful way of showing the persistence of an adherence to false perceptions of the separation and opposition between money within the 'public' economic realm and money within the 'private' household realm. Moreover, their importance highlights the question: who is being advantaged? Ultimately, proposed solutions to the experience of STD must rest upon a way of recognising the conflicts inherent in the division of debt within households.

Protection of the 'Public' From the 'Private'

The acceptance of a separation between public and private spheres of life is a marked characteristic of liberal societies. It is also a predominant organising principle in many discourses grounded in modernity, including law. Inevitably, feminist post-modernist and post-colonialist scholars have destabilised the

²¹³ *ibid.*, at 1260

conventional line of demarcation. Nevertheless, because of the central ideological role played by the separation, a seemingly irrefragable lifeline continues to connect and vitalise the boundary between public and private²¹⁴.

Mapping the Economic Subordination of Women

The construction of a distinction between the public and the private spheres of life has its theoretical foundations in liberal political philosophy. Historically, the 'private' has been used in liberal theory to refer to 'a sphere or spheres of social life in which intrusion or interference with freedom requires special justification'²¹⁵. Conversely, the 'public' has been 'regarded as more generally or more justifiably accessible'²¹⁶. Similarly, legal philosophy has conceptually supported a public-private distinction. The law's non-intervention in domestic life is conceptually linked to the 'elaboration in legal discourse of a private domain of subjectivity, morality and the personal as 'not the law's business'²¹⁷. Margaret Thornton attributes this dualism to Ancient Greek thought where the *oikos* or the home/private sphere represented economic production and reproduction in which the master exercised dominion over his wife, his children and his slaves²¹⁸. This allowed the master, freed by his slaves of economically productive work, to 'engage in the affairs of the *polis*' as a free and equal citizen²¹⁹.

²¹⁴ M. Thornton, (ed.) Public and Private Feminist Legal Debates, Oxford University Press, Melbourne, 1995, p. xiii

²¹⁵ S.M. Okin, 'Gender, the Public and the Private', in D. Held, (ed.), Political Theory Today, Polity Press, Cambridge, 1991, p. 68

²¹⁶ *ibid.*

²¹⁷ R. Graycar and J. Morgan, The Hidden Gender of Law, The Federation Press, 1990, p. 30

²¹⁸ M. Thornton, 'The Cartology of Public and Private', in M. Thornton., *op. cit.*, p. 2

²¹⁹ *ibid.*

Aristotle translated his empirical observations of this difference between men and women to normative arguments based on inferiority and premised on man 'as the paradigm and yard-stick against which all others are measured'²²⁰. As the ruled, rather than those who rule, women had not attained the fundamental purpose of humanity, that of rationality. Women lacked authority, hence lacked the reasoning to make moral choices. In Aristotle's thesis, the development of a set of dualisms accurately depicted the polarisations between men and women. His assumptions that 'male is active, the female passive; the male contributes the soul, the female the body; the male is strong, the female weak' justified the subordination of women both in the family and in the State²²¹. Women were denied political participation in the *polis* on the pretext of their lack of rationality and were dominated by a free male householder within the *oikos*. As Sandra Fredman asserts, rather than being philosophical abstractions, Aristotle's assertions 'endorsed the legal status quo in ancient Athens, where women of all classes were treated as mere chattels'²²².

The ideal in this pre-capitalist period was order and hierarchy rather than equality as a value²²³. Only the male ruling class was in a position to achieve the highest good. Plato argued differently from Aristotle that women, despite their biological differences from men, could display intellectual and moral faculties equal to men. However, all philosophers of the time supported, in the ideal society, the underlying premise of the superiority of some rather than a natural equality of all individuals²²⁴. The ideology of individual autonomy and equality emerged with the transformation of society from a

²²⁰ S. Fredman, *op. cit.*, p. 3

²²¹ *ibid.*, p. 4

²²² *ibid.*

²²³ *ibid.*

²²⁴ *ibid.* p. 5

position of pre-ordained hierarchy of 'birth and divine designation' to 'contract and individual choice' as essential to social and political analysis²²⁵. Political theorists justified the subordination of women through their claims of the intrinsic value of individuals and, that women were not individuals, not members of this 'mutual equality' of all. Politically, the model of authority supported the legitimacy of individual consent and autonomy in the private sphere. The primary function of the state, therefore, was to intrude as little as possible on individual choices and to act as a neutral umpire between conflicting interests²²⁶. Thus, as Okin argues, Locke *defines* political power by distinguishing it from the power relations operating within the household²²⁷. He supported his appeal to nature that 'men [are] by nature all free, equal and independent' by asserting that, when considering relations of hierarchy between husband and wife, 'it naturally falls to the man's share', as the 'abler and the stronger' to govern over their 'common Interest and Property'²²⁸. Hence, 'excluded from the status of 'individual' in the natural condition', women, through Locke's assumption of marriage and family existing in the natural condition, are 'naturally subordinate to men and the order of nature is reflected in the structure of conjugal relations'²²⁹.

Challenging the 'Unreflective' Public/Domestic Dichotomy

However, as Carole Pateman convincingly argues, this theoretical manoeuvring of classic contract theorists is contradictory. She argues that, if women naturally lack the capacities of individuals, and are subject to exclusion from participation in the original

²²⁵ M. Butler, 'On Locke' in M. L. Shanley and C. Pateman (eds.), Feminist Interpretations and Political Theory, Polity Press, 1991, p. 75

²²⁶ S. Fredman, *op. cit.*, p. 6

²²⁷ S. M. Okin, *op. cit.*, p. 70

²²⁸ C. Pateman, The Sexual Contract, Polity Press, Cambridge, 1988, p. 53

²²⁹ *ibid.*, p. 52

contract, the insistence by contract theorists that they must enter into the marriage contract is clearly problematic²³⁰. This simultaneously denies and presupposes that women can make contracts. Rather than the marriage contract representing an agreement between two equals or individuals, this contractual relationship is one of an individual entering into a contract with a natural subordinate²³¹. The marriage contract is in fact a fraternal contract effected between the prospective husband and the father of the bride²³² so that her husband 'gains right of sexual access to her body and to her labour as a housewife'²³³. Without formal or legal rights to own property the economic survival of women is inextricably linked to, and controlled by, a male household head.

As liberal-capitalist theory emerged with its emphasis on 'the social' or on 'the economic', domestic life was assumed to be irrelevant to the concerns of men of affairs²³⁴. As a result, the 'dynamic of power', which has typically been seen as a distinguishing feature of the political, is presumed not to operate in the domestic sphere²³⁵. As such, the sexual division of labour, economic dependency and the power structure within families is not recognised. This omission demonstrates that the freedom to contract has been crafted in a male image. Women have not been 'party to the original contract' which allowed men to 'transform their natural freedom into the security of civil freedom'. Rather, as Pateman states, women have been the 'subject of the contract'²³⁶. This sexual contract has ensured the subordination of women through

²³⁰ *ibid.*, p. 54

²³¹ *ibid.*, p. 55

²³² *ibid.*, p. 102

²³³ *ibid.*, p. 115

²³⁴ C. Pateman, The Disorder of Women, Polity Press, 1989, p. 201

²³⁵ S. M. Okin, *op. cit.*, p. 77

²³⁶ C. Pateman, *op. cit.*, 1988, p. 6

the legal regulation of the marriage contract. Through the establishment of marriage and the pretence of a contract, men's domination is hidden by the claim that marriage is either an equal or natural partnership²³⁷. Thus the theoretical construction of a private sphere free from legal regulation as a central tenet of the ideology of liberal political and legal philosophy can be seen to be a false organising concept.

Contemporary feminists have paid critical attention to women's disadvantaged position under the law and sought to rectify the inequalities which liberalism, through its implicit insistence that all individuals are equally equal, disguises. In exposing the neglect of gender within political theory, contemporary feminism has identified that the values associated with the private sphere have been instrumental in 'placing' women firmly within that sphere. The social roles that women are assigned within the home of producing children, looking after the family and doing housework have been, and continue to be, undervalued. As Margaret Thornton notes, 'it is not what women do, so much as the meaning assigned to that work' that is problematic²³⁸. However, feminists differ amongst themselves as to an appropriate standard for lawmakers to use that might more successfully enhance women's interests. Feminists have engaged with equality principles in the law through the equal treatment versus special treatment, equality versus difference, or sameness versus difference debates. At the heart of the debate is whether substantive equality or equality of outcome could best be achieved by women having the same rights as men or whether women should have different and specific rights.

Feminist legal commentators, in their examination of judicial reasoning in decided cases of sexually transmitted debt, argue that judges may indirectly discriminate against

²³⁷ *ibid.*, p. 159

²³⁸ M. Thornton, *op. cit.*, p. 14

women 'by assessing standards of conduct against a male pattern of experience (men are not likely to be in a situation of physical, or economic powerlessness in a relationship)²³⁹. Thus, the law's response to STD is inadequate in addressing the vulnerability of women for it ignores issues of financial dependency and control and violence that may characterise the relationship of the debtor and the surety.

For radical jurisprudence feminist theorist, Catharine MacKinnon, liberalism conceals the concept of 'power' within society. Power and powerlessness is divided through gender as a social system and is therefore a political system²⁴⁰. MacKinnon recognises that feminism has 'not analyzed the state's role in gender hierarchy' and asks, 'What, in gender terms, are the state's norms of accountability, sources of power, real constituency?' and 'Is the state constructed upon the subordination of women?'²⁴¹. In questioning the gendered nature and character of state power as it is expressed in law, MacKinnon concludes that feminist understanding 'has been caught between giving more power to the state in each attempt to claim it for women and leaving unchecked power in the society to men'²⁴². The legitimation of the state, through rationality, as a supposedly objective locus of power allows the reinforcement of the status quo of male power and female powerlessness, while at the same time maintaining the myth of its own neutrality and gender-blindness²⁴³. Thus MacKinnon states

once gender is grasped as a means of social stratification, the status categories basic to medieval law, thought to have been superseded by liberal regimes in

²³⁹ P. Baron, *op. cit.*, p. 51

²⁴⁰ C. MacKinnon, Toward a Feminist Theory of the State, Harvard University Press, Cambridge, Massachusetts, 1989, p. 161

²⁴¹ *ibid.*

²⁴² *ibid.*

²⁴³ *ibid.*, pp. 162-163

aspirational nonhierarchical constructs of abstract personhood, are revealed deeply unchanged²⁴⁴.

MacKinnon suggests two feminist legal and conceptual responses to the question of gender. The feminist debate about equality, particularly in relation to law, has hinged on whether women are the same as men or different. The sameness/difference debate, like the public/private debate, engages feminists in developing strategies for reform based on their positions in these debates. For MacKinnon, first however,

the gender question is a question of difference. There are two options under it. The first I call the "male standard": Women can be the *same* as men. In law, it is called gender neutrality. The other option I call the "female standard": You can be *different* from men. In Law, it is called special protection²⁴⁵.

Whether law adopts the sameness approach, that is to say that a woman qualifies for a particular position because she can demonstrate the same capabilities as a man, or whether the 'difference' approach, that which treats women as different from and deserving of different treatment from men, is adopted, the options are 'just two ways of having men as your standard'²⁴⁶. Thus, the

philosophy underlying the sameness/difference approach applies liberalism to women. Sex is a natural difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness branch of the doctrine conforms normative rules to empirical reality by granting

²⁴⁴ *ibid.*, p. 163

²⁴⁵ E. duBois *et al.*, 'Feminist Discourse, Moral Values and the Law – A Conversation', Buffalo Law Review, Vol XXXIV, 1985, p. 20

²⁴⁶ *ibid.*, p. 21

women access to what men have: to the extent women are no different from men, women deserve what men have. The difference branch ... exists to value or compensate women for what they are or have become distinctively as women – by which is meant, unlike men; or to leave women as 'different' as equality law finds them²⁴⁷.

MacKinnon's second answer to the gender question, and her own position, focuses on dominance. Gender is a political hierarchy of power in which some people have power and some are powerless: one part of the distinction is dominant, and the other part of the distinction is subordinate²⁴⁸. Power over and domination of women by men is the basis of inequality rather than any differences between them. Thus, rather than trying to make rules fit social reality, the question becomes how to change reality.

For Angela Harris, MacKinnon's theory is limiting for women as it relies on the 'notion that unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience'²⁴⁹. Similarly, Diana Fuss cautions against essentialism for

A hierarchy of identities is set up *within* each speaking subject (not just between subjects), and it is this ranking of identities which is often used either to authorize an individual to speak on the basis of the truth of her lived experience or to de-authorize an individual from speaking on the basis of his *lack* of experience. What we see in this ordering of identities is none other than the paradoxical and

²⁴⁷ C. MacKinnon, *ibid.*, 1989, p. 220

²⁴⁸ E. duBois *et al.*, *op. cit.*, p. 21

²⁴⁹ A Harris, 'Race and Essentialism in Feminist Legal Theory', *Stanford Law Review*, Vol 42, 1990, p. 585

questionable assumption that some essences are more *essential* than others²⁵⁰.

The decision in *Garcia* provides justice for only one group of women, namely those that are in marital relationships only, and are able to access legal redress despite the time-consuming and costly nature of the legal process. As Harris points out, the differences between women are often ignored under the law. To adequately protect all women in intimate relationships who sign loan contracts, the law should be restated to include women whatever their financial resources, knowledge, race, ethnicity and marital status.

Further critique by feminist legal commentators of the law's inadequate response to women who have signed loan contracts for their partners relies on the work of educational psychologist Carol Gilligan²⁵¹. Paula Baron argues that judges indirectly discriminate against women by 'assuming traditional societal expectations of women's altruism (she should behave altruistically – he should not)²⁵². There remains a strong societal expectation that 'women are expected to act selflessly: men are expected to act selfishly except in certain circumscribed situations, most notably where the good of their children is concerned²⁵³. In judicial terms, the stereotypical role of women is 'seen to be one of supporting and furthering the ambitions of their partners and families²⁵⁴. Miranda Kaye and Nicola Howell also suggest that the vulnerability of women to STD can be linked to the fact that women may prioritise relationships of connection through their style of reasoning²⁵⁵.

²⁵⁰ D. Fuss, *Essentially Speaking: Feminism, Nature and Difference*. Routledge, New York, 1989, p. 116

²⁵¹ N. Howell, *op. cit.*, 1994, p. 95; M. Kaye, 'Equity's Treatment of Sexually Transmitted Debt', *Feminist Legal Studies*, Vol V No 1, 1997, p. 38

²⁵² P. Baron, *op. cit.*, p. 51

²⁵³ *ibid.*

²⁵⁴ *ibid.*

²⁵⁵ N. Howell, *loc. cit.*; M. Kaye, *loc. cit.*

In examining the work of Lawrence Kohlberg on moral development, Carol Gilligan noted that his empirical work had relied on observations of the behaviour of male children only and therefore had inadequately represented human development²⁵⁶. Gilligan's research concerned the interpretation of the manner and extent to which girls and boys differed in their reactions to a moral dilemma. For Gilligan both responses are 'equally sophisticated' but simply 'display different modes of moral understanding, different ways of thinking about conflict and choice'²⁵⁷. Thus,

the morality of rights is predicated on equality and centred on the understanding of fairness, while the ethic of responsibility relies on the concept of equity, the recognition of differences in need. While the ethic of rights is a manifestation of equal respect, balancing the claims of other and self, the ethic of responsibility rests on an understanding that gives rise to compassion and care²⁵⁸.

Catharine MacKinnon is critical of Gilligan's analysis as it neglects to explain 'why women become these people, more than men, who represent these values'²⁵⁹. She asserts that women think in relational terms because their 'existence is defined in relation to men'²⁶⁰. Their powerlessness forces them to 'value care because men have valued us [women] according to the care we give them'²⁶¹. MacKinnon views this 'positively valued feminine stereotype' as limited and potentially limiting if women

²⁵⁶ C. Gilligan, In a Different Voice: Psychological Theory and Women's Development, Harvard University Press, Cambridge, Massachusetts, 1982, p. 18

²⁵⁷ *ibid.*, p. 32

²⁵⁸ *ibid.*, p. 164

²⁵⁹ E. duBois *et al.*, *op. cit.*, p. 74

²⁶⁰ C. MacKinnon, *op. cit.*, 1987, p. 39

²⁶¹ *ibid.*

identify with it²⁶².

For Belinda Fehlberg, Gilligan's research does lend support to the experience of married women in providing third party guarantees for their husbands. A woman requested by her husband to execute a security, according to Gilligan's claim, 'would be likely to view her decision less in terms of law, economic considerations, or property, than in terms of the negative impact her refusal ... would have on their relationship'²⁶³. Consequently, women may not seek independent legal advice concerning the legal, economic or property consequences of her signing. If they did, they would be less likely to give it greater weight than the relationship²⁶⁴.

Again however, the 'difference' approach, also fails to recognise the underlying reality of economic power imbalances within the household, which are obscured and consequently remain hidden in the 'private' realm.

The Household Economy

In discussions of the privacy of marital relations or of the boundaries of state intervention, the home, the family and the married couple remain an entity that is taken for granted. The couple is a unit, a black box, into which the law does not purport to peer. What goes on inside the box is not perceived as the law's concern. The belief is that it is for family members to sort out their personal relationships. What this overlooks is the power inequalities inside the family

²⁶² *ibid.*

²⁶³ B. Fehlberg, *op. cit.*, 1997b, p. 86

²⁶⁴ *ibid.*

which are of course affected by structures external to it²⁶⁵.

As Regina Graycar and Jenny Morgan assert, this ideology of privacy and non-intervention has been articulated by legislators, by the judiciary and by legal scholars²⁶⁶. The public sphere/private sphere split has also marked the scholarship of economics and sociology.

The Family as 'One'

Money has historically been analysed within the paradigm of the public sphere of Western economic markets and from the perspective of the discipline of economics. Dominant within the discipline has been the quantitative nature of money as the natural unit of measure. In economic scholarship, the prototypical market is one in which 'tangible goods or labor services are exchanged, with money facilitating the transactions, and in which the agents are individual persons'²⁶⁷. At the heart of the economist's model world is an individual who is 'self-interested, autonomous, rational, and whose active choices are the focus of interest'²⁶⁸. This dominant view effectively marginalises the individual who 'would be social, other-interested, dependent, emotional, and directed by an intrinsic nature'²⁶⁹. As with the law, economics has historically upheld the formal, mathematical model of rational, individual choice attributable to the 'public' realm. The underlying premises of the economic model are

²⁶⁵ R. Graycar and J. Morgan, *op. cit.*, p. 33

²⁶⁶ *ibid.*

²⁶⁷ J. Nelson, Feminism, Objectivity and Economics, Routledge, London, 1996, p. 21

²⁶⁸ *ibid.*, p. 22

²⁶⁹ *ibid.*

very similar to the basic liberal premises of rationality, autonomy, neutrality of the state, individualism and equality, which underpin the law:

Rationality becomes the ability to maximise self-interest; autonomy denotes freedom within the market; state neutrality means lack of intervention in the workings or outcomes of the market. Society is assumed to be composed of atomistic individuals who are interchangeable market agents, and equality is simply the formal equality of individuals to enter into contracts²⁷⁰.

Increasingly, feminist economists have paid critical attention to the objective value system espoused by economists. According to feminists, the belief that economics is based on free choices made by individuals within the market who are rational and informed is a false claim of objectivity. Underlying the concept of *homo economicus* is a romance of individuality without connection to nature or to society²⁷¹. For feminist economist Prue Hyman, economics has largely ignored the fact 'that different people enter the market with very different access to resources and power' and therefore 'have widely differing options and constraints on their choice'²⁷². This neglect is justified by the argument posited by economists that these aspects of life are unimportant or merely 'natural' and therefore non-economic. Thus, they should be dealt with by disciplines other than economics²⁷³. If not entirely ignored, the most common neoclassical approach to the 'private' realm has been to treat the household as if 'it were an individual itself, consigning all its internal workings to a "black box"²⁷⁴.

²⁷⁰ S. Fredman, *op. cit.*, p. 405

²⁷¹ J. Nelson, *loc. cit.*

²⁷² P. Hyman, 'The Use of Economic Orthodoxy to Justify Inequality: A Feminist Critique' in R. Du Plessis, (ed), *Feminist Voices*, Oxford University Press, Auckland, 1992, p. 255

²⁷³ J. Nelson, *op. cit.*, p. 26

²⁷⁴ *ibid.*, p. 63

The Division of Money Within the 'Black Box'

Julie Nelson points out that some attempt has been made in contemporary economics to recognise families, as many persons rather than a single agent, in the unit of analysis. The work of Gary Becker, known as a New Home Economist, assumes that families seek to maximise the utility function of the family 'altruist'²⁷⁵. This model asserts that the 'head' of the family is that member who "transfers general purchasing power to all other members because he cares about their welfare"²⁷⁶. However, as Nelson argues, although Becker made it clear that his definition of the altruist or head 'does not rely on "sex or age," the weight of law, religion and tradition makes such a statement rather disingenuous'²⁷⁷. If the person who has the power to transfer general purchasing power to all members is not benevolent then the other members, by default, will not get much. Thus, feminist analysis of economic theory shows that the family 'neither possesses a joint-utility maximising function, nor can one assume an equal balance of power of decision-making or an equitable distribution of income among family members'²⁷⁸. The family is treated as if it were an individual embodied in a male household head.

The non-economic aspects of money have also, until recently, dominated sociological analysis of modern society. Social theorists like Marx, Simmel and Weber placed their emphasis on viewing money as responsible for the depersonalising of social relations²⁷⁹. For Marx, the 'transformational powers of money subverted reality' by 'obliterating all subjective connection between objects and individuals' thus 'debasement personal relations

²⁷⁵ *ibid.*, p. 61

²⁷⁶ *ibid.*, p. 62

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*, p. 261

²⁷⁹ N. Dodd, The Sociology of Money: Economics, Reason and Contemporary Society, Polity Press, Cambridge, 1994, pp. 160-161

into calculative instrumental ties²⁸⁰. This 'money fetishism' not only 'neutralized all possible qualitative distinctions between commodities' but also changed 'even intangible objects devoid of utility – such as conscience or honor - into ordinary commodities'²⁸¹. Money for Simmel and Weber, in its 'uncompromising objectivity', portrayed the economic relations between objects 'without itself entering into those relations' thus transforming the world into 'an arithmetically calculable problem'²⁸².

However, sociological analysis in the 1980s recognised the significance of money as a resource in households; the distribution of income within households has since been a major theme of women's studies interest. In a 1981 report commissioned by the National Women's Advisory Council of Australia, Meredith Edwards examines the extent to which the traditional social policy assumption of joint financial decision-making by husbands and wives can be justified. This assumption had been premised on economic understanding of the household economy that supported the notion that (1) the income of a household is pooled and spent for the benefit of its members (or at least of both partners in a marriage), and (2) the welfare of any member of a household can be ascertained by reference to household income²⁸³.

Through a study of 50 married couples, Edwards aimed to distinguish more clearly the difference between the 'management' and 'control' aspects of financial arrangements within families. While many wives 'managed' family finances by paying the household bills, buying food, clothing and smaller household goods, only a small number 'had

²⁸⁰ V. Zelizer, 'The Social Meaning of Money: "Special Monies"', American Journal of Sociology, Vol 95 No 2, 1989, p. 345

²⁸¹ *ibid.*

²⁸² *ibid.*

²⁸³ M. Edwards, 'The Distribution of Income Within Households' in D. Broom, (ed.), Unfinished Business: Social Justice for Women In Australia, George Allen & Unwin, 1984, p. 120

overall control' of the finances²⁸⁴. She concludes that, because household 'pooling' of money is not equitable, 'unrecognised poverty and 'hidden' poverty exists within households'²⁸⁵. This she argues has great significance for social policy decisions on tax and social security as policies at the time favoured the family unit rather than the individual within the family.

Similarly, in order to test ideologies about family life and the relative power of men and women within marriage, Jan Pahl undertook a study from 1982 to 1983 involving 102 randomly selected married couples in England²⁸⁶. With the accepted knowledge that a couple's financial arrangements included joint bank accounts and therefore a 'pooling' of money, respondents were questioned about the extent to which income was pooled and the control of the pool. For Pahl, *control* denotes the decisions that are made when money enters the household, access to joint money, control over ownership of individual money and major financial decisions. *Management* of money is concerned with the action of managing the particular allocative system that couples have adopted. While the dominant ideology about the nature of marriage suggests that married couples share their income, Pahl's study results failed to support this assumption. Financial and power inequality within marriage occurs, not only because of earning levels, as previously researched, but also because of male dominance in decision-making²⁸⁷. Husbands more often either controlled the joint account or, if there was no joint account, controlled the household money held in a separate account owned by husbands.

²⁸⁴ M. Edwards, *op. cit.*, 1981, p. 59

²⁸⁵ *ibid.*, p. 5

²⁸⁶ J. Pahl, 'Money and Power in Marriage' in P. Abbott, and C. Wallace (eds), Gender, Power and Sexuality, Macmillan, London, 1991

²⁸⁷ *ibid.*, p. 57

Both studies shifted the focus in sociological research, from the association between an individual's financial contribution to the household and his or her power within it based on their contribution, to the intra-household economy and its links with intra-household power over shared money²⁸⁸.

Viviana Zelizer, an American sociologist, also challenges economics' assumed homogeneity of money exempt from extraeconomic influences. In her study of the changing meaning of married women's money between the 1870s and 1930s, Zelizer applies to the modern world a concept, adapted from anthropological studies, of 'special money'. She examines the ways in which cultural and social distinctions, as opposed to economic distinctions, mark the 'uses, allocation, sources, and quantity' of modern money²⁸⁹. Without this application, she asserts, little knowledge can be gained of how money should be analysed beyond a limited economic understanding. By examining 'domestic' money in particular, Zelizer is able to defend her claim that money represents something other than only the market.

She argues that

money is reductively defined as the ultimate objectifier, homogenising all qualitative distinctions into an abstract quantity²⁹⁰

Such a utilitarian conception of market money has ignored the important connection between the economic and non-economic qualities of money, that is money as a social and cultural phenomenon rather than just as an objective means of rational calculation

²⁸⁸ *ibid.*, p. 41

²⁸⁹ V. Zelizer, *op. cit.*, 1989, p. 350

²⁹⁰ *ibid.*, p. 342

within the market. She asserts that, in order to gain a better understanding of the social differentiation of monies, the structure and social meaning of money needs to be mapped.

Zelizer notes that five underlying assumptions have characterised the classical interpretation of money²⁹¹. The first is that money is not shaped by cultural and social factors, for the functions and characteristics of money are defined strictly in economic terms. The second assumption is that there is only one kind of money, market money. Therefore she argues that the third assumption is that a clear division has been established between pecuniary and non-pecuniary values. The former locates money as qualitatively neutral while the latter is qualitatively distinct and marked by 'personal, social and sacred values'. This leads to the fourth assumption that market money is indifferent to human interests, for it is responsible for the continued commodification of society but remains unaccountable for the social consequences of that commodification. The fifth assumption identified by Zelizer is that money is exempt in reality from extraeconomic influences and therefore, according to Marx, is 'unfettered by objective or ethical considerations'²⁹².

Thus money, argues Zelizer, has been seen as wholly quantifiable as its properties include fungibility, homogeneity and objectivity. When economists reduce the meaning of money to a medium used to exchange commodities in a way that excludes emotional attachment, money assumes abstract qualities. In order to transfer money's meaning from quantifiable to qualitative, fungible to nonfungible, homogeneous to heterogeneous and objective to subjective, the social and symbolic value of money needs to be examined. Zelizer recognises that anthropologists have identified different

²⁹¹ V. Zelizer, The Social Meaning of Money, Basic Books, New York, 1994, pp. 11-12; V. Zelizer, *op. cit.*, 1989, pp. 346-347

²⁹² *ibid.*, p. 347

meanings allocated to money within primitive societies, such as designated uses dependent on gender, status and ritual. Anthropologists call these currencies 'special monies'²⁹³. Qualitatively the money used for a dowry is ranked differently from that derived from selling a cow. However, she argues that, although their analysis of primitive monies as special monies significantly advances theoretical understanding of the cultural values of money, anthropologists continue to describe modern money in terms of economic distinctions, and therefore limit cultural analysis through their neglect of special monies²⁹⁴. They have established a 'sharp dichotomy' between the two that assumes that modern money 'as a single currency, unburdened by ritual or social controls, can function effectively as a universal medium of exchange'²⁹⁵.

Zelizer's study of 'special monies' allows her to challenge the assumptions made about money in industrialised societies as simply 'market money'. She concludes that social and cultural factors do influence the way market money is viewed upon entering the household. Furthermore, she asserts that gender roles and social class strongly influence the meanings and methods of allocation of married women's money. When marriages supposedly became more egalitarian, the allocation and uses of domestic money did not follow this change. The money married women earned by caring for boarders or taking in sewing or laundry was merged into the family's housekeeping money and commonly spoken of as 'pin' money. If she earned money outside the home, this was also trivialised as supplementary to the primary income, 'pin' money too. Thus, differential meanings and uses marked women's earned income and men's earned wages.

²⁹³ *ibid.*, pp. 348-350

²⁹⁴ V. Zelizer, *op. cit.*, 1994, pp. 22-24

²⁹⁵ *ibid.*, p. 22

Through the qualitative analysis of historical data within the United States of America, Zelizer has charted the shift in meanings and uses of domestic money. Prior to the Married Women's Property Acts any wages a wife received for work performed outside the home belonged to her husband. This right was incorporated in America slowly from the second half of the nineteenth century with much resistance by amendments or in later statutes²⁹⁶. Different meanings emerged between the money women earned in the home from domestic work and the income they earned from wages. Common law cases of personal injury contested the Married Women's Property Acts legislation in deciding whether the husband or the wife was entitled to recover for a woman's inability to work. However, the courts 'staunchly opposed converting a wife's money into her tangible property' by insisting that the money earned by a wife as a member of the domestic sphere was 'not a real earning [that is, earned in the public sphere] and therefore belonged to her husband'²⁹⁷.

At the turn of the century middle class women had traditionally been given an amount from their husbands' earnings, sufficient only to feed and clothe family members. The remaining earnings were considered to be "serious money" and therefore only suitable as men's currency. Women often relied 'on "invisible dollars", crediting their expenses and rarely handling cash at all'²⁹⁸. Accounts would be held with retailers and any necessary household expenses would be channelled through these outlets. In the case of working class women, Zelizer notes that they were usually given their husbands' and children's paychecks and 'expected to administer the collective income skilfully'²⁹⁹. While this might appear to have been a much more equitable system, with the wife

²⁹⁶ For a comprehensive discussion of these reforms see L. Speth, *op. cit.*

²⁹⁷ *ibid.*, p. 366

²⁹⁸ *ibid.*, p. 357

²⁹⁹ *ibid.*

having greater power as to the allocation and distribution of money than her middle class counterparts, Zelizer notes that a greater uncertainty of income was a feature of these women's lives. Therefore, the task of managing the money was far more arduous. Coupled with this, Zelizer questions the actual discretionary power of wives, noting that there has been minimal research undertaken to establish the dimensions of monetary power within the family³⁰⁰.

Using a variety of sources including magazine articles, advice columns, etiquette manuals, home economic textbooks and popular household manuals for her study, Zelizer records the influence of increased consumerism on understandings of family money. A strong American economy and corresponding increased disposable income for families 'forced a re-evaluation of family finances' as women's magazines and home economics experts endorsed an allowance for wives. Rather than upper and middle class women being 'doled out' money by their husbands for household goods and clothing, an allowance was seen as appropriate to ensure mothers' 'efficiency as manager and buyer' for the family³⁰¹. In addition to successfully managing the household, married women should have some money for personal use. This benefit was something that men, with control of their own finances, had always had. Despite the growing social acceptance of a wife's personal allowance, men were not compelled to provide an allowance proportionate to their earnings. Many questions remained as to who defined the uses of this money³⁰².

Zelizer argues that the allowance represents a different form of money. While domestic money was seen as different from market money, the allowance was also seen as having

³⁰⁰ *ibid.*, p. 363

³⁰¹ *ibid.*, p. 360

³⁰² V. Zelizer, *op. cit.*, 1994, p. 53

a separate special identity by its meaning and use. Unlike the dole, which had been viewed as a gift, the allowance was viewed as a budgetary entitlement. As it was prescribed for household use and not leisure uses still, women were not able to individualise and differentiate this money in the way men were able to with their wages or salaries³⁰³. Disagreement ensued within households as to how much should be 'allowed' and how it should be spent.

Even in working class families where the wife had control of the money, husbands and children were given an allowance. But Zelizer points out that this was far from ideal for women. Often this meant that the burden of responsibility for wives amounted to being blamed for 'female mismanagement rather than blame falling on a tight budget or an irregular labour market'³⁰⁴. Further, the withholding of part of the earnings prior to handing over pay packets represented competing internal claims for the money. The 'earners', men and children, were able to allocate themselves pocket money while women's money, 'retained a collective identity' devoid of choice³⁰⁵. After the allocation of family expenses, wives often had no money left within the budget to spend on themselves.

As a means of circumventing these issues, women improvised ways in which to differentiate and personalise their monies. As domestic money was distinguished as to whether it could be considered 'real' money or 'pin' money by who earned it within the family, the money women earned through selling eggs or butter, taking in boarders, sewing, washing and ironing was considered to be different from money allocated by the allowance and was therefore used differently. This earmarking, as Zelizer describes

³⁰³ *ibid.*, p. 60

³⁰⁴ V. Zelizer, *op. cit.*, 1989, p. 364

³⁰⁵ *ibid.*, p. 365

it, was qualitatively different for

regardless of its sources, once money had entered the household, its allocation, calculation, and uses were subject to a set of domestic rules distinct from the rules of the market. Family money was nonfungible; social barriers prevented its conversion into ordinary wages³⁰⁶.

So for Zelizer

domestic money is a special money, not just a medium of economic exchange but a meaningful, socially constructed currency, shaped by the domestic sphere where it circulates and by the gender and social class of its domestic "money handlers"³⁰⁷.

Australian sociologist, Supriya Singh also examines the issue of the social meaning of money. Zelizer has argued that market money does not exist in isolation and that non-market money, in particular 'domestic money', is an example of a different type of money. Singh extends Zelizer's theory by examining 'marriage money' *and* 'market money' in the social construction of 'banking money'. She undertook open-ended interviews between 1991 and 1992 with 37 persons from 21 households randomly selected in a predominantly middle-income Melbourne suburb³⁰⁸. Almost all were Australian-born, Anglo-Celtic, middle aged, in first marriages with annual household incomes of over \$50,000. She subsequently surveyed 188 non-English-speaking background persons (comprised of 33 countries of origin) from an adjacent region with

³⁰⁶ V. Zelizer, *op. cit.*, 1994, p. 64

³⁰⁷ V. Zelizer, *op. cit.*, 1989, p. 370

³⁰⁸ S. Singh, *loc. cit.*

household incomes of less than \$15,000. In response to discussions with her respondents during the course of the data collection, Singh recognised that her study needed to move from changes in banking to the meanings of marriage money³⁰⁹. Respondents spoke in terms of their own financial practices rather than recognising the involvement of banks and other financial institutions.

Where Zelizer had chosen to concentrate on the examination of multiple monies in the context of non-economic monies only, Singh sought to examine both economic and non-economic multiple monies. Her doctoral study initially focused on financial deregulation and the changing relationship between banks and consumers. Thus her theoretical analysis stemmed from the banking industry's perspective rather than the consumers' and consequently, was grounded in the assumptions of market money³¹⁰. Singh accepted that money is conceived in banking policy as 'impersonal, public and individual'³¹¹. As against this limited understanding by banks, Singh argues that it is not possible to understand banking unless the interrelatedness of marriage and marriage money to banking is recognised and vice versa. The use of the term marriage money is predicated on common assumptions, for middle-income, Anglo-Celtic Australians, of marriage as being based on jointness, sharing and trust and the jointness is symbolised by the joint bank account³¹². The joint bank account is seen as one of the major generational changes in banking directly attributable to women's increased employment and the changes in marriage ideology towards marriage as an equal partnership³¹³. This type of account highlights the important point of divergence between banking money

³⁰⁹ *ibid.*

³¹⁰ *ibid.*, p. 29

³¹¹ *ibid.*, p. 18

³¹² *ibid.*, p. 55

³¹³ *ibid.*, p. 112

and market money. Couples in Singh's study saw banking as a personal relationship characterised by loyalty and trust rather than solely a commercial relationship based on banking money as a commodity to buy and sell³¹⁴. For Singh, the joint bank account is central to the way in which couples construct the meanings of marriage money³¹⁵.

Singh asserts that the joint bank account is not necessarily an indicator of joint control and therefore equality³¹⁶. Various combinations of control existed amongst her respondents, for example, husband control, wife control and independent control. A lack of information also led to a lack of control. This occurred when the income earner failed to disclose his or her total income and only allocates part of that income to the joint account. But banking technology, such as direct crediting of wages, pensions and benefits into bank accounts and credit cards has, in her view, contributed to greater access to money and information about money between married couples³¹⁷.

For Singh, banking money is at the heart of the earmarking and control of money in marriage. The use of separate accounts for savings, mortgage, and housekeeping allows and reflects distinctions that make banking money personal rather than impersonal³¹⁸. Similarly banking money differs from marriage money in its characteristics. Marriage money is domestic rather than public, cooperative rather than contractual, nebulous rather than calculable³¹⁹. However, banks fail to recognise these social patterns and cultural values that underlie consumer practices. This conflict leads Singh to the

³¹⁴ *ibid.*, p. 136

³¹⁵ *ibid.*

³¹⁶ *ibid.*, p. 99

³¹⁷ *ibid.*, p. 110

³¹⁸ *ibid.*, p. 136

³¹⁹ *ibid.*, p. 152

identification of sexually transmitted debt as a consequence of the differing meanings money has for household members and banks³²⁰. It is only when the marital or banking relationship breaks down that domestic money is treated by the law, and by different parties to the relationship, in a way that mirrors traditional market money assumptions³²¹.

She concludes, like Zelizer, that money has gender and that the different types of money that she has identified are gendered in different ways. Women see money as joint, domestic and nebulous. However, men view money 'in tune with the ideal-type version of the impersonal, individual world of the market'³²². Men see money inside the family home as like banking money. Though Singh does not discuss how men see women's money within the household, the narratives of the couples in her study suggest that women's money is viewed by men less seriously and is used for housekeeping or as 'pin money'. As with the emergence in sociology of the sexual division of labour, the concept of multiple monies allows a more exacting analysis of power, work, equality, independence and choice and, subsequently, the potential for a redefinition of money. This would allow for a move away from existing analyses of the systems of money management to the characteristics of money in marriage and allow the examination of how gender shapes the nature of money rather than how a lack of money shapes the construction of gender³²³. Ultimately Singh recognises that she is left with the unanswered questions³²⁴: Is market money male? Does the maleness of market money influence the gender of marriage money? Does it lessen the power of women in

³²⁰ *ibid.*, p. 150

³²¹ *ibid.*

³²² *ibid.*, p. 163

³²³ *ibid.*, p. 155

³²⁴ *ibid.*, p. 33

marriage? These issues are returned to in chapter six.

Both Zelizer and Singh begin their research from the premise that money is an asset. Zelizer examines and discusses household earnings and Singh analyses distinctions of marital earnings and associated bank policy. As such, money has qualities of value and usefulness that relate across and within the economic, social and cultural realms. However, money should also be viewed as a liability. When debt as an element of money is considered within a household structure it can be seen as both providing an asset and incurring a liability. The debt is useful and valuable when incurred, utilised and repaid within a framework of equal partnership in a domestic relationship but onerous and in fact crippling when experienced inequitably. The shaping of money in households must include the social shaping of debt as a crucial component in order to gain an understanding of why sexually transmitted debt continues to be a contentious social issue³²⁵.

Singh's voice is imbued with an acceptance of banking practice as essentially 'good practice'. When discussing sexually transmitted debt she states that

the guarantors and co-borrowers need to be aware that, if there is a problem with the loan, it is the norms of market money that will apply. Money will no longer be seen as personal, joint and nebulous, but will be seen as impersonal, individual and precise. Joint loans become individual liabilities. Women need to recognise this difference more than men, for women are more willing than men to guarantee loans³²⁶.

³²⁵ Singh points out that money has not been 'indexed in studies of gender or marriage and family ... even when the study is patently of the family economy, work or about inequality in marriage', *ibid.*, p. 156. She does not consider that debt has also not been indexed.

³²⁶ *ibid.*, p. 150

That women are more willing to sign guarantee loans than men is supported by my research. However, the reasons why women sign, as discussed in the next chapter, are far more complex than Singh implies and cannot simply be located within a good bank manager practice juxtaposed with a bad bank consumer model. Singh reports that when women from her survey had disclosed 'stories of guarantees gone wrong' they also expressed 'regret at their stupidity in having guaranteed the loan in the first place'³²⁷. She then relays the story of one woman having been 'alerted' by a bank manager to the possible consequences of signing as a co-borrower. After previously co-signing for her husband's business loans, "I got a shock ... It never occurred to me before, that all the joint loans we've taken out could very well revert to me if I was by myself." Subsequently 'the bank manager sent Robyn home to think about it ... it was the first time that I've been made aware that I was in an enormous amount of debt'. Singh's portrayal does not elaborate on the implications of the bank's role in failing to provide information to the surety earlier. Instead we are left with an image of women as weak and always in need of special protection in the public sphere.

Central to Singh's analysis, as discussed earlier, are the role of the joint account in making marriage money visible and the importance of the transfer between banks and consumers of information about money. In this she shows that consumers do not necessarily seek information about money or use that information for their decisions or actions, and that joint accounts are not a measure of joint control. Yet joint accounts are held by 'most married couples in Australia'³²⁸ and their 'preference for the joint account and joint home ownership is echoed by bankers'³²⁹. Singh sees the joint account as 'broadly coterminous' with marriage ideology, women's employment and joint home

³²⁷ *ibid.*

³²⁸ *ibid.*, p. 43

³²⁹ *ibid.*, p. 80

ownership. But she also suggests that changes to the *Privacy Act* 1988 spearheaded the move to joint loans by banks³³⁰. Prior to the Act credit reference files held the credit information of the husband and the wife on the one file. So that banks could continue to check the wife's creditworthiness after the Act when files became individual, they then offered joint loans.

Lending institutions, through their media campaigns, promote their virtuousness in providing customers with bank services that they want. A consistent theme of such marketing is that couples *want* to jointly borrow and *want* joint accounts. When respondents in my study were asked whether they would borrow jointly or hold joint accounts in the future many said they wouldn't because, as Singh points out, joint does not necessarily mean equal. Their experiences of joint accounts within their relationships invariably portrayed a lack of control, and an unequal share of the money held in the accounts. In addition, respondents also spoke of the lack of information they had about the money within joint accounts. Either bank statements were received and withheld by their partners or, at times, separate bank statements were not sent to women as joint account holders because they were not considered to be the primary account holder.

When joint accounts and joint information are considered within the framework of joint debt, the practices of banks become highly contestable. Joint loans, like joint accounts and joint home ownership imply to the surety that Singh's characteristics of 'marriage money' will apply: 'joint, personal, private, domestic, nebulous and co-operative'³³¹. Banks sell this ideal of jointness within marital relations. However, the characteristics of 'market money', that is calculable, contractual, public, individual, and impersonal

³³⁰ *ibid.*

³³¹ *ibid.*, p. 152

better describe the reality of joint loans. The construction of 'joint' by banks allows Singh to consider that banking money is, as the banks see it, and can ultimately enforce, 'mid-way between marriage money and market money'. Banking money has the combined characteristics of both. However, I contend that joint loans are perceived by banks as involving two individual debtors rather than one indivisible debt and are therefore always individual debts by their very nature. Either party can be held responsible for the full extent of any debt incurred, though the implication is that in the event of default, either party would be responsible for only half of the debt. Banks market joint loans to consumers under a banner that implies the rights of the 'private' sphere, but in the event of default defend their actions under a 'public' banner. Thus the loan is always contractual, calculable, public, individual and impersonal.

Feminist contributions to economics and sociology have substantially advanced the identification of power and conflict in financial decision-making within families and along gendered lines. The inequality of decision-making within marriages has been documented most recently in two major studies of domestic power in Australia³³². Ken Dempsey observes that the ideology of individual ownership of money remains 'very resilient' in the face of a marital ideology that favours an equal sharing of 'a couple's resources, irrespective of who brings those resources to the marriage'³³³. Although couples interviewed in Australia during 1992 to 1994 for Dempsey's study frequently said that decision-making about money within the household was joint, husbands assumed that 'because they had earned it, they had the right to spend at least some of the income without reference to their wives'³³⁴. Wives often 'accepted this practice as legitimate' and even when they had a separate income chose not to spend it on

³³² K. Dempsey, *Inequalities in Marriage: Australia and Beyond*, Oxford University Press, Melbourne, 1997; M. Bittman and J. Pixley, *The Double Life of the Family*, Allen & Unwin, Australia, 1997

³³³ K. Dempsey, *ibid.*, p.105

³³⁴ *ibid.*

themselves but to contribute it to the family collectively³³⁵. Bittman and Lovejoy contend that household traditions where men did not share the family wage equally within their families 'clearly persist to the present day'³³⁶.

But how can this inequality be remedied under the law when considered in the experience of sexually transmitted debt? How can individual behaviour in financial decision-making within intimate relationships be recognised outside the domestic sphere? It is clear from the above discussion that disassociating women from their contexts as if they have the same opportunities and experiences in the household as men have will not provide them with equality. Nor, as shown, will a 'difference' approach provide a solution to the impasse. Feminist political theorist, Carol Bacchi argues that 'the language of sameness and difference implies that women are the problem' and therefore, 'men do not have to change nor does the system, except to the extent that it must "accommodate" women'³³⁷.

If feminists start from specific social problems and then work back to assess which strategies for change would be the most effective then, rather than either/or choices, the questions of how the choice came to be defined and whose interests it serves can be addressed³³⁸. Applying this dictum to the law's response to women's 'public' treatment in cases of sexually transmitted debt with a call to 'special treatment' presents a double-edged sword. Belinda Fehlberg, Paula Baron, Miranda Kaye and Nicola Howell have all convincingly argued for the recognition of equity's failure to provide a true picture of the circumstances of women who have signed loan contracts. Paula Baron assigns

³³⁵ *ibid.*

³³⁶ M. Bittman and J. Pixley, *op. cit.*, p. 222

³³⁷ C. Bacchi, Same Difference: Feminism and Sexual Difference. Allen & Unwin, Sydney, 1990, p. xvi

³³⁸ J. Adiba Sohrab, 'Avoiding The "Exquisite Trap": A Critical Look At the Equal Treatment/Special Treatment Debate in Law', Feminist Legal Studies, Vol 1 No 2, 1993, p. 159

blame to judicial discrimination and the limitations of contract law. Similarly Nicola Howell argues that women's signatures on loan contracts under the law of contract are 'desexed' as the sex of the parties involved is irrelevant. By contrast, equitable unconscionability doctrines 'explicitly utilise a "difference" model'³³⁹. While this second equitable approach

seems to produce more equitable results, both approaches regard the 'deviants' who do not fit the norm as the problem. They fail to criticise the criteria against which people are judged and where, as here, the criteria are not gender neutral, neither approach will significantly improve the experiences of women³⁴⁰.

Thus, rather than reforms that are designed to 'make women fit into the system', change is needed that makes 'the system suit women'³⁴¹. Bacchi's challenge to the privileging of the male norm is a fresh conceptual approach that '*includes* women in the human standard'³⁴².

Reversing the Rules of Relevance

to be disadvantaged is also to be taken advantage of³⁴³.

the most effective opposition to change is one that is kept intangible³⁴⁴.

³³⁹ N. Howell, *op. cit.*, 1994, p. 105

³⁴⁰ *ibid.*

³⁴¹ C. Bacchi, *op. cit.*, p. 265

³⁴² *ibid.*, p. 266

³⁴³ J. Eveline, The Politics of Advantage, Australian Feminist Studies, No 19 Autumn 1994, p. 149

In order to disrupt and displace the 'regulative and the constitutive ordering of society', Daphne Patai argues the need to 'reverse the rules of relevance' thereby revealing the conflict within and 'dislocating the dominance of one term over the other'³⁴⁵. If feminists are to address the problem of the relevance of women's sex and the irrelevance of men's then a strategic reversal is crucial as a means to that end. She suggests that 'only by putting "men" in place of "women"' is it possible to see 'a particular view of the world in which women are eternally on the defensive, eternally the ones to be explained and justified'³⁴⁶. Joan Eveline applies Patai's claim to feminist theorising of subordination and feminisms of difference that have traditionally sought to elucidate how best to challenge male ordered power.

Her strategic focus is built around these normative pursuits of feminism but aims to provide a conceptual shift in the dimensions of the politics of feminism. Eveline coins the term 'disruptive' feminist strategy to reflect the claim for transformative change in the existing gendered order of society and, 'defensive' strategy for the defence of women against the effects of that ordering³⁴⁷. The first 'makes visible the muted contradictions that sustain the rigidities, reductions, distinctions, and inequities of the established order and transforms them into active or public discussions or controversies'³⁴⁸. The second 'transforms socially estranged situations into less openly conflictual social forms' working, for example, 'with and against the more normative assumptions of men as simultaneously free and controlling and women as ordered, of men as the workers and

³⁴⁴ M. Eduards, 'Against the Rules of the Game: On Importance of Women's Collective Actions' in Maud L. Eduards *et al.*, Rethinking Change: Current Swedish Feminist Research (HSFR) Uppsala, 1992, p. 85 quoted in J. Eveline, *ibid.*, p. 134

³⁴⁵ D. Patai, 'Beyond Defensiveness: Feminist Research Strategies', Women's Studies International Forum, Vol 6 No 2, 1983, p. 183 quoted in J. Eveline, *ibid.*, p. 148

³⁴⁶ *ibid.*

³⁴⁷ J. Eveline, *ibid.*, p. 143

³⁴⁸ *ibid.*, p. 144

women as the carers³⁴⁹. Eveline promotes both strategies as fundamental to change but poses the interaction of both as a more effective strategy to end the privileging of the male standard.

Using the example of equal opportunity legislation, Eveline argues that women's disadvantage has been the dominant discourse of policy. The need for more 'training' or 'self-esteem' for women is usually advanced as the solution to women's job prospects. Yet if equal employment opportunity policies are to succeed a case could be made that men need training and retraining³⁵⁰. However, feminist policy-makers focus on disadvantage for 'equal opportunity policies are sold because they give opportunities to women and benefit everyone, rather than because they take away male advantages'³⁵¹. For Eveline, this linguistic coding perpetuates male privilege as the absence in language and discourse of the relational link between categories of difference allows the norm to remain unspoken. The 'defensive' strategies of this policy, the 'foregrounding of disadvantage', defer 'to a background of advantage, ensuring the latter remains primarily normalised and tacitly familiar'³⁵². Women continue to be 'the problem'.

If a 'disruptive' strategy is used by feminists by reference to 'men's advantage', this reverses the unspoken and simultaneously allows a comprehension of both women's disadvantage *and* men's advantage with neither position muted. The situation of both men and women is then recognised. By focusing on the advantage of being male the male standard becomes problematic. So for example, if 'women's economic abuse' is recoded as 'bank economic abuse against women' the relationships that are inherent in

³⁴⁹ *ibid.*

³⁵⁰ *ibid.*, p. 134

³⁵¹ *ibid.*, p. 142

³⁵² *ibid.*, p. 134

the abuse of women are not censored and the abuse itself is not consequently condoned. Thus, in linking defensive and discursive strategies, the familiar private dispute becomes unfamiliar as a public equality issue and, a different understanding of equity is created with different solutions. In conceptually applying the politics of advantage promoted by Eveline to the experience of sexually transmitted debt, a pathway begins to emerge that might advance proposed solutions to overcome the impasse of either/or choices based on women's disadvantage. This will be returned to in chapter six.

Conclusion

Historically, jurisprudence, economics, political philosophy and sociology have all, prior to recent feminist theorists, treated the private sector as a 'black box'. Either they assumed they did not need to know about the household, as in economics and the law. Or in the case of political theory, and sociology to an extent, they felt that the private sector was not really of relevance to the public sector. The characteristics of the public sector like power, conflict and the different interests of actors, were presumed not to be features of the private sector, leaving the 'head of the household' to 'represent' the interests of the household in toto.

In challenging the inequity in financial decision-making within the 'black box', feminists have exposed the inadequacy of research that ignores the power imbalances in gender relations. While the division of money between men and women in households has been a major theme of sociological interest, debt within households remains relatively unexplored. The study of financial decision-making as it relates to sexually transmitted debt provides a valuable contribution towards rectifying this gap in the literature. The empirical research presented in the next chapter will focus on the emotional dependence of women in intimate relationships. The research questions were

framed in terms of difference approach to domestic debt. I explored the context in which women took responsibility for a partner's potential debt, to uncover the extent of 'emotional dependence' as Kirby J calls it, 'trust and confidence' as *Garcia* discusses, and, in some cases economic and physical coercion, rarely mentioned in decided cases. Chapter five explores the consequences of signing, which extend well beyond a change in their financial status for these women. The consequences indicate the need for a 'disruptive feminist strategy' (Eveline) in relation to STD, the subject of chapter 6.

CHAPTER FOUR

TO SIGN OR NOT TO SIGN

The chequebook was presented to me in bed and I signed. (Fiona)

Introduction

In August 1998 when the High Court delivered judgement in *Garcia v National Australia Bank Ltd*³⁵³ upholding the *Yerkey* principle, extensive debate ensued as to the wisdom of the presiding judges. As discussed in chapter two, the court ruled that the appellant Mrs Jean Garcia could not be held liable for her husband's business debts. The National Australia Bank was unable to establish that she understood the real extent of her personal responsibility and failed to ensure that she received independent professional advice before signing the guarantee. The High Court found this, despite the fact that the trial judge had established that Jean Garcia had previously signed four guarantees in favour of her husband's business.

Mrs Garcia's credibility assumed significant importance for the defence³⁵⁴. Much was made in the lower court judgements of Mrs Garcia's presumed knowledge of what she was signing and her understanding of what the subsequent implications to her would be if the loan were not repaid. This assessment of intelligence and business acumen was based on her professional qualification as a physiotherapist and the fact that she had 'set up a practice as a physiotherapist on her own account' and continues to 'practise in that

³⁵³ (1998) HC 72 ALJR 1243

³⁵⁴ For a discussion of women's credibility in court see M. Thornton, 'The Judicial Gendering of Citizenship: A Look at Property Interests During Marriage', *Journal of Law and Society*, Vol 24 No 4, 1997, pp. 486-503

way³⁵⁵. She had consciously acted as a Director of companies and had signed loan documents in that capacity on several occasions. In addition, she had previously appeared before the New South Wales Registrar in the Supreme Court in relation to the liquidation of a company where she had been warned of the obligations of company directors under s541 of the Companies Code³⁵⁶. She was cautioned to familiarise herself with what a company director is and to check documents before signing them.

The *Yerkey* principle afforded special protection to Jean Garcia from liability because of her status as a married woman. While not openly stated, this construction of Mrs Garcia by the court was interpreted by others – including feminists – as reproducing women as irresponsible. For commentators like Lang, the ability of women to 'escape liability altogether' serves to reinforce their lack of credibility³⁵⁷. Cretney asserts that it is 'likely to encourage borrowers and their associates' to try to 'escape from their obligations' by challenging the adequacy of the bank's explanation because 'how many people actually understand all the implications of a mortgage, for example?' Other commentators suggested that, by allowing women to escape legal liability for their debts, the High Court has 'reinforced a stereotype' of 'financial ineptitude'³⁵⁸. According to feminist commentator Beatrice Faust, 'if women are always protected they will never learn to manage their money and manage their partnerships'³⁵⁹. Faust takes the position that women should be held accountable for the financial decisions they make otherwise they will gain no credibility within society.

³⁵⁵ *Garcia v National Australia Bank Ltd* (1993), *op. cit.*, at 11,997

³⁵⁶ *ibid.* at 12,005

³⁵⁷ A. Lang, 'High Court Wipes Out Sexually Transmitted Debt', *Law Society Journal*, September 1998, p. 53

³⁵⁸ G. Safe, "'Til Debt Us Do Part', *The Weekend Australian* 22-23 August 1998, p. 21

³⁵⁹ *ibid.*

The discourses of sexually transmitted debt have claimed that the emotion of love rather than arm's length commercial judgement is central to an explanation of the motivations of signatories³⁶⁰. Cliches such as 'all in the name of love'³⁶¹, 'for love - and no money'³⁶² and 'til debt us do part'³⁶³, are frequently used by those writing about sexually transmitted debt. Factors such as trust, dependence and control, coercion and altruism, are commonly adduced as motivations and attributed according to traditional gender roles and power imbalances within intimate relationships.

This chapter explores why the forty-seven women in this study signed or conversely refused to sign loan contracts. The High Court's prescribed reasons of 'trust' and 'confidence' in *Garcia* together with the factors of dependence and control, coercion and altruism will be discussed in order to form a picture of women's economic reasons for entering household debt. I argue that women in intimate relationships do not enter into loan contracts on equal terms economically, domestically or socially. At one level, they may act in accordance with an ideology of marriage that promotes and applauds notions of romance and partnership and encompasses a loving, sharing, and caring paradigm of commitment. At a different level, women may be influenced to sign by their partners through a lack of information about the terms and conditions of the contract, by an acceptance that their 'signature does not really count', or through fear of physical or emotional abuse.

³⁶⁰ See for example Australian Law Reform Commission, *op. cit.*; P. Baron, *op. cit.*; N. Howell, *op. cit.*, 1994; M. Kaye, *op. cit.*; B. Fehlberg, *op. cit.*, 1997b

³⁶¹ A. Taylor, How to get out of sexually transmitted debt: a guide for workers assisting women in debt, The Women and Credit Task Group, n.d., p. 1

³⁶² J. Scutt, 'Of Love, Of Pain, and Money' in The Incredible Woman: Power and Sexual Politics, Vol 2, Artemis Publishing, 1997, p. 129

³⁶³ R. Jukic, 'Til Debt Us Do Part: The Problem of Company Director Wives Who Guarantee The Debts of Their Husbands' Companies, Consumer Credit Legal Service, Melbourne, 1994

Trust and Confidence

For Justices Gaudron, McHugh, Gummow, Hayne and Callinan in *Garcia*

the rationale of *Yerkey v Jones* ... is based on trust and confidence, in the ordinary sense of those words, between marriage partners³⁶⁴.

Mrs Garcia's trust and confidence within her relationship had been manifested in two ways. Mr Garcia held a Master of Business Administration from Harvard University and during the years when she had signed guarantees her husband was self-employed as a foreign exchange broker. They had been married for more than nine years when she had first agreed to act as a surety for a loan in favour of Mr Garcia's business. Mrs Garcia had trust in her partner because he had a particular occupation that required particular skills. Moreover, because of his commitment to the marriage and its longevity, she viewed it as a partnership. Even when she doubted the wisdom of further borrowing from the bank she agreed because she trusted him to organise the business. She knew that the business had 'a high turnover' and that the bank account fluctuated dramatically depending on whether 'there had just been a heavy buying period or a heavy selling period'³⁶⁵.

Debtor's Expertise

When Mrs Garcia's husband needed her signature in order for the Bank to increase his overdraft so that he could deal in larger amounts of gold, she 'had indicated that she did

³⁶⁴ (1998), *op. cit.*

³⁶⁵ *Garcia v National Australia Bank Ltd* (1993), *op. cit.*, at 11,997

not wish to be involved in an increase³⁶⁶. However, his response to her was that she was very conservative 'just like the rest of your boring family'. He threatened to leave her, saying she could 'be boring all by yourself'. In response the following dialogue was exchanged:

She replied, 'I know you think I'm boring and stupid. I do trust you but I worry about things I don't understand.' FBG [husband] said, 'You shouldn't worry. You should trust me, I keep telling you there is no danger, if the money isn't there the gold is there'³⁶⁷.

Many of the forty-seven women, like Mrs Garcia, when asked to sign loan contracts placed their trust and confidence in their partners. For Emily, Fiona, Paula and Barbara, their partners' professional training and knowledge gave them good reasons for their trust. Emily co-signed 'because I trusted what he told me', which was that 'I'm the accountant and I know what I am doing'. When Fiona's husband wanted to refinance the mortgage she was advised by the bank to speak to a solicitor. But this advice was problematic because 'when your husband is a lawyer that is very, very difficult'. She had suggested to him that she felt she needed to seek independent advice but he encouraged her to 'come and see one of the lawyers that I employ and they'll advise you'. Because of the 'fact that I was married to a lawyer' her attempt to seek another's advice seemed disloyal. Paula agreed to borrow against her house because she trusted her husband who 'had a very successful law firm that had a high turnover'. When he suggested that they needed to borrow money in order 'to stretch things' she 'didn't doubt it' because he 'always talked in terms of the amount of money he made'.

³⁶⁶ *ibid.* at 12,007

³⁶⁷ *ibid.*

Barbara's husband was an 'ambitious' architect running his own large business and she viewed him as 'an entrepreneur who was always after the big jobs'. They had 'acquired all the trappings of a nice lifestyle' that included 'a lovely house, a farm, a holiday house on the beach, a yacht at the squadron'. So when her husband asked her to sign a guarantee over their house on the debts that were associated with the business, and brought in a lawyer 'who assured me that everything would be okay' she agreed. While she had misgivings about the wisdom of signing, 'it was like if you don't do it you don't trust your spouse'.

Similarly, Olivia, Wendy, Pia, Mardi and Dana counted on the expertise and knowledge of their partners when they made their financial decision. At the beginning of Olivia's third marriage her new husband wanted to again start up his own furniture making business in partnership with a close friend of his. Neither her husband nor his friend had any money to put towards the business so they wanted Olivia to act as surety with her house as security. She felt that she had worked hard bringing up three sons as a widower and, with a \$25,000 mortgage remaining, was very reluctant to jeopardise her home. Her husband showed her videos of the furniture he had made in a former business so she signed for an overdraft of \$10,000. But

he had the chequebook with the business stuff because he knew what to do. I was supposed to be secretary – I didn't have a clue how to do that. He was going to show me – I just trusted him.

Commitment to a Romantic and Business Partnership

Sociologists have identified the shift in marriage ideology from the male breadwinner and female housewife model to one that stresses companionship and an equal

partnership within relationships³⁶⁸. Simultaneously, sociological studies of the division of labour and financial decision-making within households have shown the contradictions within this ideology of partnership. Yet, studies of the involvement of women in family businesses show a persistent adherence to the ideology of marriage as an 'equal partnership'. In discussing the reasons why sureties provide security to their partners, Belinda Fehlberg asserts that women in her study 'emphasised the sense of joint enterprise' they felt 'in the context of a stable marriage', and 'did not consider that there was a substantial financial risk involved'³⁶⁹. Supriya Singh shows that the ideology of marriage as an equal partnership 'leads to the expectation that both husband and wife should be involved in the family business'³⁷⁰. Women in my study articulated reasons for signing that connect to equality, responsibility and togetherness within intimate partnerships.

Wendy had retained the family home in her divorce settlement. At that time the mortgage remaining was \$25,000 and she estimated the total value of the house to be \$275,000. She subsequently met and formed a relationship with a man who had his own large hairdressing business and had been self-employed for more than twenty years. Because he was 'putting a lot of time, effort and worry into running a big business' and suffering from high blood pressure, Wendy became 'emotionally involved'. When she found out that he had a substantial loan outstanding with his bank and that they were threatening to force him into bankruptcy, she mortgaged her house 'to the tune of \$85,000 that I handed over to him lock, stock and barrel'. As to whether

³⁶⁸ M. Bittman and F. Lovejoy, 'Domestic power: Negotiating An Unequal Division of Labour Within a Framework of Equality', The Australian & New Zealand Journal of Sociology, Vol 29 No 3, 1994, pp. 302-321; M. Gilding, 'Gender Roles in Contemporary Australia' in K. Pritchard Hughes (ed.), Contemporary Australian Feminism, Longman, Melbourne, 1995, pp. 102-126

³⁶⁹ B. Fehlberg, *op. cit.*, 1997b, p. 154

³⁷⁰ S. Singh, For Love Not Money: Women, Information and the Family Business, Consumer Advocacy and Financial Counselling Association of Victoria (Inc.), Melbourne, 1995a, p. 92

she would have listened to advice, even if it had been given by the bank, Wendy responded with:

I mean I thought that I was going to spend the rest of my life with this man and I thought he was wonderful – I adored him but it's now obvious that he didn't feel the same way about me.

During the first year of Pia's relationship her partner was working for an earthmoving business. When the business was going to be sold and he 'very much wanted to buy it but he didn't have the money', Pia 'put a mortgage debenture' on her home. She had many years of administrative experience in office positions and therefore felt she could run the office and 'I can work hard and he's a good salesman and I trust him'. Mardi also saw herself as able to augment the success of a business that she and her partner started. He was 'very good at his concreting work' and she had previously run a childcare centre for many years. While she had not before been involved with a landscaping business, she felt that her partner would be able to teach her the details. As with Wendy, Mardi's thoughts were that 'this is the person that I'm going to spend the rest of my life with – this business is going to be our financial security'. Dana echoes this reasoning when 'she trusted Dan that he knew' because 'he had done it [that particular kind of business] before' and was a 'brilliant furniture maker'.

The 'Caring Partner'

Paula Baron suggests that decided cases in the area of sexually transmitted debt show a pattern of traditional social expectations as to gender roles that assume women should behave altruistically³⁷¹. An unselfish regard for the needs and interests of others is

³⁷¹ *op. cit.*, p. 25

exemplified in 'supporting and furthering the ambitions of their partners and families'³⁷².

At the time of signing, Dana found she 'didn't have a good answer' to her husband's statement to her that 'if you love me you will sign this'. She 'believed in the marriage' and in hindsight felt 'it would have floundered right there if I hadn't [signed]'. Mel had 'been caught up in wanting to be needed' when she met her partner. Six weeks prior she experienced the break-up of an intimate relationship in which engagement had been imminent. When she decided to borrow \$6000 so that her new partner could pay off his loan on the truck he had for his small business it was, in a sense, to cement her commitment to him. She subsequently agreed to co-sign for a loan so that he could buy a race boat. She did so because she felt he had missed out on a great deal in his childhood and that this would compensate for his lost opportunities. Josie went guarantor for her boyfriend's car because she knew that on his income he would not be able to buy it otherwise. With no explanation from the financier as to her obligations as guarantor, Josie believed that she would not have to pay for the car, just that she was helping him get what he wanted. And Betty remembers that she 'always felt like I was really responsible for his emotional housekeeping' and therefore continued to elect to sign contracts because she thought 'it would cheer him up or something'.

Where these women did not discuss their children's involvement in their decision, Una did. When her husband wanted to buy a boat and she knew they couldn't afford that expense with five children, she relented because

in the end I remember going to the bank with him – I mean the bank loan had to be in our name but I had to sign it because I was the worker and I can remember feeling like I was emotionally blackmailed into signing these papers because the

³⁷² *ibid.*

kids were giving me a hard time. All this time they were saying, "Mum, how can you be so selfish when Dad really, really wants it".

However it became evident from the interviews that another dimension of altruism had motivated many of the women. While Paula Baron's assertion of altruism as acting selflessly can certainly be seen to be the case for some of the women who prioritised the continuance of their relationships to their financial detriment, others jeopardised their financial futures by being prepared to sign simply to get out of the relationship. In many instances women were signing, not for their partners, but because they wanted to protect their children's futures. By signing they hoped for an amicable parting. Anna saw herself as 'a dependent wife' so her financial decisions were 'influenced to a state of trying to keep things socially okay'. She mused that 'often it is automatically assumed that a marriage is over from the separation date but it's not – something dies years prior to that' so:

I think that was why when he left that it was such a relief that he was going that I would have signed anything and put myself into any amount of debt to get him out of the house. I was just desperate, so yeah, I did sign to actually say "yes take the amount extra on the mortgage – just go". A woman will do that for the sake of protecting her children – my boys. (Anna)

Betty 'would have given him anything and signed anything at the end because I was at the end of my tether'. She said that she knew 'that sounds really stupid but that's the way I felt'. Similarly, Cathy

got to the point where I was so frustrated when I wanted to leave that I was willing to walk away – sign everything over – both businesses – sign it all over

and just walk away with nothing because I wanted out and I couldn't work out how to get out.

Dependence and Control

Ken Dempsey argues that 'in Western culture money continues to be seen as the private property of individuals rather than couples or family units'³⁷³. This ideology of individual ownership is competing today with a marital ideology which stresses that individual ownership should be set aside in favour of an equal sharing of a couple's resources, irrespective of who brings those resources to the marriage. Through questioning the women on how financial decision-making was carried out within their relationships, issues of dependence and control emerged as central to why women signed. All of the interviewees had responsibility for the management of some of the household money and many perceived themselves to have had a substantial role in the control and management of household finances. Yet, typically, discussions of their role in regard to the finances within their relationship were of conflict between financial responsibility and financial authority.

Financial Responsibility

When women undertake paid employment and unpaid inequitably shared 'after hours' household work of childcare and housework, commentators have referred to this gendered division of domestic work as the 'second shift'³⁷⁴. Bittman and Pixley found that when women's paid work increases, the domestic workload of husbands and

³⁷³ K. Dempsey, *loc. cit.*

³⁷⁴ A. Hochschild, The Second Shift, Avon, New York, 1989

children of the marriage does not increase to support the women, but in fact, on average, decreases³⁷⁵. As a means of coping with this double burden, women reduce the time they would otherwise spend on domestic work. Either they do not do some of the work or they pay someone to clean, iron, provide childcare and food³⁷⁶. Thus, the 'outsourcing' of work has been described as the 'rise of a new domestic division of labour between women, with the load being shared between wives and their employed domestic (female) help'³⁷⁷. A further identification of the gendered division of labour has been reported as the 'triple shift' where it is argued that the 'psychic well-being of partners and children' is also undertaken by employed wives³⁷⁸.

Much attention has been spent on how changes in women's paid work affect the unpaid household work of couples. However, not as much attention has been given to how men's paid work is supported by women's unpaid work undertaken for his business, together with the effects of this on women's own financial situations if they become liable for sexually transmitted debt. Janet Finch's study of, amongst others, vicars, soldiers, politicians and managers of multinational companies recognises and examines this important link in sociological research³⁷⁹. She explores the incorporation of wives in men's work through their perceived economic influences of 'making his breadwinning possible' and 'enhancing his earning capacity'³⁸⁰. Although her emphasis is primarily on the incorporation of wives in the work their husbands do for employers, she briefly

³⁷⁵ M. Bittman and J. Pixley, *op. cit.*, p. 112

³⁷⁶ *ibid.* p. 113

³⁷⁷ A. McMahon, Taking Care of Men: Sexual Politics in the Public Mind, Cambridge University Press, Cambridge, 1999, p. 19

³⁷⁸ *ibid.*, p. 26

³⁷⁹ J. Finch, Married to the Job: Wives' Incorporation in Men's Work, George Allen & Unwin, London, 1983

³⁸⁰ *ibid.*, p. 48

considers the wives of self-employed, home-based workers. Their incorporation as 'additional worker' occurs through their assignment of 'women's work', especially office work associated with the business³⁸¹. This involves taking telephone calls and 'doing the books' which 'clearly is of material significance for the success of the business' though the wife is not necessarily paid. Thus, according to Lisa Adkins, 'wives' labour is efficient and reliable, it is on call 24 hours a day and it cuts the wages bill³⁸².

In the course of signing up for the debts, women in my study expected that either they would be undertaking the role of 'doing the books' for their husband/partner, or that this task was to be undertaken by their husband/partner. Those who expected to do the books expressed their choice as one of 'being able to share in the success of the business'; those who were not to be involved found that often their labour was appropriated anyway. Adkins identified the appropriation of women's labour within the hotel and catering sector, in particular in relation to pub and hotel managers and their wives³⁸³. The labour of wives in the family production of hotels included 'managing the housekeeping section in a hotel or preparing and serving food, or serving behind the bar'. Adkins found that husbands exercised considerable control over what jobs wives did within the hotel and frequently this involved him doing those jobs he enjoyed and his wife doing those he did not enjoy. The wives themselves were not paid wages by the hotel companies that employed their husbands as managers and, therefore, relied on their husbands to decide how much and what wives should receive for their work.

Adkins argues that 'claiming a lack of skills in relation to a particular task or tasks is

³⁸¹ *ibid.*, p. 103

³⁸² L. Adkins, *Gendered Work: Sexuality, Family and the Labour Market*, Open University Press, Buckingham, 1995, p. 89

³⁸³ *ibid.*

indeed a common method used by husbands to control the work of wives³⁸⁴. Using the disclaimer of being 'no good at the business side of things, including all the bookwork, payment of wages, VAT and PAYE, and ordering food and bar stocks,' allowed one of her interviewees to make it clear to his wife that 'if it was to get done ... she had to do it'³⁸⁵. Men also disproportionately undertake the jobs of their choice within the household, opting more often for gardening and home maintenance rather than child care, cleaning and washing³⁸⁶. When interviewed, women in my study discussed the appropriation and exploitation of their labour for their husband's business in a context of responsibility; their financial responsibility and his financial irresponsibility.

When Vicki married and realised how her husband ran the financial side of his service station and workshop she attempted to 'get things organised'. After her own full-time working day she would go to the service station, serve petrol and 'try and do the books'. Her husband 'never bothered to keep receipts' and he 'never drew wages' preferring to 'dip into the cash money all the time from the till'. Betty also undertook this role on an ongoing basis whenever her husband was self-employed. As well as working in full-time paid work as a professional she was doing the books for the business after hours and undertaking the household tasks associated with a family of four. Betty discovered that he 'didn't have a good business brain'. The business was barely making money but he employed an apprentice and

normally there was just enough money to pay his apprentice and sometimes I even had to pay his wage out of my wage so it really wasn't a business at all. At the end of the financial year we had things like work cover and provisional tax

³⁸⁴ *ibid.*, p. 79

³⁸⁵ *ibid.*

³⁸⁶ A. McMahon, *op. cit.*, p. 20; However, Bittman and Pixley suggest men now devote more time to the care of their children: *op. cit.*, p. 143

that really weren't accounted for and I found it a hell of a strain on my wage.

Throughout this time her husband's attitude towards the business remained one of little commitment, deteriorating further when he began having an affair with another woman. He wouldn't listen to Betty when she kept telling him that they weren't able to make money 'because of the way he quoted jobs'. He 'didn't bother to drop off his monthly accounts so that money came in' and he left 'returning his phone calls and organising his appointments to me'. Throughout the more than twenty years of her marriage, Betty had only a brief period of time away from full-time paid work, during the birth of each of her two children. She continued to strive to prop up her husband's business by working at the weekends and laughingly said that she was 'working twelve days a week'.

This relentless commitment to making the business and the partnership work because she trusted in their relationship is also a feature of Gayle's marriage. Her husband had a career spanning more than twenty years in the finance sector working for a bank and finance company. When discussing the financial history of her marriage Gayle recalled that her husband 'never brought home a pay packet or a bank statement'. He took full responsibility for the mortgage and any major debt and she 'was given enough to keep the household and the children going'. When there didn't seem to be enough money to go around she got a part-time job. She 'just trusted that he was doing the right thing with the money he was earning' as he had told her that his bank wages weren't very high.

He and Gayle then started a small business together in which she did the books as he said, "I've worked with finance all my life and I don't want to know – you do it". She continued to rely on his prior knowledge when it came to such financial decisions as overdrafts. When the business started to show reduced profits due to his gambling habit, at that time still clandestine, he was able to convince her that she was in fact 'not

doing the books right'. They had a short period of separation in the marriage when Gayle moved out of the family home and left the business. This was because of his lack of communication in relation to the business finances and her frustration with not being able to make the books balance. When she returned to the business and the marriage, she discovered 'in the cellar of the shop, locked up in an old file, nine months of bank statements and nine months of creditors letters that hadn't been opened'. She then realised that

he wasn't putting into the bank half of what we were earning. It was coming straight out of the till and never getting to the bank and when I eventually got hold of the bank statements I could see that.

The behaviour of husbands or partners in relation to giving their businesses the best possible chance to be viable and profitable is significant. Frequently these businessmen had little regard for the importance of even basic bookkeeping and tended to leave the administrative side of the business in abeyance unless attention to it was absolutely necessary. Many of the women considered their partner's financial irresponsibility with the books to have been instrumental in the failure of their businesses. After Gina left paid work and had her son she became involved with the business accounts 'because it used to be thrown on the floor of his car'. She subsequently 'got a filing cabinet and tried to set up the spare room'. Eventually the system broke down because 'it was just so hard to keep track of stuff' and she felt 'embarrassed rolling up to an accountant with a box of stuff and [it was in] no order'. Dana was working in a government job when her husband started a small business. While she considered her husband to be 'very able' in his furniture making, the same could not be said of his 'bookwork stuff which he tried to push on to me by trying to get me to leave work so I could do the books'.

Letitia co-signed with her husband because she thought he would be financially

responsible. In the early years of their marriage Letitia and her husband agreed to buy a block of land in Queensland as an investment. Because he had insufficient collateral after his divorce, Letitia provided the deposit. However, they had agreed that they would each contribute equally to the repayments. Within four months he informed her that he was unable to continue to pay his share because of his financial commitment to pay child maintenance from his previous marriage. Letitia accepted this as 'that wasn't a great burden on me at that point' and felt that 'it was an investment for both of them that would bring money back ultimately'. Subsequently they chose to change their lifestyle and bought a block of land in the country. Again the same pattern occurred and she was left to make all the repayments. When asked why she had again agreed to put this property in to joint names she responded that 'foolishly one has to trust one's husband'. Unbeknown to Letitia he had substantial debts from his previous marriage. When these became too difficult to deal with he declared himself bankrupt, which meant that the creditors then pursued her.

During her 1993 trial in the New South Wales Supreme Court, Mrs Garcia was asked the extent of her knowledge of what she was signing as a director of the companies her husband managed and operated. She responded that 'on some occasions' her husband would say "I'm going to bring some things home because I am going to make you a director of this company". Mr Garcia would then often ask her to sign documents 'that were put in front of her just as she was rushing out to work in the morning'³⁸⁷. Such incidents were also disclosed by the women in my study. Barbara was a director and secretary of several companies that were managed and operated by her husband. She worked as a health professional, sat on the boards of companies and had a high profile in local government. She knew that she had responsibilities in terms of the roles she was given as director or secretary but when she asked her husband when 'were they

³⁸⁷ *Garcia v National Australia Bank Ltd* (1993), *op. cit.*, at 12,005

meeting and when do I know what's going on' she always received the response from him of 'well you don't really need to [know]'. The chequebook was presented to her in bed and she signed. This lack of communication by her husband culminated in the following circumstance. On a trip to the bank to withdraw money, Barbara was told by the bank teller that they would 'have to ring her husband'. When she asked why, the response was that 'your husband has \$45,000 in overdraft' which was a complete surprise to her.

Like Mr Garcia, Fiona's husband relied on the morning 'rush hour' for her signature when he wanted anything signed. He would say

"Look the bank wants to update, just sign here" and I would say, "Frank, what am I signing, what am I signing" and he would say "oh we're doing all right, you wouldn't want to have the kids out of school or no clothes or no food".

Fiona was signing at a time when her husband knew that his business was in trouble financially but he failed to alert her to this fact and preferred to assign any responsibility to her.

Frequently these women described their lives as extremely busy at the times when they signed. Although they recognised that this was not necessarily any excuse for the decisions that they made, they did see this element as having contributed significantly to their reluctant willingness to sign. Of the forty-seven, thirty-nine worked full-time or part-time outside of the home and twenty had pre-school or school aged children. Fiona recounts that the 'treadmill of family life' with the need for a double income so that their three children could go to private school 'was so important to us that we just got into a mode of work, work, work – educate the children'. In much the same way Barbara had two adolescents, was working full-time and on numerous committees. On the rare

occasions when there was time to discuss the finances her husband would say

"I'm too busy. I'm going to America and I'm going to Germany so we'll talk about that later" and that was the way life was.

Financial Authority

Reflecting on her financial authority or power during her marriage, Fiona asserted that

because I didn't work, that did give him a lot of power. ...He made sure that every account went to his office. I never saw any accounts ... David Jones, John Martins, any bankcard, even the ETSA bill went to the office and when I asked him he said it was for his taxation purposes. I wasn't happy about it but I accepted it.

Paula Baron argues that there is substantial evidence in decided cases of sexually transmitted debt of women's 'broken work patterns' leading to a loss of income, skills and future potential³⁸⁸. When Gina was being advised as to the need for her to sign as a director of a company her husband was to control, she feared that this would be a recipe for disaster. The amount of money involved was considerable and the person that her husband was going into partnership with was, in Gina's view, untrustworthy. But in the week leading up to her signing her husband had insisted that 'there is no risk involved' and that 'we'll be right'. To Gina he had always been an 'extremely difficult person to get along with'. While he was 'never physically violent' he was 'emotionally intimidating when he wanted to be'. When she continued to question his wisdom he

³⁸⁸ P. Baron, *op. cit.*, p. 27

countered with the claim that she 'was always holding him back' and that she 'never wanted to do what he wanted to'. Moreover, he told her that if she 'didn't like it then just leave'. With a young child to consider and no paid employment, Gina considered this ultimatum to be extremely threatening and duly signed.

Emily's husband controlled the amount of money she was given to manage her family and spent freely from his income on gambling and alcohol:

I sort of had to ask and then I would be really worried - if I just had to say the children needed a pair of shoes he would go crackers about getting them repaired or whatever and do they really need shoes. I was always made to feel as if I was a terrible spender even though around the house all the maintenance has been done by me – the cementing and God knows what I have always done it. I have always cut his hair, I've always made the kids' clothes but that was the way it always was that I was the one responsible for us never having any money.

Emily's husband refinanced the house more than once and used the loan proceeds to support some home projects but also to maintain his gambling addiction. With no income of her own, Emily felt she had little choice but to agree to his financial decisions. They travelled to Melbourne from Adelaide for a holiday and he asked her to drop him in town so that he could spend the day at their son's work. He instead spent the day at the Casino without her knowledge and spent all they had. On their trip home in very hot weather he asked Emily not to use the air-conditioner in the car so that they could 'see if we can get home on one tank of petrol'. The next morning he wrote a shopping list and told her to get the items from Woolworths but when she got to the checkout the credit card showed that there was no cash available in their account. This 'was his way of letting me know that there was no cash without having to be there and face me'.

Jane's voice was silenced when her husband wanted to buy a 'you beaut' television and hi-fi system. With four children under the age of ten Jane knew the budget to be too tight for the inclusion of such 'an expensive' purchase, but, through his continued insistence, agreed and co-signed. Within the year they separated and he then stopped making the hire purchase payments without advising her of his decision. As he was then not earning any income, and she was employed, the creditors sought the money from Jane and she was subsequently taken to court for her failure to pay.

When women were asked who has the final say on credit decisions, especially hire purchase in Edwards' 1981 study, half said their husband³⁸⁹. In Dempsey's study women also did not have the final say, concerning expenditure such as moving house, or a wife taking paid work although Dempsey did not ask about financial decisions about borrowing money³⁹⁰. Even those wives who were engaged in full-time paid work did not ultimately hold that financial power, 'whereas almost half their husbands did'³⁹¹. In the event of disagreement over what debt should or could be incurred, women's economic independence appears to make no difference. Similarly, for women in my study, financial authority when decisions about debt were made, did not appear to differ significantly between those who had paid work and those who did not. When asked who made the major financial decisions within the household all the women said their husbands or partners had the final say. These findings are also consistent with those in Fehlberg's study of sureties³⁹².

In my study, the partners of Cathy, Una, Alanna, Jane, Deidre and Gina blatantly

³⁸⁹ M. Edwards, *op. cit.*, 1981, p. 116

³⁹⁰ K. Dempsey, *op. cit.*, p. 103

³⁹¹ *ibid.*, p. 109

³⁹² B. Fehlberg, 'Money and Marriage: Sexually Transmitted Debt in England', International Journal of Law, Policy and the Family, Vol 11 No 3, 1997a, p. 119

overruled their financial decisions. While Cathy had total control of the household money because 'he wouldn't care', when it came to decisions about major purchases they would discuss them. Ultimately if it was 'something he really wanted and I disagreed he would usually go and get it anyway'. She paid the bills, paid the tax and surreptitiously banked what she could but when he found out how much there was he would always spend it on racing cars. His view was 'I earned it so I'll spend it'.

Throughout their married life Una had done all the paperwork. She sees herself as having been the financially responsible partner. She did 'the budgets, the bills and all that sort of thing' for her family of seven. She remembered taking a flexi-day off work to 'ring around and organise insurance' because her husband did not have the skills to do this. Although her knowledge and ability to manage the running of the household, together with her employment, would appear to be sufficient for her to avoid relationship debt, Una ultimately did not hold all the cards:

I think the crunch came when he just insisted that we had to have this boat that's in the driveway and I just said no we can't afford it in the budget. In the end I just let him have it to shut him up and I said, "Look that's \$60 a week, that's \$120 a fortnight – we just don't have it to spare!" He said, "Oh but it's my dream. It will bring the family together".

Often Alanna's husband withdraws all of the money from their bank account without consultation and she is left to fend off the resultant queries from their insurance company and landlord when the direct debits fail to eventuate. With her husband's financial history Alanna considers any form of debt unwise. So when he decided to get a \$1000 overdraft when she fell pregnant with their twins she expressed her misgivings. But, on his parents' advice, he went ahead and within 'two months the thousand dollars was gone'. In fact, 'the day after he had got it he had spent three quarters of it' which

Alanna assumed was 'probably overdue rent'.

Deidre's husband asked her to support their nephew by acting as a guarantor for a car loan. When she queried why David's own parents wouldn't do this for him the response was that they had refused. Deidre describes her nephew as 'feral ... he's always drunk, he's always on drugs and he's always in trouble with the police'. She told her husband that she felt they would lose the money if they went guarantor for him. Undeterred he told her that they were going "'down to your sister's place in Melbourne this weekend to finalise it" so off we went'. Three weeks after this event Deidre separated from her husband. The nephew subsequently failed to make the payments. The bank informed Deidre that she was liable for \$6000 so she began making payments of \$50.00 per week towards the debt from her disability support pension. This continued for almost a year until her nephew's parents told her that the remaining debt had been paid. Over a year later she received a letter from the financial institution stating that a further \$2000 was owed. Her husband had not responded to any previous letters from the bank and they had therefore turned to Deidre for the money.

Even after the relationship had ended, husbands and partners exercised financial control. Kate had brought up four sons and managed the household tasks of child rearing, cooking and cleaning. Her husband 'held the purse strings' and paid the bills. Five years after they separated, they agreed to sell the family home that her husband had continued to live in. A total of \$30,000 was necessary to undertake renovations that would increase the house value. They agreed to borrow against the mortgage for the renovations. When her husband approached Kate to co-sign for the loan she agreed because he made it clear that he would repay the whole of the loan. She had established with him that she would be unable to service the loan on her income. Money had 'never really been an issue that we ever argued over' so she had 'no reason not to believe him because he had always been honourable anyway'. Several years later, the renovations

were still very incomplete so Kate took the initial steps in seeing a lawyer in order to gain a divorce. He remains in the house and has told Kate that there is

still \$19,000 of the \$30,000 owing – that my signature was on it and I couldn't believe what I was hearing because I thought "you gave me your word. I believed you and trusted you and that was why I signed".

In her third marriage Thea became the 'ultimate dependent wife'. Her husband was offered a job in Western Australia as an agricultural pilot so she left her house, her teenage children and her small business to take up this opportunity. The relationship and financial security for their future motivated her decision. They bought a half share in a small agricultural plane by mortgaging Thea's house and again added to the mortgage when the plane's engine blew up the day after they purchased it. With his 'flying every daylight hour, seven days a week' and much of their marriage spent living at airfields in a caravan within a hanger, and with no car, no radio, and no telephone the relationship eventually broke down. Thea stated that

As far as my husband was concerned it was our plane but my mortgage. I wanted something to cover me legally you know. I didn't have any paper work to show that I was a half owner in this plane, had nothing in paper work to show that he owed me half the money. Every time I asked him, looking after my own interests, he would always come back with "well I'm your husband and you should trust me" and I was at the point where I didn't trust him any more, I can tell you.

The plane was sold at a loss and Thea was left with the additional mortgage despite her husband promising to share that cost when they separated.

Coercion

Often commentators suggest that physical or psychological violence can be a motivation for signing. In the 1994 Australian Law Reform Commission's *Equality Before The Law: Women's Equality* Report it was suggested that violence may be apparent 'in the most extreme cases'³⁹³. Baron likens the extent of dependency and control to a scale that places overt violence at the 'upper' end³⁹⁴. For Kaye, violence is not limited to physical assaults but 'may include emotional abuse, bullying, sexual abuse, social isolation and economic abuse or deprivation'³⁹⁵.

Of the forty-seven interviewees, seven stated that physical assaults had occurred during their relationship. In two cases their partner had threatened to kill them and in one case a restraining order had been taken out against a partner. Most of the women wanted their identity to remain confidential. This decision was based on their need for privacy within society but also stemmed from their desire to remain anonymous should their husband/partner, either ex or current, hear that they had participated in the research. Vicki had her husband 'pressed with stalking charges but they [the police] go and like give a warning'. Cathy took out a restraining order and others, like Paula and Heather, made comments that indicated they feared reprisals if their ex partner knew about their participation in my research. Several stated that they had nothing to hide and, either way, they would participate. Understandably those who had been threatened with physical violence during and after the relationship sought absolute assurance that their identity and current location would not be divulged. Of the thirty-three that rang in response to *The Messenger* article, five preferred to only divulge their first name.

³⁹³ Australian Law Reform Commission, *op. cit.*, p. 242

³⁹⁴ P. Baron, *op. cit.*, p. 28

³⁹⁵ M. Kaye, *op. cit.*, p. 41

A few of the women felt that they were much more vulnerable because they had made the decision to leave their husband/partner and had consequently suffered repercussions. Cathy and her husband had been running two separate businesses, in partnership, which she considered were economically very viable. One involved an earthmoving contract with a government services department and the other a holiday camp. She administered the books, did the banking, tax, wages, and Workcover for both businesses. She also ran the camp which involved her as sole 'gardener, plumber, electrician, cook, secretary, office person, canoe instructor – you name it'. Her husband carried out any of the 'heavy or harder stuff' on top of operating the equipment necessary for their government contract. Cathy's decision to leave the marriage was due to her husband's drinking and gambling problems, and culminated in his attempt to shoot her. During this period they endlessly discussed how they would split their assets but were unable to agree.

Cathy's husband expressed the trust and confidence in the marriage that legal cases so often assign to women partners. Her husband 'always signed anything I gave him so I gave him a piece of paper one day and he signed it'. Although she didn't want to because it was a very good business, Cathy went ahead and 'sold the place from underneath him'. She then split the proceeds from one business to give him a forty per cent share and left him with the contract business still intact. This included a \$30,000 debt on plant equipment that was a joint loan but which he had accepted he would continue to pay, as all the income was now his. He subsequently failed to repay the debt and, through his unwillingness to work, lost the government contract and declared himself bankrupt. At this point Cathy was pursued by the bank for the debt. She had to take out a restraining order against her husband because he 'used to smash my car up and threaten to shoot me and try to stab me'.

Emotional Abuse

The interviewees were not directly questioned as to the type and circumstances of violence to which they may have been subjected. Even so, during the course of their stories, these women constantly referred to emotional and economic abuse. They more often experienced violence that is, in a sense, controlled rather than out of control but equally as damaging to the person. This emotional abuse is palpable when Heather states

While I was taking Hugh [son] to school I get this urgent phone call from Harry [husband] saying they are down there waiting for you, "I've just been down there [the bank] to sign the papers and you have to be there in 15 minutes to sign them". I said, "Why?" and he knows because of the mental cruelty and abuse that he inflicted on me over the years that I am in awe of him and I am still scared of him now to this day. I feel like I have been punched every time I have to talk to him. When he came to pick up Hugh to play soccer for an hour last night I felt like I – I feel like I have been raped every time I see him. Does that make sense to you? That's a strong word but that's how I feel – it's that same feeling of powerlessness and being totally out of control and I'm like this [shows her hands shaking]. ... The bank rang me shortly after to say the papers were there for me to sign and when I asked if I needed to be down there straight away they said that I just needed to some time during the course of the day.

While Fiona said her husband was never physically violent, if she 'asked him something he didn't like or questioned him' he would 'raise his voice and that would be quite fearful so then you shut up'.

Dana stood up to her husband at times when he questioned where she went and dictated

who she mixed with but 'he's a very tall guy with a very deep voice and he could be very scary'. Because he would 'hit things and break things around the house' she said that she 'always had this element of being on your guard, doing what Dan wanted because he could snap'. When Helen was confronted 'out of the blue' with the loan contract for a new car that her husband wanted to buy she initially said she wouldn't sign because they had not discussed it. The amount involved was considerable and, although she knew it was not the right decision, in the end 'there was no question about me not signing'. She asserts that the threat 'wasn't physical' but the ensuing argument left her in no doubt that she must sign or 'face the accusations of not loving him'. Gina 'always felt a bit threatened' by her husband and when 'he drove up the driveway it would be let's get Guy [her son] out of the way so there wouldn't be any confrontation'.

Economic Abuse

Feminist lawyer Jocelyne Scutt has defined economic abuse as

not allowing a woman (wife or de facto wife) a fair share of money in the household, whether business assets, family funds or housekeeping money, and demanding food and clothing be provided on unrealistic amounts of money³⁹⁶.

Others state that the use of economic abuse within intimate relationships extends to 'preventing her from getting or keeping a job, making her ask for money, giving her an allowance, taking her money and not letting her know about or have access to family income'³⁹⁷.

³⁹⁶ J. Scutt, *op. cit.*, p. 126

³⁹⁷ E. Pence and M. Paymar, Education Groups for Men Who Batter, Springer Publishing Company Inc., New York, 1993 quoted in B. Fehlberg, 'Violence and Sexually Transmitted Debt', Current Family Law, Vol 3, 1997, p. 80

Economic abuse is rarely, if ever, referred to within the literature on domestic violence. In three recent major Australian and British texts on domestic violence, neither 'money', 'debt', 'financial', 'economic', 'debit', or 'credit' are indexed³⁹⁸. In 1997 the Australian Federal Government initiated 'Partnerships Against Domestic Violence' in response to the continued incidence of domestic violence within the community. In a report produced in 1999 as part of that initiative, there is only a brief reference to economic abuse³⁹⁹. A short paragraph states economic abuse includes

complete control of all monies by perpetrators, no access to bank accounts, inadequate 'allowances' given to women and, if she worked, her wages were used for all household expenses whilst his wages were used completely on him. In many instances the perpetrator controlled all access to food, with food being locked in cupboards and in some instances women and children going hungry⁴⁰⁰.

Yet, in this report it is noted of a phone-in on domestic violence undertaken in South Australia, that 'economic deprivation was reported by most women'⁴⁰¹.

In a survey conducted in Australia in 1999 as part of the Federal Government funded 'Partnerships against Domestic Violence Program', 5000 young people between the ages of 12 and 20 were interviewed⁴⁰². The findings revealed what might be the expected

³⁹⁸ J. Breckenridge and L. Laing (eds), Challenging Silence: Innovative Responses to Sexual and Domestic Violence, Allen & Unwin, 1999; J. Hearn, The Violences of Men, Sage Publications, London, 1998; R.E. Dobash and R.P. Dobash (eds), Rethinking Violence Against Women, Sage Publications, London, 1998

³⁹⁹ *Partnerships Against Domestic Violence, Current perspectives on domestic violence: a review of national and international literature/ Strategic Partners Pty Ltd in collaboration with the Research Centre for Gender Studies, University of South Australia, Canberra, ACT, 1999, p. 7 and p. 8*

⁴⁰⁰ *ibid.*, p. 7

⁴⁰¹ *ibid.*

⁴⁰² T. O'Loughlin, 'Date Violence: A Third of Girls Are Victims', *The Sydney Morning Herald*, 26 April 2000, p. 2

definitions of physical violence, such as sexual and physical assault. Interestingly, they also understood economic violence to be part of domestic violence. More than half (53 percent) of those surveyed thought that denying a partner money, for his or her own use, was violent behaviour. This recognition by young people that the assertion of financial control within intimate relationships is just as unacceptable and inequitable as the assertion of physical, sexual and verbal control indicates a potential shift of power for future generations in financial management within domestic households.

For Alanna this pattern of economic abuse has characterised most of the more than ten years of her marriage. She has a five-year-old son and 18 month old twin boys and has chosen not to enter the paid workforce again until her twins start school. Her husband controls the household money and 'hates spending more than \$60 a week at the supermarket'. When there is a need to spend more he 'gets really angry'. Alanna solves the problem by eating very little herself and ensuring that the boys eat well within the constraints of the budget. She sees this situation as very unfair when her husband also buys his lunch in town every day.

When Deidre came home from a craft market with a couple of hundred dollars that she had earned from her handiwork she 'hadn't even got out of the car and it was gone'. Her husband considered the money to be for his use only. Emily's fair share of the money did not extend to pocket money but just covered the basic food and clothing. Sometimes she was given money by her husband for her birthday but inevitably it would be spent on something that was needed for the house. She remembers 'the biggest insult' being when she 'was given half a dozen beer glasses for her birthday', when she doesn't drink. She mused that at least she could use the 'electric drills and things' she was given on other birthdays. When he was in the Army reserves, her husband would go away on camp and 'literally leave me with no money at all and the kids and I would survive on what food was in the house'.

Faith has never had a driver's licence. She signed as a guarantor for a vehicle that her partner wanted. When asked whether she rode in the van very often she replied that

if I did I put petrol money in. If I sent him up to the shop from here to the corner to get a loaf of bread he would ask for petrol money. Everything had to be – go to my girlfriend's place put petrol in, go to Church put petrol in.

Cynthia's boyfriend used the money she had given him to pay her car insurance on 'putting a new engine in his car'. She states that she 'knew he was hopeless with money but she didn't expect him to steal from her'.

Refusing To Sign

As discussed in chapter one and earlier in this chapter, legal commentators and the popular writers tell women that in order to avoid STD they need to take personal financial responsibility. Feminist lawyers such as Jocelyne Scutt conclude their analyses of case law in the area of sexually transmitted debt with statements which position women within a framework of responsibility. When engaging in financial transactions women 'should not be regarded as external victims' but should 'take responsibility for their personal acts and omissions'⁴⁰³.

While Supriya Singh does not state that women should take financial responsibility when they sign loan contracts, she interprets her data in a way that positions all women as needing to be more responsible with their finances. Women are too ready to sign loan guarantees and fail to recognise that the banks will pursue the party that is most

⁴⁰³ J. Scutt, *op. cit.*, p. 139

likely to be able to repay⁴⁰⁴. By using the example of one woman from her data, Singh portrays a picture of irresponsibility that is implicitly assumed to apply to all women. The interviewee in question had previously co-signed for her husband's business loans. She 'does not know how much debt she has signed for' nor does she know 'the terms of the loan'. It is 'her husband who has always negotiated the loans' because, as this woman states, 'to me, it's a man's world and it's not a negotiating point that I would be involved in'⁴⁰⁵. In response to Singh's questioning of why she doesn't ring the bank and find out, she states 'because of the [ugliness] surrounding it. I'm for a peaceful life'⁴⁰⁶. This, for Singh, effectively completes her admission of irresponsibility. As Dempsey points out, 'typically the current research fails to take into account the fact that such decision-making processes [i.e. concerning finances] are affected by powerful feelings – fear, love, resentment, envy, anger, compassion – past experiences, and by self-understandings and personal priorities'⁴⁰⁷.

In my study, a total of ten of the respondents had refused to sign loan contracts for their partners. However, the majority of these women had refused only because they had earlier in their relationships experienced difficulties with debt. In order to elicit determining factors in their decision-making these women's decisions were examined in relation to the earlier headings of trust and confidence, dependence and control and coercion. Two factors emerged that seem to distinguish these women from those who agreed to sign. The first is their grim determination to put the head above the heart even though it was tough; second is their ability to earn good money independently from their partners, thereby allowing them financial independence.

⁴⁰⁴ S. Singh, *op. cit.*, 1997, p. 150

⁴⁰⁵ *ibid.*, p. 151

⁴⁰⁶ *ibid.*

⁴⁰⁷ K. Dempsey, *op. cit.*, p. 109

For several of the women, their partner's lack of financial responsibility was the key determinant in their decision not to agree to incur debt. Nina had no previous business experience but she knew from her role within the family as the 'household accountant' that her husband's finance decisions were not always sound.

He wanted to go into business ... he has a brilliant brain in his own field but no sense when it comes to finance. Nick had borrowed money for the workshop so we battled through and then engineering was getting really slow so he just sat back and that's when we found we had really big problems. He actually went out and got the machine in anticipation of getting the contract. He didn't get the contract. He didn't listen to what anyone was trying to tell him, including me, because he said I didn't know anything about business. So that was dragging us down. Then he went to the bank to borrow more money to build a mulching machine because he had already done a minor run of mulching and it had gone really well. He went to the bank and wanted to borrow \$150,000. He knew what debt we had and the work wasn't there. I went to the bank and agreed to \$50,000 and I wanted to make sure that it wasn't against my house because by this time it was paid off and I didn't want to lose it.

Alanna has yet again 'taken over complete control' of the household finances from her husband because he has finally admitted that he isn't able to cope with budgeting. This means her family of five can survive on one income. While she sees this as their last chance of keeping the marriage together, Alanna concedes that all she is managing to do at this stage is 'shovel one pile of dirt from one side of the hole to the other side. It's going to take a long time to get out of the situation we are in. We owe lots of money in lots of different areas'. Her reasoning for taking control of the finances is centred on knowing that she is able to provide food and shelter for her family and to allow her to plan for their future security. When asked whether she would allow her husband to get

any more credit as part of the financial plan, she was adamant that 'we can't afford it'. Although she currently 'has the final say' as to what the household income will be used for and they jointly make decisions as to priorities and allocations, she recognises that this may change again.

Jane's view of marriage as a partnership is very clear when she recounted that her husband

said to me when he first started the business that I used to look up to him and have this look of awe in my face that there was nothing that he couldn't achieve. By about six months into it he said I'd lost that. And I said yeah, because you lost my respect. You no longer listened to what it was I was telling you – you no longer took my advice. A part of being a partnership and being married is that your opinion and your thoughts are just as important as mine.

The recognition of her husband's ideology of individual ownership led Jane to then decide that he should run the business solely as she

didn't agree with the practices that he was doing. I did not want my signature or did not want to be liable for what went wrong because I knew that from the start he had very little credit sense and basically decided that I will not get a fifty per cent say in this. As long as I am not going to get a fifty per cent say in it and get to make the big decisions as well I don't want to be part of it.

Jane described herself as being 'a lot tougher' in business. She felt that her husband couldn't separate 'the business from the personal' and in this way was much more likely to allow non-payment by debtors if they 'put him on the spot and bawled their eyes out'. In the same situation she would say to them 'well sorry but that's business'.

However, the influence of her family was instrumental in her making the decision she did. Jane's aunt had been married to a man who was a gambler. He forged her signature and she went bankrupt. So for this reason Jane's family had said to her 'whatever you do, do not co-sign on anything'. If she had not 'listened to the advice of her family' she would have 'been naive and co-signed and gone hell for leather with him in borrowing money for the business':

I would have said yeah, no worries I'll back you up in this because I was married to him – I loved him. He was my life and I would have done anything for him, um, even if it meant getting into debt. The big thing about being married to someone and loving someone is that you very much walk around with the blinkers on and say it's all right, it will pass because you will still love me at the end of the day even if we don't have any money or even if we do go bankrupt.

Yvonne had been divorced for a number of years and since then had had several relationships. She has a freehold house, several rental properties and considers herself to be financially independent. When she has been in a relationship and financial co-dependence has been discussed she has been very tempted to run her financial affairs in this way. However, she has refused but 'you go through this trauma' because of the relationship and 'the hopes that you have of it being a long-term one'. In a recent relationship:

we went to Mildura and of course his parents were so welcoming and they wanted me to marry Antonio – open up the pizza bar [with her money], have the wedding, go and see Father Pat and I was thinking this is all a bit fast [laughs]. ... I wanted to come home because I thought it was a bit too much and he said, "Oh how can you go home now it is the first day of the new year" and the emotional blackmail started to come into it and I was surprised how much I could still fall

into the emotional trap having gone through a whole heap of that with my ex-husband. We started renovating the restaurant and I took a lawyer to look into various aspects of it and he actually laughed and said, "you realise you are taking on sexually transmitted debt" and I said yes well [laughs]. I thought I could still be on top of it but I had never run a restaurant on my own, right, so I had to count on someone else who was knowledgeable about making food at that level. Then I sort of thought at the end of it that no, every time that we went there I felt quite sick in my stomach and that it didn't feel right. He kept saying, "Oh it will be all right and you will open up and start making food and people will come". But it all seemed like a pipe dream to me so I put a stop to it. I phoned the lawyer up and said stop everything now.

Yvonne lost the lawyer's fee of \$700 over that venture but 'was still a little bit emotionally involved' with Antonio so considered his further suggestion of buying a vineyard, again with her money as he had none.

"But how am I going to pay for it – I don't have those sort of funds?" "You can take a loan" he said. So I phoned up my bank manager and he said "How much do you need?" I said "\$80,000", and he said, "Well you know I will give it to you but do you realise that you will end up paying back \$13,000 interest for a year?" ...Then I thought what if he walks out – I'll be sitting at the vineyard [laughs] with the dog. ... Then I found out from a friend of his that Antonio was seeing another woman so I packed my bags and came home.

Clearly the professional advice of a lawyer and a bank manager was instrumental in Yvonne's ultimate decision against the investments. She also feels that the fact she ran her own business for twelve and a half years helped considerably:

It's that women think with their hearts rather than their brains when they get involved with someone and this is what I have always fought against. I think that my business background certainly helped but I've still had to battle with the heart [laughs].

Barbara also maintains that her ability to now control the household income is due to her professional background, otherwise she 'couldn't have earned the sort of money that I can earn'. This income allows her to maintain mortgage payments so that she has the security of knowing that if her marriage does fail in the future, she will at least have the asset of the house.

What seems to define these few women from those who agreed to sign is their awareness of what they were doing and the costs of this to their marriage relationship. In effect, they forced themselves to act as 'rational' economic actors. They were in fact enabled to put their head above their heart because they had financial independence. Women in positions of economic or other subordination found it almost impossible to refuse their partner's demands. While some of those who agreed knew of the risks, perhaps in a general sense, many did not and few were advised in any detail or within the notion of STD which may have served as a warning to them. In some cases those who refused were advised of the risks of signing by their bank manager, a lawyer or their family.

Conclusion

The motivating forces for the financial decision-making of the forty-seven women serve to expose the inadequacy of claims made within the literature. When it is asserted that women sign for emotional reasons only, this assumes they never sign as rational beings with full knowledge of the circumstances. All the women acted from something like

'full knowledge' of the emotional cost to their relationship of refusing to sign even if they lacked 'full knowledge' of the financial circumstances. Thus, there are two kinds of knowledge and the banks and the law are only interested in financial knowledge, not the effects on the relationship and knowledge of this.

Although the High Court decision in *Garcia* has provided much needed special protection for married women, the decision recognises trust and confidence but avoids gender inequalities of subservience or inferior economic position within intimate relationships. A call for either special protection and thereby making women seem inferior, or denying them special protection and ignoring their less powerful circumstances, does not provide satisfactory solutions for women affected by sexually transmitted debt. The continued reference to women's financial responsibility that permeates existing understandings of STD promotes a 'why didn't she just refuse to sign' discourse that is not dissimilar to the discourse of 'why didn't she just leave' in cases of domestic violence where women are continuously physically assaulted. The consequences to women of signing or refusing to sign are examined in the next chapter. My research has uncovered consequences of signing and refusing to sign which have not been discussed at any length in the decided cases or in the social science research. Therefore, to demand that women act in 'full knowledge' when they sign is to demand of them knowledge that in a sense no-one has, except perhaps those who have experienced household debt.

CHAPTER FIVE

THE CONSEQUENCES

I went to see a guy in town at a government department staffed by lawyers because I'd thought I've got to get some advice and he was really disgusting and he didn't help me at all. All he said was "I'm sick and tired of you stupid women signing things without understanding them. When are you women going to learn?"(Dana)

I then just started to go to the meetings with the bank. All these men that sat around the table and just ignored me and, I mean, I screamed at them sometimes you know "This is my house, this is my life you're talking about" and it was all so matter of fact and no emotion and several times I stormed out. I thought, "this isn't me" but I was so angry and so distressed. But I think the person I was angry with was me because I really felt like I'd let it happen to myself. I think that because I thought, you know, here I was, I'd sat on the boards of companies to make sure that things happened you know - \$6,000,000 to build this and that and I thought how could I let this happen to myself. (Barbara)

Introduction

Two broad descriptors of the consequences of sexually transmitted debt emerged during analysis. 'Culpability' and the 'burden of responsibility' aptly describe not only the experiences and sensibilities of Dana and Barbara but of all the women interviewed. Commentary published after the *Garcia* High Court decision stated that Mrs Garcia

'escaped liability altogether'⁴⁰⁸. This claim implies that she deserves blame. It assumes that the cost of her ordeal is non-existent because there has not been an economic cost to her. On the other hand, a *Weekend Australian* article that reports the High Court findings in *Garcia* implies that the consequences to her go well beyond financial liability. Reference is made to Mrs Garcia's 'eight years of anxiety' in a 'battle to keep her home' and she states that 'after all these years, it's been a terrible pressure'⁴⁰⁹. The reporting of guarantor experiences by the media ordinarily focuses on their financial loss through the dispossession of the family home and bankruptcy. A few feminist commentators have asserted that the reality is that women who sign loan contracts invariably do not escape liability financially, and nor do they escape personally or socially.

This chapter examines the literature that discusses these much broader consequences for women and explores the actual lived consequences, of both signing and refusing to sign loan contracts, for the forty seven women interviewed. Their experiences are considered within four sections. The first focuses on the financial decisions they made concerning their debt in light of the availability of professional and personal sources of help and advice. Second, the emotional consequences to them are discussed and third, the effect of the debt/s on the status of the relationship with their husband/partner and their own health. The final section discusses the financial, personal and societal consequences for those women who refused to sign. Although it was anticipated that these women would have experienced fewer negative consequences this was not in fact always the case.

⁴⁰⁸ A. Lang, *loc. cit.*

⁴⁰⁹ G. Safe, *op. cit.*, p. 6

Financial Consequences

Bankruptcy

Under the modern law of bankruptcy in Australia the debtor is 'freed from the burden of accumulated debts' so that he or she can 'make a fresh start'⁴¹⁰. That is 'unless the debtor has been guilty of some dishonesty, extravagance or other improper conduct in financial matters'⁴¹¹. But when a loan agreement is signed jointly and one signatory becomes bankrupt, the non-bankrupt spouse or partner still has a liability for the total amount outstanding on all debts incurred jointly⁴¹². Further, if the family home is owned by the bankrupt then the trustee, who administers the estate of the bankrupt, can take possession of it and sell it⁴¹³. If both the husband and wife own the home the bankruptcy of one spouse will mean that joint tenancy is effectively dissolved and tenancy in common results⁴¹⁴. If the non-bankrupt does not consent to the sale of the house, the trustee can apply to the Court for an order for the sale to allow distribution of the proceeds to the creditors. Although the non-bankrupt is given the opportunity to purchase the half share previously held by the bankrupt none of the women in this study were in a position to do this.

The standard period of a bankruptcy is three years and this period may be extended to

⁴¹⁰ D. Rose (ed.), Australian Bankruptcy Law, 10th edn, The Law Book Company Limited, 1994, p. 1

⁴¹¹ *ibid.*

⁴¹² B. Weule, The Bankruptcy Handbook, Redfern Legal Centre Publishing, Australia, 1998, p. 153

⁴¹³ A. Keay, Insolvency: Personal and Corporate Law and Practice, 2nd edn, Longman Australia, 1994, p. 50

⁴¹⁴ Joint tenancy means that each tenant, rather than having a distinct share in the property, is to be treated as far as outsiders are concerned as the single owner of the entire property. Tenancy in common means that all owners have distinct but undivided shares in the same property, that is, though each owns a specified proportion of the whole, none can identify a particular part of the property with his/her share.

either five or eight years if the Bankruptcy Act is contravened⁴¹⁵. Even after discharge from bankruptcy, the bankruptcy will remain forever on public record via the National Personal Insolvency Index.

In 1999-2000 there were 23,298 new bankruptcies in Australia compared with 8493 in 1989-1990⁴¹⁶. Of those for 1999-2000, 16.7% were directly related to an individual's business and 83.3% had no connection to any proprietary interest in a business⁴¹⁷. In South Australia there were a total of 2668 new bankruptcies in 1999-2000 and the bulk of those are attributed to bankrupts with an age profile between 25 and 54 years of age⁴¹⁸. A lack of business ability was the major reason given by bankrupts in business bankruptcies⁴¹⁹. For those who decide to become bankrupt there are obviously some advantages. These can broadly be described as providing 'peace of mind' to the bankrupt. Bankruptcy will 'stop creditor harassment, most of their debts will be wiped out on discharge, their standard of living will be better' and they can 'make a fresh start'⁴²⁰.

A small percentage of the women saw bankruptcy as a 'shield' because the process ended their constant pursuit by creditors⁴²¹. With her house sold to service part of the

⁴¹⁵ B. Weule, *op. cit.*, p. 152

⁴¹⁶ Annual Report by the Inspector-General in Bankruptcy on the Operation of the Bankruptcy Act, 1 July 1999 to 30 June 2000, p.8

⁴¹⁷ *ibid.*, p. 7. It must be noted that this does not indicate the number of businesses that have become bankrupt because more than one person may become bankrupt on presentation of a petition. Debtors in partnership or with joint debts may petition for bankruptcy jointly and a creditor may petition for the bankruptcy of joint debtors on a single creditor's petition.

⁴¹⁸ *ibid.*, p. 32

⁴¹⁹ *ibid.*, p. 17

⁴²⁰ B. Weule, *op. cit.*, p. 56

⁴²¹ See Appendix II, Table 2.7 for the approximate total debt for each woman.

debt, Nina went bankrupt because she 'knew they [the bank] were then going to leave me alone so that was a plateau I needed – to be left alone'. Similarly Betty felt that bankruptcy was the only option because the bank pursued her for the debt as her estranged husband was on unemployment benefits and had no assets. She was trying to pay taxation and Workcover debts still outstanding from the business, bringing up the children without any maintenance contribution from her husband, working full-time and increasing her MasterCard in order to keep ahead. So bankruptcy was 'just like a lifesaver to me after years of struggling with his debt'. Pia 'was pleased to go bankrupt because I just wanted to stop those creditors' calls coming in'. At the time her husband was living away from her in another relationship at an address unknown to their creditors. They relentlessly harassed her with abusive phone calls and constant knocking at her door.

Although these women described their decision as positive, they also expressed some negative impacts due to the lack of closure of the experience of sexually transmitted debt:

the thing is I can't do anything. I can't get myself a house. I can't set myself up in anything. I can't get any credit. I feel cross that he could have given me a bit more money and I still could have gone on and I could have been in the same situation but that wasn't to be. (Betty)

An inability to settle is the consequence of bankruptcy for Nina. She is finding it difficult to find a house to rent and has been living with her daughter. This is the outcome of a combination of her record as a bankrupt and her low income on a disability pension. Dana says that she has 'just taken out a loan with the credit union but it's very hard to get loans after you've been bankrupt. Probably two years after I tried at Harris Scarfes just to see if I could get a \$500 card with them but they didn't want to

know me'.

The perceived disadvantages of bankruptcy provided the incentive for five women not to take this option. Financial counselling services list many disadvantages of bankruptcy that range from emotional and financial consequences to the impact of not being able to hold public office which includes 'being treasurer of the local junior football club or the school auxiliary'⁴²². None of the women, perhaps through a lack of awareness, discussed reasons based on possible future roles. Instead they cited reasons that involved the stigma attached to being a bankrupt, future credit limitations, inheritance losses and the effect on their employment. Underlying their decisions is the critical factor that none of them wanted to be held responsible for their husband's/partner's solely made financial decisions.

After they had separated, Mel's husband voluntarily declared himself bankrupt. As they had a joint loan for a boat Mel became responsible for the whole loan. When asked whether she considered bankruptcy, Mel stated that she has 'too much pride in myself to do that'. She felt that her husband had 'taken the easy way out' and failed to realise he will have the stigma of the bankruptcy for the rest of his life. Her feeling was that she 'had created my hole or made my bed and I had to sleep in it whatever'. Ingrid 'didn't like the idea of not being able to go and buy something because I was bankrupt and had that on record. I would rather be debt free'. Likewise Linda stated that she did not want to have to declare herself bankrupt because she 'didn't want to lose my credit rating because of him'. Gina states

insolvency and bankruptcy are such harsh terms and have such stigma attached to them that you are sort of – feel a bit lost in a sea of dishonest people I think and

⁴²² *ibid.*, p. 58

you can disassociate yourself maybe to a certain extent from all the people who should be in the position they are but that is really hard.

Bankruptcy legislation that allows the transfer of responsibility to these women seems particularly unfair. Although Gina's husband is a bankrupt he has been able to hide financially because he is in another relationship with someone who has their 'own beautiful home and he's now got a boat, a motorbike and that I find terribly, terribly difficult'. He 'graciously pays \$20 per week maintenance now but for a long time paid nothing'.

Unknown to Letitia, her husband had amassed debts in another state prior to their marriage. He then made the decision several years into their marriage to declare himself bankrupt and did this without any consultation with her. As a consequence of his debts their joint investment property had to be sold and Letitia had to take out a personal loan to pay the remaining debt so that she would not have to sell her house. She feels that 'the only person that had absolutely no rights in this whole process was me. My husband had rights because he was protected by the bankruptcy legislation'. Letitia broke down in tears at the injustice she had experienced. 'I felt like I was being punished twice – punished by being married to this prick and punished by society as well'. When asked whether she had considered bankruptcy, Letitia responded that it was in her view unacceptable because 'why should I carry that stigma when it wasn't my fault'. She asserts that she has a very good credit rating and is 'probably any financial institution's dream customer so why should I be labelled because of something that was out of my control'.

Gina, Dana and Nina talked of the shame they felt when their parents needed to change their wills so that any future inheritance would not be acquired as an asset in relation to the bankruptcy. When Nina's mother died she knew she was in the will and 'I had to

make her change her will on her death bed to cut me out of it otherwise it would go to pay the bankruptcy debts. That really hurt her and me'.

Barbara's shame went beyond her family and into the community when she says:

I feel uncomfortable because some of those people [creditors] didn't get all their entitlements and you know all that sort of thing and we've had ongoing court cases between other directors and us. It's just been horrible – a nightmare to have assets of a million dollars one day and nothing the next.

Jane states:

I don't see why I should go bankrupt because I've worked my arse off over the last ten years and I've gone and supported everybody and made sure that money was in the house. At that stage, because I was working full-time, part of my contract states that if I am to go bankrupt at any time I will lose my job.

Their decisions not to voluntarily declare themselves bankrupt were obviously underwritten by the fact that these women did have the ability to pay the debt/s either through income, assets or negotiation.

Negotiation

Being able to negotiate with the lending institution provided either the 'writing off' of the debt or at least an extension of time for some of the women. Cathy lives in a small semi-rural community and had banked at the same branch for a number of years. She knew the manager, her history of financial management was recognised as being very

good and she was able to negotiate her way out of her partner's share of the debt after they were separated. Gayle did not realise that her husband had not paid out a loan of \$7000 they had had for their business until a couple of years later when they were separated. She got a letter from the bank at her new address demanding the repayment of the debt, which with interest added, was then \$11,000. Over a two-year period Gayle continually negotiated with the bank in order to reach the point where they discontinued action against her for the loan repayment. This long and difficult process proved extremely stressful and was undertaken at a time when she was recovering from surgery and chemotherapy for cancer.

Gina and her estranged husband had a substantial amount still owing after the sale of their home. This left her with the 'quandary – do I declare myself bankrupt or don't I and I kept on thinking why am I responsible for these problems. I won't declare myself bankrupt'. So she 'rang all the financial institutions and told them that I had no money – I don't have anything left basically and explained the situation of how I had ended up with the enormous amount of debt'. At the time of interview she had been to legal aid and was 'in the process of gathering information for a case' because 'I believe that I will continue to carry these debts fully as he's declared himself bankrupt'.

While there appears to be some capacity to negotiate with lending institutions, the majority of the women had no such ability, due to the debt collection practices of the banking industry. Una felt that the vigilance of her bank was extreme. They continually rang her demanding that she pay a greater amount each fortnight for the personal loan her husband had taken out in order to buy a boat. She found it frustrating in that 'you were being punished because you were the one trying to take the financial responsibility and they would treat you like a dirt bag, an absolute scuzz bucket. They really don't give a shit about your position and who caused the debt. Udy's walked away scot free without having to pay any of these debts'.

Or, as Wendy said:

Banks don't care. I laugh when I see their ads on TV. I would have as little as possible to do with them if I could. There's nothing personal in their service. My lawyer said I could take the bank to court because I wasn't aware of what I was signing ... but it was all too much for me emotionally and financially.

Some women's financial responsibility proved to be a key factor in their determination to repay the debt even if that meant extreme hardship over an extended period. They expressed their sense of pride in being able independently to move on financially and to secure themselves for their future.

Una's husband considered declaring them bankrupt but in hindsight she feels it was 'lucky that I had the capacity to get out of the mess because I didn't want to be taken down with him'. She knew that she would not be able to borrow money for a house in the future and thereby 'build her assets when she was out of the relationship'. At forty-three years of age and with five children, three of whom are teenagers, Una saw her financial independence as crucial. Vicki 'could have given in completely and just gone bankrupt' when the extent of her debts were revealed by the bank but she was able to 'slowly deal with it' because she had a good income and no family to support. The fact that she has a fortnightly income allows her to make her own decisions as to what she uses the money for and she sees herself as the 'person that lives with that consequence if I make a bad financial decision' rather than having to 'live with someone else's'. As 'it's almost like starting from square one at forty-one', those who could afford to pay mortgages and contribute to superannuation funds were striving for financial security so that they could hopefully avoid 'still working at sixty-six just to pay off the mortgage' (Una). Ingrid initially felt depressed at the thought of the amount of debt she owed and the fact that she had no support to repay her debts. However, 'after six months of

mourning', she 'got up and looked in the mirror – smacked my face and said, "Hey woman, life's too short to be like this" and I have never looked back since'.

While Helen, Josie and Mel negotiated with the lending institution to reach an agreement about the debt, the outcome remains inequitable. Helen's husband was trying to persuade her to go bankrupt so that the loan for their car and debts that he had from his business would be removed. 'It was totally against my principles. Sometimes I look back and think I really stuck my neck out and I probably could have done ... I didn't feel that I had done anything to justify going bankrupt so I didn't want to do that'. Her husband then declared himself bankrupt so the finance company pursued her for payments on the car loan of \$14,000. When she explained her situation to the finance company they 'were very reasonable and said if I could come up with half that money we will wipe that debt'. So Helen is now effectively paying all of her half share and her husband is not contributing at all to the debt. Similarly Josie paid her half share of the debt to the lending institution after her boyfriend disappeared and his car, that she had guaranteed, was repossessed. Mel used her tax refund cheque to pay out the last of the boat loan but continues to pay a truck loan from her ex-husband's business. She anticipates that it will take another four years before the loan is repaid in full. In the meantime her husband has sold the truck at auction and kept the money.

Credit Reference

Another significant finding of the financial consequences for these women was the impact of the debts on their credit reference. One quarter of the respondents revealed the problems that they had encountered when seeking credit in their own right after their separation or divorce. In Australia, credit reference agencies hold credit histories on individuals, companies and businesses. When consumers apply for credit facilities such

as housing loans and credit cards, and businesses apply for credit, these agencies provide their credit records to banks, finance companies, retailers, credit unions, building societies, credit/charge card issuers, telecommunication providers and a wide range of manufacturing, wholesale and service organisations⁴²³. The record of the consumer's credit history lists credit extended, defaults, and applications for family, domestic and household purposes. This is held on file for five years from the date of listing. In the case of bankruptcy the history is held on file for seven years.

Often the women found this out only at the time of applying for credit. They felt a great deal of resentment and embarrassment that they were considered a 'bad risk' by credit providers when they had not been the one who had failed to repay the debt. Emily ordered some floor tiles and contacted a tiler to lay them. At the time she told the contractor that it would be a cash job. They checked her credit reference and saw that there had been a block put on her and her husband's record because he was not allowed to have any further loans. She had to pay for the job before it was done. Faith needed a washing machine and fridge when she moved away from her de facto partner. When she approached a retail business to arrange credit for these she was 'knocked back'. She had asked whether this was on account of the car debt incurred by her partner and was given the telephone number of a credit reference agency to follow up. However she chose not to because of the 'hassle involved', bought a very cheap fridge and 'would rather do without until I can pay cash'.

When Gayle applied for a loan of \$30 a month for a mobile phone this was refused because of her 'sexually transmitted' credit history that was held in joint names by the credit reference agency. She then began the process of getting the bank to contact the credit reference agency to upgrade her credit history. Similarly, Helen applied to

⁴²³ Media Release, Credit Advantage Limited, 2000, p. 1, (Online, accessed 2 Aug. 2000) URL: http://www.creditadvantage.com.au/frequently_asked_questions.htm

transfer her mobile phone over to a new one and she was turned down. 'I was just mortified because it was just a piddly bit of money and so then I wrote to the credit reference agency and asked them to send my file. That was the thing that really got up my nose because I've always had a very good credit rating'. For Mel too, having a credit reference record created unwanted difficulties. She also was unable to get a mobile phone and when she recently bought a new car she had to take a letter from her credit union as verification. Although she has paid out the previous car loan, her credit reference record does not as yet reflect this.

Of particular concern is the fact that within Australia, these agencies are limited to 'negative credit reporting'. They can only hold and report on bad credit risks. According to Australia's major agency this limitation, imposed by the Privacy Act 1988 (Cth), means that a consumer's credit file cannot record any instances of non-default⁴²⁴. 'Positive credit reporting' of the credit histories of these women would certainly allow a much more accurate record of their financial responsibility.

Familial Support and Advice

The decision to seek the support and advice of others about their financial position proved to be a vexed issue for many of the women. Those with dependent children seemed to have little choice as they were unable to shield them from the financial consequences. In some cases this provided them with a renewed respect from their children who saw the hardships they had gone through and the reasons why. Conversely, Teresa had needed to borrow money from her son and that was now causing problems with their relationship. She was unable to repay the loan and he

⁴²⁴ *ibid.*

needed the money for his own family. Some women chose to protect their adult children from their circumstances because they believed that this would have a detrimental effect on them. Faith's daughter was in a job that was very dangerous and she knew she did not need distractions.

Not surprisingly, those who had a supportive family usually experienced very positive encouragement and advice. For 'ears to bash and shoulders to cry on' Cathy relied on her father and stepmother, a trusted brother, her accountant 'who has been a friend for twenty years' and two girlfriends. Letitia felt that she had been able to recover very quickly from the debt because she has a 'very supportive and generous family' and her parents had given her money to allow her to build another house. Though Betty discussed her intention to declare herself bankrupt with her mother-in-law and father the support she received was contrary to her expectation. The former considered bankruptcy to be the 'most disgraceful thing one could do, which made me feel really bad'. Her father, perhaps displaying a similar generational view of the stigma involved, said "I would rather visit you in jail" [laughs] because he looked at it that my ex had really fleeced me and he said "I don't want him to make you go bankrupt – I'd rather visit you in jail".

However, there were exceptions. Mardi had started a landscaping business with her de facto partner. But at the time she did not complete any legally binding agreement that acknowledged her role as a partner. During the course of the business they were purchasing building goods on account through a building supply company run by her partner's friend. At the time when her partner left their relationship he was able to convince the friend to debit Mardi personally for the outstanding account rather than the business. He also 'took the business with him and all the money because he emptied the bank accounts cos I wasn't quick enough'. When Mardi was asked how she coped financially she responded through her tears that she had to resort to charity from a local

church and asking her eldest son to give her extra money from his weekly wages. While she says that he will always give her the money, 'it is the attitude that goes with it' that has caused her a great deal of anguish. She feels that 'he thinks that I shouldn't have done what I did'. As he is under 18 years of age 'he's not old enough to have the understanding of why I made those choices. His attitude is that my family's a bunch of losers'.

Paula had disclosed her circumstances to her neighbours, children's school, family and friends. She had lived for many years in a suburb that has a strong sense of community. When she married, her husband also became very involved in the community, both at a personal and professional level. She states that since her separation and divorce 'the community, family, friends, structures, actively act against' her:

You don't exist in the community afterwards. ... there is no compassion. No one will pick up that phone to see how the children are. ... You are diminished because if he left you why did he leave you? You must be untrustworthy in every way. ... We are not allowed to tell our story because you have to pretend it is not happening. ... It is far more hideous going through it in this area than it is in Hackham West because I had a girlfriend in Hackham West. We met at university. She had a shocking story but the reality is she was not a criminal in her area – I am in mine. Taking the pension is par for the course where she lived so she didn't have to contend with that and she had humans out there to support her. I don't have that here.' [At her children's school] 'they say to me "You'd know Carmel wouldn't you – she's one of you" ... What they mean is that she is a sole parent like me so we must automatically mix together and know each other.

Others who might ordinarily have looked to their families for support in their daily lives chose not to because of their feelings of privacy concerning money. Still others drew

strong support from their children who viewed the debtor parent as the cause of their problems. Barbara and Fiona's children, all in their early twenties, have been very affected by the debt and carry strong resentment towards their respective fathers because of the way they handled the business. They all believe that their fathers should have been much stronger than they were in disclosing the true financial picture of the business earlier.

Of the forty-seven women, eight were separated at the time of the interview and twenty-two were divorced. (See Appendix 2 Table 2.4) While very few said that the debt directly caused the breakdown of their relationship, most saw it as a contributing factor bound up with financial irresponsibility by their partner. However, Winifred and Serena implied that it was central to their separation and subsequent divorce.

Ultimately all the women were facing an economic future post-STD that was much reduced from their prior circumstances. Thirty-four of the respondents are forty years or older (See Appendix 2, Table 2.2). Many would not own a house at retirement, yet they had in some cases been paying off their own home when they entered the relationship. Sixteen of these women had contributed to the assets of the relationship for more than fifteen years (See Appendix 2, Table 2.8) and then, like Teresa, found that they 'had lost a life's work'. Only a few would retire with self-funded superannuation, albeit much reduced due to the short time they had been contributing.

Half of those who were employed held positions in a narrow range of occupations that pay relatively low wages (See Appendix 2, Table 2.6). To supplement their wages many use credit cards and some have borrowed against their life insurance in order to keep up with their debts. When considering the economic consequences for these women following separation and divorce, the picture seems significantly more difficult than the current data on post-divorce economic disadvantage for women suggests. In

many cases there are no assets from the relationship to divide at the time of settlement. Many spoke of the possibility of entering into intimate relationships in the future. However, they consistently made it clear that any financial decision-making would be separate rather than joint. Further, many were adamant that they would never co-sign loan contracts or guarantee agreements again.

Recent data from The Australian Institute of Family Studies (AIFS) Australian Divorce Transitions Project reflects greater post-divorce economic disadvantage for women who had been in intimate relationships for at least fifteen years and were aged forty-five plus at the time of separation⁴²⁵. While repartnering was found to be 'a key way out of financial difficulties for women' the research has not investigated the impact on economic advantage if money within the relationship was treated individually rather than jointly⁴²⁶.

Non-Financial Consequences

Emotional

I sort of saw myself as swimming upstream because I didn't have a car, I had a part-time job, and I had no savings. Then within a couple of months my employer went broke. It shattered my confidence in my bookkeeping skills, it shattered my trust. I lost face with friends and family and didn't really know who I was any more basically. I then worked as a Girl Friday and I felt really shaky about writing out cheques and with any financial responsibility. What it's really

⁴²⁵ R. Weston and B. Smyth, 'Financial Living Standards After Divorce', *Family Matters*, No. 55 Autumn, 2000, p. 14

⁴²⁶ *ibid.*, p. 15

meant for me is rebuilding from the ground up because everything that I believed in – nothing is as I thought it was. So I thought I had to reconstruct my reality, my values. I was renting my brother's investment unit and just last year they decided they wanted to sell but I was fortunate because my daughter and her husband came up with the deposit so that I could buy this. That was very hard to take money from your kids [starts to cry]. ... I've rationalised that, everything - that I knew I signed for everything - and I had to take the consequences. ...I've done a lot of deep reflection I can tell you [laughs]. (Pia)

Pia's emotional experience epitomises that of almost all of the women in my study. Their experiences have had a profound effect on their self-esteem; a sense of personal failure often pervades their narratives. Wendy and Helen spoke of how they had 'lost their children's inheritance' and that they had not, and in Wendy's case 'probably would never tell', their children the extent of the total loss. Wendy had promised her ex-husband that, if she ever sold the family home, which was part of their property settlement at the time of divorce that she would give the girls thirty per cent of the sale as their inheritance. When she had to sell and was unable to fulfil the promise she 'felt guilty for a long time' about what she 'had done to my children'. She knew that if they needed her financial help she would not be able to assist and that they would then find out what she had done to 'their inheritance'.

This sense of guilt and shame underpinned the women's reluctance to disclose their financial and personal position to others. Work colleagues, social acquaintances and friends were often not made aware of the reality of the women's private lives. This led to feelings of isolation and loneliness. Rita still meets with some friends from a Child Adolescent and Family Health Service (CAFHS) group that she joined after her daughter was born. Although they know that she and her partner are separated, she has never disclosed any information about her financial situation. She feels that she cannot

tell them the truth about how tight her budget is and how close she is to not being able to pay her mortgage:

I think this is all my fault because I signed that loan and I've still got this real guilt thing about I've messed it up for myself. I feel really guilty when I can't be home all the time for Maddie [her daughter] because I really wanted to have her and be a full-time mother to her.

Barbara had a very high profile within the community in local government and held positions on many committees and a board. She had aspirations of becoming a politician.

I know I am more reclusive since all of this has happened and I am really not the person out there that I used to be. I don't get involved like I used to. It took a huge toll in terms of your own credibility and status. I withdrew tremendously from my friends. I don't have that huge group of friends and associates. I mean I see people but I'm not as comfortable any more.

When asked whether she sought advice from friends, colleagues and family Claire replied that she didn't like to talk about it because she felt that 'it was betraying my husband's trust in a sense and it was very embarrassing'. She 'didn't want people to know what a mess we were in and what a mess we had made'.

I didn't really want my friends to be brought into this and I didn't let anyone know here at the school so it can be very lonely.

The 'silencing' of these women's voices' bears a strong resemblance to the practices, identified by commentators, of denial and silence of women who experience domestic

violence. Amongst other reasons, women remain silent for, if they reveal the violence, they fear they will not be believed or they will be blamed for causing the violence⁴²⁷. This pattern of silence for the women who experienced STD perpetuates the invisibility of the problem.

Without exception the women described themselves as 'gullible', 'a stupid person', 'plain stupid', 'naively ignorant' and 'trusting' when they considered their position. That they did not make their husband/partner take responsibility either during the relationship or after they had parted company remained a constant source of self-rebuke.

Several of the women diffused their accounts of their partners financial irresponsibility by either blaming themselves for their current financial circumstances or pointing out the personal and social influences that their partners were experiencing at the time. Evelyn asserts that 'I guess I allowed him to do some things that put us into debt at times when maybe I should have been stronger'. When she left her husband, Cathy helped him get a bank account, a house, apply to connect the phone and electricity and wrote a budget out for him to follow. She asserts that she never really hated him but 'felt sorry for him because he couldn't do anything'. His inability to do anything she put down to the fact that 'he went from his mother to me and maybe I mothered and perhaps you shouldn't mother a man – I mean you tend to think you should when you first marry and you want to do everything for them but wrong – make them do it themselves'.

Deidre asserts that women 'hand themselves over completely and utterly to one person when they marry' and later think 'what did we do that for?' For Pia, much of the blame seemed to be hers because she 'relied on blind faith, being naive as far as business went' and 'not knowing anything about the industry I was going into'. Betty minimises the

⁴²⁷ H. Astor, 'The Weight of Silence: Talking About Violence in Family Mediation' in M. Thornton, *op. cit.*, p. 174-196; M. Bittman and J. Pixley, *op. cit.*, p. 42-46.

blame that her husband should bear by reflecting that 'looking back at it I didn't realise it' but 'he was really starting to get to the depths of this mid-life crisis thing'. She had agreed to act as a guarantor for him when he wanted to purchase a car because she thought that 'maybe if he gets this car it will make him feel better'. Her devotion to her marriage meant that she had 'always felt responsible for his emotional housekeeping' and saw her decision as being cognisant of that concern. In hindsight she sees that 'he wanted friends and missed people from his past'.

When Fiona went to a psychiatrist because she felt she needed to share her situation and feelings with a professional, she felt that the psychiatrist was judging her husband as incompetent. However she 'immediately thought no, he is good at this work but he just got into a jam with the business side of things'. For Barbara:

I kind of let it go and I guess it was my anger at myself at not being able to stretch myself or not insist because I think I thought – I think that initially I was very angry towards myself and perhaps luckily not so much towards my husband because I don't think our marriage would have survived.

However Helen states that she doesn't think that she has guilt but that she's 'angry with myself that this could have happened'. She perceives herself to be 'very resentful about a lot of things but it's things in general that at my age in life after so many years of working I've got nothing'.

Tess described feeling an emotional mess as a result of the sexually transmitted debt and the divorce because she 'felt I was to blame. I had had two marriages and both had been unsuccessful'. She told of having to leave her children at home on their own for two weeks when they were twelve and thirteen because she had to work interstate in order to get money and she 'feels really bad about that'.

Health

The issues of personal safety, financial insecurity and privacy contributed significantly to the interviewees' health and general wellbeing. Many of the women discussed health consequences that ranged from short-term anxiety and stress to long-term psychiatric problems. At the most extreme end of the health continuum suicidal thoughts and attempts plagued four of the women. Cathy felt that if she hadn't been in a new relationship after her separation she 'might not be here now because so many times I just thought death would be easier'. She meant easier than continuously dealing with the banks over the debts, easier than dealing with her husband's continuous physical and verbal abuse, easier than trying to make a new life for herself and her son.

Suicidal thoughts were frequent for Teresa as she fought with the bank to retain their family home. Kate 'thought about taking my own life but I ended up going to the doctor and on tablets for depression'. For Emily suicide seemed to be the only alternative when she 'stuck the hose in the car just before Christmas because I couldn't see a way out'. After ongoing problems with her husband's gambling debts and alcoholism, a financial counsellor had advised Emily that she needed to run the household finances solely. Throughout her thirty plus year marriage her husband had total control of the money and she had to account for everything she bought. When their roles were reversed her husband retaliated by systematically checking up on her, which placed enormous strain on Emily. His checking ranged from 'where have you been, what have you been doing' to 'if I'm reading a book or anything it's a little signature that he puts on it – he's an auditor [at work] so that's what he thinks that he is doing [laughs]. He's auditing everything that I do, even down to what book I'm reading'.

Three of the women sought the help of psychiatrists, each because of the stresses of the debts and one also because of the marriage breakdown. Wendy went to see a

psychiatrist because she 'went off the rails a bit. I felt guilty that I wasn't providing a home for my girls and that my parents would know'. Fiona had 'only been sleeping about three quarters of an hour and then waking up and perhaps going back to sleep at 2.00 a.m.'. While the psychiatrist diagnosed 'an incredible amount of medication' Fiona reduced the dosage so that it 'isn't an anti-depressant but it is just a sleeping aid and I still take that'. Una sought the help of a psychiatrist because there was 'this constant stress and the constant tiredness of running a full-time job, dealing with the kids' problems and still having to come home and face up to another job at the end of the day'.

All of the women expressed their concern at the impact that the debts had on their health generally. While they voiced an acceptance of stress as part of 'modern day living', the financial and social repercussions of the debt created levels of stress far beyond what they felt might be considered normal. Kate voiced the feelings of many when she spoke of her 'exhaustion with all this because I can't get on with my life. I just cannot get out of the mire and past the brambles to find a clear road and say, that's done, that side of my life is finished – look to the future and get on with it'. Many, like Linda, live with the effects constantly: 'It has been the first thing on my mind when I wake in the morning and the last thing on my mind when I go to sleep'.

Opposing Views

Seven of the women interviewed remain married despite either having experienced sexually transmitted debt within the relationship or having refused to agree to sign loan contracts for their husband or partner.

Trust, albeit in different contexts, is central to why these women remain in their

relationships and/or why they refused to sign. The women who agreed to sign and experienced sexually transmitted debt now run the household finances. Not only do they no longer trust their husband's/partner's financial ability, but they had proof that their lack of trust of partner's financial competence was not misplaced. The majority of those women who had an income from external employment displayed a sense of calm about their role reassignment within the relationship. This stemmed from their ability to be financially independent if they chose and their perceived power to refuse to sign loan contracts in the future.

Barbara felt that taking over the finances did not unduly influence her relationship. She has a high income herself from a full-time professional position and was able to put a deposit on a house in order to start again after the loss of all of their assets. She knows that she could afford to pay the entire mortgage on the house if her husband left her and asserted that 'it doesn't really matter what he does any more because I'm not going to sign any guarantees or anything – absolutely not'. Fiona 'now does everything ... as soon as money comes in he brings his chequebook home and I write out these cheques. He is a lot – he's very happy for me to do that. There is no secrecy any more'. Although she 'wouldn't say I've lost faith in him my faith in him is definitely eroded. I'm lucky I've got a good job'.

Helen's marital relationship is tenuous. Her husband expected that she would agree to declare herself bankrupt for the car debt but as she 'didn't want to his attitude remained that I could have done something' to avoid their financial problems. Her husband is now bankrupt and on a veteran's pension and she continues to work and pay for the mortgage and car. When considering whether she will stay in her marriage, 'half of me says yes you should just get out but it all is a bit hard because I think, well, ... we live in the same home but we live separately'.

By contrast, the women who remain in the relationship but do not have an independent income described behaviour between themselves and their partner that portrays significant undermining of their commitment to a future together. When asked what the consequences of the debt were for Teresa she responded that she 'had changed as a person' because she now 'doesn't trust her husband as she used to'. She had suicidal thoughts for some time due to the financial stress, which changed her marital relationship. Similarly for Emily:

Taking the money away from him wasn't the complete answer because we went through a phase where he was taking money out of my purse so now I have a little thing that I wear around my neck. That makes me feel awful you know and I think that's why I'm really this far [indicates a half inch gap between thumb and forefinger] from leaving the marriage, because I just don't want to go on like this.

While these few women changed the power structure within the relationship, and in doing so have redefined trust, sharing and commitment, they have not attained equality in the sense that Supriya Singh described. She asked 'how will relationships between men and women change when equality is interpreted as equally sharing marriage money and market money? How will this redefine trust, sharing and commitment in personal relationships?'⁴²⁸. The women who remain in relationships in this study were acting in a way that was neither equal, trusting, nor committed to their partner. The imbalance of power within their relationship had been reversed. In fact, the women displayed an ideology of individual ownership of money within their relationship, albeit some did so reluctantly. They perceived this to be equitable rather than equal.

The legal term *caveat subscriptor*, or let the signatory beware, assumes that there are no

⁴²⁸ S. Singh, *op. cit.*, 1997, p. 164

repercussions to those who choose not to sign. But for those women in the study, who refused to sign loan contracts for their husbands or partners, the consequences remained extreme. During the course of her first marriage Winifred's husband was 'a dreadful payer of debts and people were always chasing us for money he owed'. She reached a point where she decided that she 'would never put the house or children at risk again' and 'refused to act as a surety'. Thereafter his response to her refusal was to state 'you're responsible for ending this relationship'. At the time and for a considerable period after the marriage ended, Winifred felt 'nervous and upset ... but often looks back and thinks thank God I didn't give in'.

Conclusion

The consequences of signing show that sexually transmitted debt has a profound long-term effect on women. Plagued with the combined burdens of culpability and responsibility, these women have experienced, and will continue to experience extreme financial, emotional and health problems. Those women who remain in the relationship that is the source of STD changed their role in the financial decision-making within their household. However, the consequences to them and to their relationship are marginally better than those women no longer in the relationship. Whether they agreed or refused to sign, no one told a story of mutual trust and equality in their partners post STD. While, as with Mrs Garcia, the Yerkey principle may alleviate the financial burden for some women, that has not been the case for the women in this study. The consequences of STD, as demonstrated by these women, should be of more concern to policy-makers charged with the health and welfare of women and their immediate families.

CHAPTER SIX

RECOMMENDATIONS BASED ON BANKS' ADVANTAGE

It is necessary to ask why it is that women *can* sign legal documents in circumstances where they will be rendered responsible for debts, which are not their own, for money which they never see, for credit which never or marginally benefits them⁴²⁹.

Economic abuse and exploitation on the domestic hearth cannot exist nor continue through the coercive, violent or 'persuasive' imprecations of husbands, boyfriends, ex-lovers alone. Although men are (or should be) responsible for their own coercive, violent or 'persuasive' acts, that social and political structures lock women in to economic inequality is, and simultaneously supports and condones, economic violence against women⁴³⁰.

Introduction

The focus on women's disadvantage by the judicial system, by some feminists, in Federal and State Government Reviews, and by lending institutions in their strategies of, and for reform, continue to have limited effectiveness in reducing the incidence of sexually transmitted debt within the community. The findings in chapter four and five indicate why womens' debts accumulate. Husbands and partners come home and say

⁴²⁹ J. Scutt, *op. cit.*, p. 139

⁴³⁰ *ibid.*, p. 140

'sign here', banks assure guarantors that their debt will be limited to a certain amount, banks do not inform guarantors when a debtor defaults, debtors voluntarily declare themselves bankrupt, guarantors are not aware that jointly owned homes and joint bank accounts make them liable to pay his debts. Banks' self-proclaimed understanding of the situation thus indicates a huge failure of imagination and knowledge. Clearly, in order to act responsibly banks need to be fully aware of the circumstances and experiences of women and STD.

In applying the 'disruptive' feminist strategy of Joan Eveline to the experience of STD, the strategy of connection moves beyond STD as a 'woman's problem', and instead allows a relational link of the 'banks' advantage' in their relationship with the guarantor. As discussed in chapter two, creditors are put on inquiry when a wife offers to stand surety for her husband's debts if, undue influence or misrepresentation has been committed by her husband, or the transaction is on its face not to the financial advantage of the wife (*O'Brien*) or the wife is in substance a volunteer (*Garcia*). The formulation of the rule in both legal cases makes it clear that in order to avoid being fixed with constructive notice, creditors are limited to taking 'reasonable steps' to warn the surety. These steps include warning the surety (at a meeting not attended by the principal debtor) of the amount of the surety's potential liability, of the risks involved to the surety's own interests and advising the surety to take independent advice. Given the inequalities of financial decision-making within the household, and in the contractual agreement between the bank and the women, this chapter suggests proposals for changed obligations and behaviour to stop 'bank economic abuse against women'.

Statistics That Count

In 1991 a House of Representatives Standing Committee on Finance and Public

Administration, chaired by Stephen Martin MP, produced a report into banking and deregulation within Australia⁴³¹. This 'Martin Report' recommended that there be a clear code of practice established for banking practice⁴³².

On 3 November 1993 the Australian Bankers' Association released a Code of Banking Practice, endorsed by the federal government and intended as the benchmark for Australian consumer banking practice⁴³³. A Task Force established in response to the 'Martin Report' recommendation wrote the first two drafts of the Code. Just how these drafts became the 'written word' of the ABA rather than the established Task Force remains unclear⁴³⁴. Tyree suggests that the transferral of agency of the Code from the Task Force to the ABA resulted in a Code, though originally drafted to provide strict guidelines for banking practice, that is less stringent, and more advantageous to banks than to their customers.

The purpose of the Code is

To describe standards of good practice and service, to promote disclosure of information which is relevant and useful to customers, to promote informed and effective relationships between banks and customers and to require banks to have procedures for the resolution of disputes between banks and customers⁴³⁵.

⁴³¹ House of Representatives Standing Committee on Finance and Public Administration (Martin Committee), *A Pocket Full of Change: Banking and Deregulation*, Australian Government Printing Service, Canberra, 1991

⁴³² *ibid.*

⁴³³ A. Tyree, *Banking Law in Australia*, 2nd edn, Butterworths, Australia, 1995, p. 270

⁴³⁴ *ibid.*

⁴³⁵ *ibid.*, p. 271

The Code specified stricter guarantee procedures that include the provision of greater and more detailed information to the guarantor of the borrower's financial position, unlimited guarantees to be prohibited and the recommendation from the bank that the prospective guarantor obtain independent legal advice⁴³⁶. A press release issued by the Treasurer and Minister for Consumer Affairs on 3 November 1993 announced that the Australian Banker's Association had 'assured the Government that all of its member banks which offer retail banking services' would 'endeavour to achieve full compliance with the Code by the end of 1994'⁴³⁷. However, the Code is voluntary and member banks are not obliged to subscribe to it. In the years immediately following its release, commentators remained optimistic that banks would be responsible through self-regulation. Tyree states that 'perhaps it can be expected that there will be greater adherence both to the spirit and the letter of the Code' because of its origin⁴³⁸. Similarly, Janine Pascoe asserts that 'it is to be hoped' that self-regulation resulting in improvements 'in the provision of advice, explanation and information disclosure' is the outcome, 'in the absence of statutory directive'⁴³⁹.

Prior to the release of the Code, the Australian Banking Industry Ombudsman was established in 1990 by the banks. The scheme, 'motivated by a desire to improve public relations and to forestall any proposed legislation', was created to provide a mechanism for the resolution of disputes between individual and small business customers and banks⁴⁴⁰. It was based on a similar scheme established in the United Kingdom in 1986. In order to allow independence from direct interference by the banks as the owners of

⁴³⁶ *ibid.*, p. 281

⁴³⁷ *ibid.*, p. 272

⁴³⁸ *ibid.*, p. 270

⁴³⁹ J. Pascoe, 'Wives, Business Debts and Guarantees', *Bond Law Review*, Vol 9 No 1, 1997, p. 80

⁴⁴⁰ A. Tyree, *op. cit.*, p. 292

the scheme it is run as a company composed of a Board, a Council and the Ombudsman. Under the Terms of Reference, the Ombudsman is required and authorised to consider disputes relating to the provision within Australia of banking services by any member bank to any individual⁴⁴¹. The Ombudsman does not have the power to consider a complaint regarding a bank's commercial judgement in decisions about lending and security and its jurisdiction is limited to hearing disputes where the amount claimed or which could be claimed by a consumer does not exceed \$150,000⁴⁴². A 'commercial judgement' means 'the assessment of risk, of financial or commercial criteria or of character', and a 'decision about lending or security' is deemed to include 'any decision [or the consequences thereof] concerning any advance or similar facility, guarantee or security'⁴⁴³.

Since July 1998 the Ombudsman has been able to consider complaints about guarantees given to support loans to companies⁴⁴⁴. Prior to this, the Ombudsman could only consider complaints where the guarantee related to a debt owed by an individual or an unincorporated business. The new jurisdiction is not retrospective. Overall, the intent of the scheme is 'for the resolution of consumer complaints rather than "policy" matters or the business judgement of banks'⁴⁴⁵. Interestingly, the number of complaints concerning guarantees is reported by the ABIO to be relatively small and the proportion of guarantee complaints received by the Scheme and within the Terms of Reference has decreased relative to the overall numbers of complaints. In 1991 guarantee complaints

⁴⁴¹ *ibid.*, p. 293

⁴⁴² Australian Banking Industry Ombudsman, Annual Report 1998-99, p. 7

⁴⁴³ G. Weaver and C. Craigie, The Australian Banking Industry Ombudsman Terms of Reference, Banker and Customer, 2nd edn, LBC Information Services, New South Wales, 1990, p. 17,319

⁴⁴⁴ Australian Banking Industry Ombudsman Ltd, Report on Relationship Debt, Bulletin, No 22, 1999, p. 3

⁴⁴⁵ Australian Banking Industry Ombudsman, Annual Report 1998-99, p. 7

represented 5% of all finalised complaints; in the year from July 1997 to June 1998 they represented 0.4%⁴⁴⁶. At first glance this seems remarkable when agencies such as the New South Wales Law Reform Commission and the Australian Bankers' Association are currently reviewing the processes of third party guarantees in a bid to reduce the number of people that fall victim to failed loans they have guaranteed. The ABIO reported that the main complaints by consumers were fraudulent use and incorrect debiting of credit cards, variable interest rate home loan approval and settlement delays and inappropriate fee charging, and unauthorised or incorrect cash being dispensed in ATM transactions⁴⁴⁷.

The ABIO has highlighted the inadequacy of current statistics when lending institutions do not identify the actual numbers of third party guarantees given, the proportion of guarantees given which are actually called upon and what guarantors, on average, have to pay⁴⁴⁸. But with the continued incidence of sexually transmitted debt, the inclusion of gender and marital status within the data would be appropriate. The ABIO does not acknowledge the inadequacy of their own statistics which identify the number of cases received by them that relate to guarantees by gender, but give no indication of the nature of the relationship involved, that is, marital status and familial relationships. The New South Wales Law Reform Commission's current review of the law relating to third party guarantees discloses that, although the ABIO is unable to quantify the prevalence of third party guarantees, a preliminary submission suggests that 'approximately 75% of files documented at the bank would include third party securities and that approximately 30% of home loan files are secured by supported guarantees'⁴⁴⁹. This represents

⁴⁴⁶ Australian Banking Industry Ombudsman Ltd, *op. cit.*, 1999, p. 3

⁴⁴⁷ Australian Banking Industry Ombudsman, Annual Report 1998-99, p. 16

⁴⁴⁸ *ibid.*, p. 3

⁴⁴⁹ New South Wales Law Reform Commission, *op. cit.*, Chapter Four, p. 6. Presumably this refers to an estimation of the total number of client files documented at the bank.

approximately three quarters of the banks' loan business. Weerasooria states that although there is no 'comprehensive reliable data on resort to guarantees in lending, one of the major banks estimated their use as follows:

Commercial loans 20%, overdrafts 20% and personal loans 30%. Consumer guarantees were significant in both commercial and personal lending⁴⁵⁰.

Endeavouring to identify exactly who within society is affected by sexually transmitted debt and in what numbers has historically been problematic. As discussed in the thesis introduction, since the initial identification of the experience of sexually transmitted debt within Australia, commentators have recognised the dearth of empirical research in this area. During the period from 1990 to 1994, the Australian Banking Industry Ombudsman (ABIO) received 675 written complaints relating to guarantees and over half of these involved women guarantors⁴⁵¹. Attempting to ascertain since 1994 what percentage of complaints were made by women is difficult, given that the ABIO does not include these figures in their Annual Reports. Their business is presented as the total number of complaints received, the percentage of formal and telephone complaints, users according to their state and their rural or metropolitan location, and the nature of complaints only. However, in 1999 the ABIO has reported independently of their Annual Reports that a total number of guarantee cases received both within and outside their terms of reference during the period from 1/7/94 to 31/5/99 as 295⁴⁵². Of these, 131 or less than half of the cases involved women.

Without an indication of the reasons why The Australian Banking Industry Ombudsman

⁴⁵⁰ W. Weerasooria, *op. cit.*, p. 179

⁴⁵¹ Australian Law Reform Commission, *op. cit.*, p. 245

⁴⁵² Australian Banking Industry Ombudsman Ltd, *op. cit.*, p. 20

believes the numbers of guarantees are declining, perhaps it can be assumed that an increasingly significant number of eligible complainants are choosing not to seek the assistance of The Ombudsman. Of the forty-seven women in this study, only one had sought the assistance of The Ombudsman. Her Bank Manager had advised her when she signed a loan contract for her husband that the loan would be limited to \$50,000. The bank had offered a total loan amount of \$150,000 and she had asked for a reassurance that it would be limited because she knew that her husband would be unable to repay the greater amount. Under an "all monies" agreement⁴⁵³, which had not been explained to her at the time of her signing, the total amount was eventually released to her husband. The outcome of her contact with the ABIO was far from satisfactory although she had received a letter from them to say that the issue 'had been satisfactorily resolved under their terms of reference'. She remained responsible for the total amount of \$150,000, as at the time of her complaint, the ABIO was limited to hearing disputes where the amount that could be claimed did not exceed \$100,000⁴⁵⁴. She expressed doubt as to the ABIO's independence from the bank involved and frustration at the lack of access to an Adelaide office where she could have had face to face contact and a more detailed explanation than that which she was given via the telephone to the Melbourne office. The office of the Banking Ombudsmen is located in Melbourne and inquiries Australia-wide are directed to this office.

Of the remaining women, many would not have been eligible under the Terms of Reference as the amount they would be seeking to claim exceeded \$150,000. The Ombudsman may consider contractual dispute complaints that include claims of breach of contractual or statutory obligations, misrepresentation and 'the legal issues which

⁴⁵³ See B. Collier, *op. cit.*, 1998, for a discussion of 'all monies' clauses in a contract of guarantee.

⁴⁵⁴ A. Tyree, *op. cit.*, 1995, p. 293

arise in relation to guarantees⁴⁵⁵. However, the majority of the women either did not know of the existence of The Ombudsman, or if they did, considered that they were liable having signed the contract, and using the service would therefore be pointless. Similarly Belinda Fehlberg found that only a minority of the sureties (or debtors on their behalf) who she interviewed had contacted the Banking Ombudsman in the United Kingdom. Either the Terms of Reference had precluded them, they had 'generally not thought to contact the Banking Ombudsman' or they 'considered that their problems were beyond the power of the Ombudsman to assist'⁴⁵⁶.

If the extent and degree of STD is to be known and community awareness of this issue increased, the recording and release of third party guarantee statistics needs to be undertaken by financial institutions. Moreover, these statistics should be part of the 'independent advice' and the 'information' women receive before becoming guarantors. Banks must be statutorily obligated to keep and provide to the public and guarantors statistics that record the number and type of third-party guarantees given; the percentage of guarantees given which are actually called upon; and the amount, on average, guarantors have to pay⁴⁵⁷. They should also provide a breakdown of the gender of guarantors, the percentage of each gender who are called on to pay, and their relationship to the debtor so that a more accurate picture emerges of who is affected and how. The ABIO currently can not be certain that the Ombudsman Scheme accurately records the experience of guarantors or provides relief for those eligible.

⁴⁵⁵ Australian Banking Industry Ombudsman, *op. cit.*, p. 7

⁴⁵⁶ B. Fehlberg, *op. cit.*, 1997b, p. 247

⁴⁵⁷ Belinda Fehlberg notes that in England there are no statistics that record the number or type of securities taken in any given year, let alone the number of surety spouses: *ibid.*, p. 91

Independent Advice

The expectation was they would be helping the person, to whom they were related, not giving their house to the bank⁴⁵⁸.

What do guarantors need to know to make an 'informed choice' as a rational agent in the context of the sameness discourse? Who is best placed to provide this information, and in what circumstances and form?

Banks do not consider themselves to be responsible for the circumstances of signing or the consequences of default unless they can be proven liable under the principles of contract and equity law that include coercion, duress, misrepresentation, unconscionability and the *Yerkey* principle. In the bank's view an acceptance of responsibility must follow, in the event of default, if the third party to a contract has voluntarily and with full knowledge of their liability signed a loan contract. This line of defence leaves no room for accusations of irresponsibility on the part of banks provided they follow the 'letter of the law' in relation to guarantors.

In 1991 the Australian Banking Ombudsman, Graham McDonald stated that

In cases where the partner is aware of the possible consequences of his or her action and enters into the transaction openly and on an informed basis, then he or she must accept responsibility when things don't go to plan. These are not the cases that concern us. What concerns us is when the partner is unaware of the implications of putting his or her signature on the documentation, is misled as to

⁴⁵⁸ Australian Banking Ombudsman Ltd, *loc. cit.*

its possible consequences or is deceived into entering the transaction⁴⁵⁹.

With a voluntary Code of Banking Practice in place and a seemingly distorted view by the ABIO of the actual number of eligible complainants, lending institutions have to date, responded to the 'disadvantages' imposed by their loan contract processes at a very superficial level. The only identifiable significant response has been through shifting their responsibility to the legal profession. This transference of responsibility is made through the recommendation by the lender to the wife that she seek independent advice prior to, or at the same time as, the execution of the guarantee. This has been a very effective smokescreen in allowing the banks to continue lending in a way that advantages both themselves and the primary debtor.

In the High Court judgement in *Garcia*, the failure by the National Australia Bank to ensure that Mrs Garcia received independent professional advice before signing the guarantee meant that she was not indebted to the Bank and was freed from all liability. Justice Kirby noted that 'the Bank's ordinary procedures were not followed' because Mrs Garcia was given 'no advice or explanation of the documents which she was signing'⁴⁶⁰. Further, she was not 'told to seek independent advice' and 'that such evidence would be a pre-condition to the Bank's acceptance of her guarantee'⁴⁶¹.

After this judgement a spokesman for The Australian Bankers' Association was reported in a national newspaper to have said that most of the ABA's members would already have 'taken the precautions urged by the High Court' because 'a lot of things have changed since that [Garcia] case'⁴⁶². Those changes, he asserted, now require

⁴⁵⁹ G. McDonald, *op. cit.*, p. 72

⁴⁶⁰ *Garcia v National Australia Bank Ltd* (1998), *op. cit.*, p. 1265

⁴⁶¹ *ibid.*

⁴⁶² G. Safe., *loc. cit.*

guarantors to seek independent legal advice and to obtain a signed certificate to prove it⁴⁶³.

The 1994 Australian Law Reform Commission's *Equality Before The Law: Women's Equality Report* proffered numerous recommendations for reform in order to reduce the incidence of sexually transmitted debt. These focussed on

clarifying and extending the Code of Banking Practice, extending the jurisdiction of the Australian Banking Industry Ombudsman; and developing a practice of effective independent advice complemented by separate bank interviews and specialist women's services⁴⁶⁴.

Similarly, in the 1996 Report of the Expert Group on Financial Vulnerability the Group recommended that the *Trade Practices Act 1974 (Cth)* be amended to include a provision that states

A corporation shall take all reasonable steps to advise a person from whom a guarantee is to [be] obtained:

- a) as to the nature of the legal obligations imposed by the proposed guarantee;
- b) that there are or may be financial risks associated with the giving of the guarantee;
- c) that the persons should seek independent advice with respect to the matters set out in paragraphs (a) and (b); and

⁴⁶³ However, it appears that there is still no formal legal requirement for lenders to advise guarantors in this way. Under Section 17.5, Part B: Principles of Conduct of the Code of Bank Practice the clause that states that 'a Bank shall recommend that a prospective guarantor obtain independent legal advice' continues to serve as a guideline only.

⁴⁶⁴ Australian Law Reform Commission., *op. cit.*, p. 259

d) that, if the person decides to execute the guarantee, that should be done in the absence of the borrower⁴⁶⁵.

In a June 2000 ABA media release on how the Association is 'working with the community on relationship debt', a key statement, directed at the prospective guarantor, is the need to seek independent legal advice as an important step before going guarantor⁴⁶⁶. Under Clause 17.5 of The Code of Banking Practice there is a general requirement that 'A bank shall recommend that a prospective guarantor obtain independent legal advice'⁴⁶⁷. The ABIO claims that during the past ten years it has become more common for banks to require third party guarantors to obtain a certificate confirming that they have received independent legal advice before entering into the guarantee⁴⁶⁸. But not common enough, it would seem. A common factor in guarantee complaints that are resolved by the ABIO in favour of the complainant is the failure by banks to undertake this precaution⁴⁶⁹. The bank's lending officer in these cases has not recognised the risk to the bank if the consumer is not advised to seek independent legal advice.

There is a growing body of literature that discusses independent advice as a protective mechanism used by lenders to negate the avoidance of a guarantee by a married woman⁴⁷⁰. As Paula Baron and Hii Su-King point out, independent advice has been the

⁴⁶⁵ Report of the Expert Group on Family Financial Vulnerability, *op. cit.*, p. 63

⁴⁶⁶ Australia Bankers' Association, June 21, 2000, 09/00

⁴⁶⁷ G. Weaver and C. Craigie, *op. cit.*, p. 17,220

⁴⁶⁸ Australian Banking Industry Ombudsman Ltd, *op. cit.*, p. 13

⁴⁶⁹ *ibid.*

⁴⁷⁰ See for example, J. O'Donovan, *op. cit.*; H. Su-King, *op. cit.*; G. F. K. Santow, 'Sex, Lies and Sureties – Touching the Conscience of the Creditor', *Journal of Banking and Finance Law and Practice*, Vol 10 No 1, 1999

most commonly suggested judicial 'solution' to third party securities cases⁴⁷¹. In the 1928 case of *Harrison v National Bank of Australia Ltd* Crisp J. stated that:

Whatever the legal rights of the parties may be ... it is very desirable that in all business matters parties should, as far as may be, meet on equal terms, and that before A takes from B something which advances A but may be detrimental to B, fair dealing demands that A should be sure B knows exactly what he is doing. If, in such a case, A insisted upon having independent advice before acting, no one could deny that he would be following a wholesome course⁴⁷².

This 'wholesome course' has, in Australia, been interpreted as meaning that independent legal advice denotes that which is 'free from any taint of the relationship between the parties'⁴⁷³. Further the party undertaking liability must understand the nature and consequences of the document and the real effect of any documents on the party's rights and position must be explained⁴⁷⁴.

If, as the ABA states, the independent advice clause is adhered to by banks, and the third party guarantors obtain a certificate confirming that they have received independent legal advice before entering into the guarantee, the banks can then transfer the risk of inadequate explanation to the legal practitioner who gives the advice. The certificate provides the bank with a defence to a claim of unconscionable conduct or a claim based on *Yerkey* by the third party guarantor. In general the judiciary have been more concerned 'with whether the circumstances [of the advice] demonstrate

⁴⁷¹ P. Baron, *op. cit.*, p. 47; H. Su-King, *op. cit.*, p. 70

⁴⁷² Quoted in P. Baron, *loc. cit.*

⁴⁷³ *ibid.*

⁴⁷⁴ See *Re Coomber* [1911] 1 Ch 723 and *Willis v Barron* [1902] AC 271

independence rather than assessing the character of the advice⁴⁷⁵. Advice is not usually given on the viability of the transaction, or the borrower's ability to repay the loan in the event of default by the borrower⁴⁷⁶.

Many legal commentators have expressed the need for lenders to take the precaution of independent advice⁴⁷⁷. However Belinda Fehlberg argues that the differing perceptions between sureties and solicitors of what constitutes independent legal advice raises serious concerns. Half of the sureties in her study had met with a solicitor before signing but believed that the purpose of this was 'merely to have the documents witnessed'⁴⁷⁸. They were unaware that they were receiving 'independent legal advice' and often the debtor had made the appointment with a solicitor known to them but not to the surety⁴⁷⁹.

Moreover, in O'Donovan's view, independent legal advice is 'far from a panacea' and 'merely a Pandora's box which legal practitioners and their insurers can ill afford'⁴⁸⁰. He asserts that 'the law of guarantees is littered with technical principles which have no counterparts in general contract or property law' and lawyers who provide certificates 'without a sound grasp of these principles are acting at their peril'⁴⁸¹. For this reason the form of certificates approved by the various state law societies are usually confined to

⁴⁷⁵ S. Mahalingham, 'Deep and Meaningful: Dealing With Emotionally Transmitted Debt', Consumer Rights Journal, Vol 3 No 6, 1999, p. 6

⁴⁷⁶ Australian Banking Industry Ombudsman Ltd, *op. cit.*, p. 14

⁴⁷⁷ For example see A. Lang, *op. cit.*, p. 53; B. Collier, 'A Lender's Trap in Taking Guarantees From Married Women', The Australian Banker: Journal of the Australian Institute of Bankers, Vol 3 No 5, 1997, p. 195

⁴⁷⁸ B. Fehlberg, *op. cit.*, 1997a, pp. 328-329

⁴⁷⁹ *ibid.*

⁴⁸⁰ J. O'Donovan, *op. cit.*, p. 328

⁴⁸¹ *ibid.*

matters such as the general nature and effect of the guarantee, the consequences of a default in payment by the borrower and, in some cases, that the giving of a guarantee involves considerable risk⁴⁸².

However, Su-King reports that a 'trend towards imposing a higher and more onerous duty on a solicitor' is being demonstrated by some courts, especially where 'solicitors or law firms profess to specialise in securities'⁴⁸³. The solicitor's retainer has been expanded to include commercial and financial advice in some recent cases within Australia where the firm has claimed to be specialising in an area of law as 'the standard of care should be consistent with the expertise the firm professed to have'⁴⁸⁴. In two 1997 judgements of the Supreme Court of South Australia⁴⁸⁵, solicitors giving legal advice on guarantees were considered to have a duty to 'inquire into the prudence of the transaction and to be satisfied that the guarantor is not acting under undue influence'⁴⁸⁶. According to the ABIO, the South Australian legal practitioners' insurer, Law Claims, responded by recommending to solicitors in South Australia that they not provide certificates of independent advice⁴⁸⁷.

For the third party, the purpose of the independent advice is intended to provide them (at their expense) with the opportunity to make an informed, independent and voluntary decision, thereby eliminating any unfairness they may experience within the loan transaction. But if solicitors are unaware of all the relevant circumstances of the

⁴⁸² Australian Banking Industry Ombudsman Ltd, *op. cit.*, p. 14

⁴⁸³ H. Su-King, *op. cit.*, p. 73

⁴⁸⁴ *ibid.*

⁴⁸⁵ *Pirotta v Citibank* (judgment delivered 12 November 1997) and *Micarone & Bechara v Perpetual Trustees* (judgment delivered 19 November 1997)

⁴⁸⁶ Australian Banking Industry Ombudsman Ltd, *op. cit.*, p. 14

⁴⁸⁷ *ibid.*

transaction, such as the financial and commercial viability of the guarantee, then clearly the independent advice must be seen as inadequate. For Justice Santow, if independent advice is to be of any assistance any independent adviser must have been informed by the creditor of, 'not only facts "special" to the transaction of an unusual nature known to it [the creditor]; but also facts as basic as the amount of the indebtedness secured by the guarantee'⁴⁸⁸.

As Su-King points out, the High Court in *Garcia* did not address this problem. This has left solicitors with the task of either advising guarantors 'on such complex issues as rights of subrogation set-off, exoneration and indemnity and contribution' or explaining and defining explicitly that their retainer does not include commercial/financial advice⁴⁸⁹. In any event, the banks will be adequately protected if they insist on the guarantor seeking independent advice⁴⁹⁰. Any issues of power imbalances, such as control or dependency between the debtor and guarantor, are swept aside by lenders. The 'extent of lender concern in practical terms' stops 'at the boundary of their commercial self-interest: enforceability of the security'⁴⁹¹. As Belinda Fehlberg found in her study, changes to lenders' procedures have been 'reactive, reflecting community expectations and case law developments, rather than proactive'⁴⁹².

So, while the use of independent advice is viewed by the courts and lenders as an assurance of the woman's 'informed consent', the inadequacy of the character of the

⁴⁸⁸ G.F.K. Santow, *op. cit.*, p. 19

⁴⁸⁹ H. Su-King, *loc. cit.*

⁴⁹⁰ Banks are advised that a solicitor's certificate confirming the receipt of independent advice is produced by the guarantor. See K. Bennetts, 'Garcia v National Australia Bank Limited: A Commentary', *Corporate and Business Law Journal*, Vol 11 No 1, 1999, p. 139

⁴⁹¹ B. Fehlberg, *op. cit.*, 1997b, p. 220

⁴⁹² B. Fehlberg, *ibid.*, p. 227

advice and issues of power imbalances within the debtor/third party relationship suggest that she is neither 'truly informed' nor 'truly consenting'. In circumstances where a 'fraternity' exists amongst professions, independent advice may be insidiously masked. One study interviewee was 'caught' in this way when a solicitor came to her house to give her independent advice.

A well known South Australian person, on invitation by my husband (a lawyer), who had explained to me that it was necessary when people sign contracts, knew what was going on and I felt just betrayed at that point by an intelligent, well known high profile supposedly decent person. (Claire).

Another interviewee told of a similar manipulation of the advice.

He [her husband] got someone from the X Bank to come out. It was a young yuppie whipper snapper ... who had no problems extending my loans over my house and I now realise that my husband was doing this number with him so that they would all ignore me because realistically that man had no right to lend him more ... but Sam was doing a PR job on him: "I'm a lawyer. I've got these deals going. You too could be part of it. You've got a finance degree. Why are you limited to just working in the X Bank? Look at me. I've got this and that, you could have it too." (Paula)

Independent advice, as it is currently construed and applied, does not address the circumstances of STD for two reasons. First, it does not take account of the coercion and economic violence that is a major influence when women agree to sign loan contracts. Second, the current nature of the information provided by the financial institution, not only to the third party but also to the 'advising' solicitor or financial adviser, is inadequate. It does not reveal sufficient detail of the primary debtor's

financial history or the reason why the guarantee is sought to enable 'informed consent' by the guarantor.

It has previously been suggested that the failure by prospective guarantors and third party mortgagors to understand the nature and effect of documents could be solved through their signing a 'simple statement of their essential rights and obligations'⁴⁹³. Such a statement could make clear if all or part of their assets are at risk and set out the right of the lender, at their discretion, to pursue the guarantor for the debt. This type of statement certainly would mean that guarantors and third party mortgagors 'could hardly complain that they did not understand the nature and effect of documents'⁴⁹⁴. However, this suggestion goes only half way to the solution. It does give the woman, one hopes, adequate information to act as a 'rational man' if she can and wants to. However, it presumes she can and will. This would not provide an equality of decision-making power between the creditor and guarantor nor the debtor and guarantor.

The fact that banks currently are under a duty of confidentiality or secrecy in respect of any securities taken poses a significant impediment to sureties.

A guarantee, unlike insurance, is not a contract *uberrimae fidei* (of the utmost good faith), whereby failure to reveal all the relevant information renders the contract voidable, and it is normally unnecessary for a bank to volunteer any disclosure concerning the customer's character, dealings or financial position. Unless, therefore, the intending guarantor asks questions or makes statements which make it evident to the bank that he or she has a mistaken impression of the

⁴⁹³ J. O'Donovan, *op. cit.*, p. 329

⁴⁹⁴ *ibid.*

position, there is no need to volunteer information⁴⁹⁵.

The duty of confidentiality owed by a bank to its customer is in essence governed by legislative obligations (the *Privacy Act 1988* (Cth)), the common law and the Code of Banking Practice. For guarantors, the Code of Banking Practice provides minimal assistance to allow for disclosure of information about the primary debtor's financial status that would assist guarantors and sureties. The Code only applies to those instances where the guarantor is an individual. Therefore where a wife guarantees loans made by the family corporation in which she is a director, secretary or other officer of the corporation, the Code does not apply⁴⁹⁶.

For those few individual cases where the Code does apply there is a further hurdle for any prospective guarantor. The borrower must consent to the release of certain documents to the guarantor. These documents are restricted to a copy or summary of the contract evidencing the obligations to be guaranteed⁴⁹⁷. Information regarding an individual's credit worthiness, credit standing, credit history or credit capacity remains out of reach for sureties. This would constitute the full disclosure to the surety of all the facts pertinent to the reason for the security and the details of the purpose of the loan. This information is vital to any prospective guarantor. Clearly this presents an inequality of bargaining power to the surety or co-borrower even within a 'rational man' perspective, let alone in the event of coercion. Rather than involving the bank in minimal obligation, if the bank were obliged to disclose all the risk factors, only then would the third party be appropriately informed.

⁴⁹⁵ W. Weerasooria, *op. cit.*, p. 181

⁴⁹⁶ A. Tyree, *op. cit.*, p. 281

⁴⁹⁷ G. Weaver and C. Craigie, *loc. cit.*

The Australian Banking Industry Ombudsman, in its submission to the Review on the Code of Banking Practice, reflects this concern when it states

The absence of a right to receive information about a debtor's accounts before entering into the guarantee, and to know the reason why the guarantee is sought, would better enable guarantors to assess the risk of providing the guarantee⁴⁹⁸.

This information would have been a powerful tool for women within my study. Their decision to sign should have been commercial. Instead for many, it was based on trust and confidence in the principal debtor and in the bank:

He owed the X Bank a lot of money which I didn't know. The debt was something like \$130,000 but his accountant dealt with them and they said they would accept \$50,000 or \$55,000 and he had told them he had another \$20,000 that he could pour into the business. The guy at the bank was a friend of Wayne's. I had very little information and in the reality of it all mortgaged my house to the tune of \$85,000 which I handed over to him lock stock and barrel.
(Wendy)

Dana's husband was divorced and bankrupt when she married him. With her house as collateral he then purchased a business which subsequently failed because 'he was very creative – a brilliant furniture maker, but no sense administratively'. They have since divorced and he has remarried. The disclosure of Dan's financial history may well have meant a different process of decision-making for Dana and Dan's new wife.

⁴⁹⁸ Australian Bankers' Association, *Review of the Code of Banking Practice*, July 2000, p. 8, (Online, accessed 19 Oct. 2000) URL: <http://www.reviewbankcode.com/index.htm>

He's in trouble with his next business and his wife is working to support him to try and make this business work. I would be hopeful for him that he can do it this time but nothing seems to have changed very much. He really has this pattern. The pattern is that creditors don't pay him. He always blames everyone else – he's always the victim in it yet he doesn't stick to deadlines from my experience.

The need for disclosure by financial institutions is also reflected in other submissions to the Review of the Code of Banking Practice. Financial counselling service caseworkers are concerned that 'institutions are using privacy obligations as a way of illegitimately restricting access to information'⁴⁹⁹. The New South Wales Law Reform Commission recommends that if the 'borrower does not consent (to all the information being provided), the bank should refuse to accept the guarantee'⁵⁰⁰.

In defence of their limited disclosure to the third party, lending institutions assert that she or he needs to be responsible in asking the 'right' questions prior to signing. The ABIO suggest that questions might include; why is the guarantee required?; what will happen if the guarantee is not provided?; can the guarantee be limited as to amount?⁵⁰¹. To adopt and support a call for women as prospective guarantors to be 'hardheaded' in questioning the terms and conditions of the contract when deciding whether to agree to sign serves only to perpetuate the transfer of responsibility from the bank to the guarantor⁵⁰².

⁴⁹⁹ Consumer Credit Legal Centre (NSW) Inc., *Survey of Financial Services Caseworkers, Joint Consumer Submission to the Code of Banking Practice Review*, p. 34, *ibid.*

⁵⁰⁰ NSW Government, *Submission to Review of Banking Code of Practice, August 2000*, p. 8 in Australian Bankers' Association, *op. cit.*

⁵⁰¹ Australian Banking Ombudsman Ltd, *op. cit.*, p. 16

⁵⁰² *ibid.*, p. 15

Women do have to be prepared to take their financial responsibility seriously and not relinquish the control of their finances to their spouse or partner. However, 'hardheaded' consent can only be based on being truly informed. Belinda Fehlberg attributed her research interviewees' lack of questioning to their lack of business experience⁵⁰³. Two further very significant factors relate to the emotional state of the woman at the time of signing, as discussed in chapter four. For Claire this amounted to 'sheer physical violence I guess, so after about four days I signed the papers'. For Fiona the fact that her husband was a lawyer allowed her to think 'everything was okay so let's not make too much of an issue ...but with hindsight I should not only have asked questions but jumped up and down'.

An expectation that the woman as third party guarantor or surety will ask the 'right' questions in order to deduce the risks involved in her financial commitment, and to expect that independent legal and/or financial advice will at minimum furnish adequate information provides financial institutions with further advantages in a contractual partnership supposedly based on equality of bargaining power. Given that many financial institutions now rely on the use of 'independent advice', this effectively perpetuates the avoidance by creditors and the principal debtor of any genuine assessment of risk to the third party as a pre-contractual obligation.

If banks were obliged to offer contracts of the utmost good faith, the banker/guarantor relationship would involve the same considerations by banks as for the current banker/debtor relationship. Currently banks consider the principal debtor as 'the customer of the bank' and the guarantor a non-customer, though they may have a joint account or joint mortgage with the bank. Alternatively, appropriate independent advice is essential. Women need advice, peculiar to the loan, of a combination of particular

⁵⁰³ B. Fehlberg, *op. cit.*, 1997a, p. 330

monetary details only the bank knows, and an independent advisor able to explain the issue to them in plain English. They also need general advice and information about the percentage of guarantors, in a similar position, that end up paying off someone else's debt. This advice should be a condition of becoming a guarantor. Further, this legal and financial advice should be given at a separate bank interview, or preferably, at a specialist women's service for potential guarantors, in potential household debt situations. This would provide a setting, not in the presence of the debtor, for the separate execution of the guarantee.

Prudent Lending

The banks ... give you the money because they know you've got good properties that are worth a lot and just like that they are prepared to take it away. (Fiona)

If women are to be able to be 'prudent guarantors', they can only achieve this when they are aware that if there is some risk associated with the loan, the bank is displacing that risk on to them. Banks consider that they are not responsible for the post-contractual consequences when the third party is left with the debt. Banks adopt basic principles of lending at the pre-contractual stage, principles that they consider prudent from the lender's perspective. According to Weerasooria, the three main principles are safety of the loan, its suitability and its profitability⁵⁰⁴. These principles are said to be basically the same whether the business is an individual or a multi-national corporate entity. In examining the principles that relate to the borrower's integrity, position, performance and capacity to repay, the onus of responsibility of the bank as lender appears straightforward. Banks lend on the basis that borrowers are 'morally committed to

⁵⁰⁴ W. Weerasooria, *op. cit.*, p. 97

repay their debts' and that the borrower has either made a success (profitability and drive) of their existing business or, if a new business, that they have the expertise to be successful in business⁵⁰⁵. In the texts on banking law in Australia, security for the loan has traditionally been ascribed as 'not the most important requirement'. The principles of lending stated earlier are of more import⁵⁰⁶.

However, Weerasooria asserts that 'security for bank loans has gained importance in the decision to lend'⁵⁰⁷. He states that, just because a borrower has enough and more security to cover the advance requested, 'some lending staff do not appreciate that ... a bank loan should not merely be granted'⁵⁰⁸. This statement implies that the ethics of prudent bank lending have shifted somewhat from a position of taking security 'as a final safeguard or form of insurance against any unseen development' to calling on security as a matter of course. A lending philosophy that once was more likely to question whether the person can repay the loan without using their home as collateral has advanced to one where foremost consideration is whether the debt can be secured with the borrower's home. Future research is needed to ascertain whether or not in banking practice, the use of sureties and guarantors has increased unreasonably.

In 1999 the Australian Banking Ombudsman states that banks do not call upon guarantors and sureties unless the debtor is thought to be of high risk⁵⁰⁹. He or she has a savings history, employment or business record that may either be unstable or non-existent or the lender is not convinced that the debtor has the capacity to repay the loan

⁵⁰⁵ *ibid.*, pp. 99-101

⁵⁰⁶ *ibid.*

⁵⁰⁷ *ibid.*, p. 106

⁵⁰⁸ *ibid.*

⁵⁰⁹ Australian Banking Ombudsman Ltd, *loc. cit.*

due to their lack of assets. Either way the creditor is 'effectively using the woman as an insurance policy' underwritten without disclosure of the 'facts which are material to the risk'⁵¹⁰. There is no doubt that, provided the bank 'obtains adequate security, ... its economic position will generally be safe'. It 'then stands only to gain by the income to be derived, at handsome interest rates, by the extension of financial provision to the borrower'⁵¹¹.

Given the high separation and divorce rate within Australia⁵¹², the reduced earning power of women through unequal pay⁵¹³, broken work patterns due to child rearing, and the increasing incidence of bankruptcy, risk management in lending practice by financial institutions seems particularly one-sided. Banks continue to hedge their risk in the lending process through the increased use of third party guarantees. However, by ignoring societal trends, they ignore the risks that may confront third parties during the lifetime of the loan. When women sign, what regard is made by the creditor (and the debtor) to the lack of income of many women? Women's unequal income requires inquiry.

Economic Sterilisation of the Home

Reform emphasis has been focussed on addressing the 'disadvantages' that consumers experience in their financial dealings. Government agencies have been unwilling to suggest reforms that would allow unreasonable expectations of lenders or the

⁵¹⁰ M. Kaye, *op. cit.*, p. 54

⁵¹¹ See *Gough v Commonwealth Bank of Australia* [1994] ASC 56-270 as quoted in P. Baron, *op. cit.*, p. 51

⁵¹² G. Sheehan and B. Fehlberg, 'Families, Divorce and Family Law', *Family Matters*, No. 55 Autumn, 2000, p. 6. Within Australia, two in five marriages will end in divorce and divorce will affect one in five children during their dependent years.

⁵¹³ M. Bittman and J. Pixley, *op. cit.*, p. 176

prevention of the execution of guarantees by married women. In seeking to 'draw a balance between' the guarantor's and the lender's needs, aspects of reform have been couched in terms that recognise commercial economic stability within society as paramount. The Australian Law Reform Commission's *Equality Before The Law: Women's Equality* Report recognises the 'competing claims for justice: on the one hand, the protection of the commercial interests of lenders and their shareholders; on the other hand, the injustice that would be suffered by the woman'⁵¹⁴. In the Report of the Expert Group on Family Financial Vulnerability, reference was made to the desirability of balancing unreasonable compliance costs for the lender against the adequate provision of regular information to the guarantor regarding the borrower's account⁵¹⁵. Similarly in the current New South Wales Law Reform Commission review of the law relating to third party guarantees, the terms of reference specify that the Commission have regard to

the need to ensure that any legal framework governing this issue adequately and effectively protects the interests of personal guarantors; promotes commercial stability and certainty; and does not unduly restrain small business lending⁵¹⁶.

Judicial reasoning in cases of sexually transmitted debt has also supported a non-interventionist position, as discussed in chapter two. Lord Browne-Wilkinson in rejecting the *Yerkey* principle in *O'Brien*, reasoned that

If the rights secured to wives by the law renders vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such

⁵¹⁴ Australian Law Reform Commission, *op. cit.*, p. 244

⁵¹⁵ Report of the Expert Group on Family Financial Vulnerability, *op. cit.*, p. 47

⁵¹⁶ New South Wales Law Reform Commission, *op. cit.*, p. 12

security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions⁵¹⁷.

Justice Kirby in *Garcia* replicates this view when he argues that the desirability of protecting the vulnerable person must be balanced against the undesirability of economic sterilisation of their assets. He asserts that imposing upon lenders an unrealistic standard 'would also be tantamount to a judicial divestiture of a married woman's legal capacity to execute a guarantee'⁵¹⁸. In his view the law should not interfere 'in the economic activities of individuals' just because of 'the existence of marriage and the presumed dependence of the wife within it'⁵¹⁹. With political and judicial support of a largely non-interventionist approach, lending institutions have, to date, been able to avoid major reform. The law has thus been instrumental in policing the division of 'private' and 'public'.

There appears to be no evidence of the effects on the economy of banning use of the family home as security. The issue was discussed in a 1992 discussion paper produced by Australian Trade Practices Commission⁵²⁰. Belinda Fehlberg also argues that such an approach would 'discriminate against meritorious borrowers without their own collateral'⁵²¹. This approach, in her view, would be unlikely to receive broad community support. Yet, if the use of the family home as security for business loans

⁵¹⁷ *Barclays Bank PLC v O'Brien* [1994], *op. cit.*, at 188

⁵¹⁸ *Garcia v National Australia Bank Ltd* (1998), *op. cit.*, at 1260

⁵¹⁹ *Warburton v Whiteley* (1989), *op. cit.*, at 11,630

⁵²⁰ Australian Trade Practices Commission, *Guarantors: Problems and Perspectives*, Discussion Paper, 1992, p. 19-20

⁵²¹ B. Fehlberg, *op. cit.*, 1997b, p. 273; B. Fehlberg, 'The Husband, the Bank, the Wife and her Signature-the Sequel', *The Modern Law Review*, Vol 59, September 1996, p. 693

were banned or the extent of its use limited, would this in fact cause the economic sterilisation that underlies the caution towards lending institution reform?

Legislation limiting the use of the family home may provide a way of protecting some sureties. There are currently in some overseas jurisdictions 'homestead' laws that impose such limits. In New Zealand the Joint Family Homes Act 1964 allows 'spouses to register their home against claims up to a specified sum' and any equity beyond that sum can, at the discretion of the court, be made available to creditors⁵²². According to Belinda Fehlberg and the NSW Law Reform Commission, similar legislation exists in the United States of America and Canada⁵²³. The New Zealand Act still allows creditors to 'rely on pre-registration charges over the family home and, thereafter on securities granted with the consent of both spouses' and is limited to spouses only⁵²⁴. Thus, this legislation does not take account of the existence of de facto relationships nor the extent of inequality of financial decision-making within intimate relationships.

Belinda Fehlberg concluded that, as most (13/22) of her surety interviewees 'were not in favour of measures that would prevent individuals from using the family home as security' it was unlikely that the introduction of homestead legislation would find favour⁵²⁵. However, many of the women who I interviewed expressed the need for banks to be limited in their reliance on the total value of the family home. They wanted to be able to minimise the adverse impact of their husband's/partner's inability to repay the debt. While the use of 'homestead' legislation would effectively disable the complete use of the family home, women would still, in all probability lose this asset.

⁵²² B. Fehlberg, *ibid.*, 1997b, p. 274

⁵²³ New South Wales Law Reform Commission, *op. cit.*, Chapter Four, p. 7

⁵²⁴ B. Fehlberg, *loc. cit.*

⁵²⁵ *ibid.*

In many cases, they would be unable to service a loan that would allow them to refinance the home. Therefore, at the time of interview, before women sign as guarantors, the bank should be obliged to work out with them how they will repay the loan, then and in the future, without having to sell their house. In other words, what will the bank ask of them each month.

Without an examination of what the economic impact might be of disallowing suretyship, suppositions as to the real impact remain just that. Future research is necessary to determine what the effects of sterilisation have been on the economy in New Zealand. Australia currently has a home ownership rate of sixty-nine per cent⁵²⁶. In countries where home ownership is very low, how does bank lending policy on business loans security compare with Australia? Further, can the judicial notion of suretyship as a social good be justified when the experience of STD shows no signs of abatement?

Post-Contractual Information and Costs

Graham McDonald states that

there may be many reasons, including legitimate ones, for such debts [sexually transmitted] to be incurred. One would hope that in most cases where the parties separate, or a difficulty arises, that the couple would be responsible and able to facilitate an early and sensible settlement of the debt. This occurs in many cases, though there is a paucity of statistics in this area⁵²⁷.

⁵²⁶ D. Macken, 'Great Aussie Home Dream: Only Half Need Apply', *The Australian Financial Review* 13 March 2001

⁵²⁷ G. McDonald, *loc. cit.*

As the findings in the previous chapter revealed, contrary to McDonald's assumption, the propensity for irresponsible financial behaviour on the part of principal debtors is high. Often the debtor had declared himself bankrupt without consulting the third party.

Letitia's husband

had resigned from his job at the Education Department without telling me, he had taken all the money – his superannuation and whatever money he was owed and blown it in Queensland. He obviously had debts that I wasn't aware of that he couldn't meet and so I think his intention had been to ... to kill himself ... but he came back and presented me with the fact that he had no money and was debt free (he had declared himself bankrupt).

Lending institutions had not provided statements and letters of demand to the guarantors that would have alerted them to the fact that the debtor had failed to comply with the terms of the loan. The now ten year old recommendation in the 'Martin Report' that full disclosure be made about the primary borrower to the potential guarantor, even if this meant a revision of the Privacy Act 1988 (Cth) has not been implemented⁵²⁸. Gayle's husband repaid two thirds of their joint business loan and, without Gayle's knowledge, withheld payment of the final third. Around this time Gayle was hospitalised for four weeks then separated from her husband. She received no notification from the bank of his default until twelve months later. With only a part-time job and in rental accommodation she 'pleaded with' her husband to start paying the \$11,000 debt off.

I said, "Look, I don't have the money to do it. I'm flat out keeping my head above water myself". By that time he had started into a very good job and he was

⁵²⁸ House of Representatives Standing Committee on Finance and Public Administration (Martin Committee), *op. cit.*

earning probably double what I was earning ... provided with a house, a company car and a mobile phone. So I said, "Please pay it. You have the means and I don't. I don't want to go to court. I don't want to be bankrupt because being bankrupt is going to present a whole lot of new problems to me". He promised to pay them \$100 a month and he did that for about three months and then he stopped. The reason I knew was because I was woken up one morning with a Magistrate's Court order to say that we were being taken to court.

The Code of Banking Practice does not currently mandate the provision of this information. Some lending institutions, at the time of signing loan contracts, have the co-borrower sign a document nominating the primary debtor (on their behalf) as the person who can receive notices⁵²⁹. It would be safer if financial institutions were obliged to provide notices to both parties from the outset given the incidence of separation and divorce, and debtors hiding information from guarantors. The Code of Banking Practice also does not ensure that, prior to seeking to enforce a personal guarantee, the lending institution pursues the borrower in all instances. Thus, guarantors should receive independent notices outlining the status of the loan and repayments whether requested by them or not. In addition, banks have an obligation to pursue the primary debtor, in the first instance, to the utmost.

In the ABIO's experience 'a common response to a guarantee being called up is one of shock'⁵³⁰. They state that

It is rare to find a case where a guarantee has been signed with any expectation that it will be called upon or with any financial planning being done to prepare

⁵²⁹ The New Consumer Credit Code: New Rules - A Better Balance, [Online, accessed 15 Aug. 2000]. URL: <http://www.creditcode.gov.au/whatis.htm>

⁵³⁰ Australian Banking Ombudsman Ltd, *loc. cit.*

for this occurring. So, while a guarantor may be made aware of the consequences if the borrower defaults, the expectation appears to be that the possibility of the borrower defaulting is a remote one. This may be influenced in particular cases by statements by the debtor or the lender or both that "your house is not at risk". It may result from a natural unwillingness on the part of the guarantor to believe that the worst will happen⁵³¹.

This statement provides only a partial account of the circumstances of default. When the women in this study signed loan contracts many expected that, first, the bank had approved the loan because they considered it to be prudent, and, second, their husband or partner would act responsibly in the way they dealt with their business/personal finances. Thus, the debt would be repaid in full. There is no doubt from the findings in chapter five that women feel that they do have a responsibility to adhere to the conditions of the loan contract. They understand this to be to pay their 'share'. Perhaps 'protective legislation' that allows a guarantor to only ever be liable for half the loan, if she is cohabiting with the primary debtor at the time of contracting, would cause banks to consider more carefully before signing women to loan contracts.

Several women expressed their dismay with bank policy that affords a monetary barrier to changing the order of names on mortgage documents in the event of debtor default on the loan. If one party to the mortgage wishes to have the document show only the name of the person who is making the entire repayments, and has sole title to the property, current banking policy demands a 'reorigination' of the loan. This means that the existing loan has to be paid out by the creation of a new loan and the charge for this is in the order of between \$600 to \$1000. Women who wished their mortgage document to reflect their status as the sole debtor with title to the property were not in a financial

⁵³¹ *ibid.*

position to pay this amount. They had no other option but to leave the document in joint names. If women take on the whole obligation for the debt, banks should be obligated to execute the reorigination of the jointly owned home free of charge to her.

Conclusion

Through revisioning the relationship between banks, and women as guarantors or sureties in the STD discourse, the impact of bank's advantage is made clear. To date, limited reform has been undertaken by financial institutions because of the prevailing attitude that only some procedures of the lender are the panacea to sexually transmitted debt. In order to deal with the conflict between 'rational' choice and 'trust and confidence' in the STD discourse, women need to be able to make an informed decision about their risk, prior to signing loan contracts. The concept of 'informed consent' can only apply in unequal and domestic relations if some key reforms are made to the way financial institutions 'sell' and 'administer' loans, thus providing a greater level of protection to women in particular and a broader group of 'at risk' members. Lending institutions need to be statutorily obliged to disclose the degree and extent of their use of third party guarantees. Their process of lending must include a more accurate assessment of societal trends to supplement their principles of credit analysis. Further, they should be obliged to supply the detailed information that would allow the third party to have complete knowledge of their and their partner's risk and obligation, together with accurate and timely information both before and after signing. Women need to be able to sign a contract that commits them to an equitable outcome in the event of default. This would certainly significantly reduce the workload of financial counsellors, consumer credit legal services, the courts and, arguably, that of health professionals.

CONCLUSION

Banks ... are the cornerstones of economies. They provide the backbone to many people's lives. They obtain their funds from customers of all walks of life and backgrounds. As such, they have a special responsibility in relation to society. That responsibility is to act fairly; to not abuse their special position of power but to pay special attention when they are dealing with people who may be in an unequal bargaining position in relation to themselves⁵³².

I was a guarantor with my assets for him and I 'phoned the bank and I said I'm separated, please don't engage in any more money lending. It's my understanding that the bank continued to lend money with me as a guarantor and that's close to \$600,000 in cash. (Claire)

Case law provides only a partial view of the circumstances of women in this situation. Sociological studies of financial decision-making within households ignore the analysis of household debt. As the first empirical research undertaken in Australia on the effects of household debt, this study examined forty-seven South Australian women's actual experiences of and responses to sexually transmitted debt. Their interviews paint a comprehensive picture of the inadequacies of contract law to address the experiences of women.

Legal, social and even feminist commentary has primarily focused on presenting either/or choices as the solution to STD. Decided cases demonstrate conflicting judicial constructions of gender. The decisions in the New South Wales Court of Appeal that

⁵³² Kirby J., *Gough v Commonwealth Bank of Australia* [1994] ASC 56-270, at 58,843

challenged the *Yerkey* principle, positioned women as not in need of special protection under the law. The subsequent appeal to the High Court in *Garcia* constructed women as emotionally dependent and therefore in need of special protection. Feminist attention to the issue of STD has been focussed on demonstrating the inadequacy of contract law to address traditional societal expectations of womens' behaviour, and power imbalances within intimate relationships. This difference approach based on the emotional dependence of women, coupled with the assertion that women should be more responsible when making financial decisions within the household, has paved the way to an acceptance of STD as a problem about women.

My interview findings make it clear that womens' experience of STD is influenced by their subordinate position in relation to financial decision-making about debt within the household. While they may have managed the household money they invariably were unable to control when, how and what debt should be incurred. Moreover, they were likely to lose any control they may have had in the decision-making process at the time of incurring the debt, or throughout the life of the debt, because financial institutions allowed their husbands or partners to usurp control. Through revisioning women's subordination as banks' advantage, a set of proposals has been articulated that give women more equal bargaining power in their domestic debt relationship between themselves, the bank and their husband/partner.

These recommendations primarily focus on the need for banks to be obligated to provide pre and post-contractual information to the guarantor; to disclose the extent of guarantee provision and enforcement of guarantees; and to absorb the cost of 'reorigination' and independent financial and legal advice. Despite providing more equal bargaining power, most of the suggested recommendations do not treat women as emotional, unable to make decisions in their own interests, as 'different' or 'dominated'. They instead treat women within the sameness framework but are justified through

equalising the position of actors as much as possible. However, the sterilisation of the home and perhaps limiting the bank's ability to retrieve the loan monies to half the debts would provide a degree of special protection for women.

STD occurs at the conjunction of two apparently contradictory systems: private/public, rational/emotional, and household money/bank money. The loan contract intersects these dualisms bringing together the public economy and the household economy. In identifying household debt as involving banking money and household money, the meaning of 'joint' loans is revealed as contradictory. Though predominantly viewed by the judiciary, media, and banks, as joint (domestic, private and co-operative), debt money within the household is fundamentally representative of market money because it involves individual ownership and responsibility. While women in my study had made their decisions about incurring debt within a framework of 'marriage' money, their stories portrayed individual decisions about incurring the debt, individual decisions about the use of the debt, and individual convictions as to the responsibility for repayment. The use of absolute and independent legal and financial advice would allow women to consider the risk to themselves within the context of their jointness, and potential separateness. They would then be in the best possible position legally and financially to decide whether or not to sign a loan contract for their partner, and, would be much more prepared for the consequences of loan default.

In addition to those future research issues already proposed, the following need consideration. Changes need to be made to the Privacy Act 1988 (Cth) to allow for 'positive credit reporting' of credit histories. This would allow women who have experienced STD to apply for credit without experiencing unfounded prejudice. Future research needs to be undertaken in the area of domestic violence to take account of the economic abuse that is obviously a significant aspect of the experience of STD. The barriers that prevent women from making public the economic abuse perpetuated

against them within the household need investigation. Also, this study has examined the circumstances of urban women only. There is a need for further research to document the extent and degree of STD, and its effect on women within rural communities.

My research makes it clear that gender is built in to all aspects of sexually transmitted debt. This is expressed in the existing knowledge of this issue (for example, a dearth of statistics and sparse literature); in society's negative assumptions as to why women sign (she must be stupid); in judicial decisions that acknowledge emotional dependence but not financial dependence; in the politics of allocation within financial institutions' lending practices (the importance of the principal debtor); and in the calling up of loans (who is pursued).

APPENDICES

APPENDIX I: INTERVIEW SCHEDULE

Alias Date of Interview

Location No.

The purpose of this interview is for me to hear your experiences of sexually transmitted debt. I want to hear how you experienced this issue. If at any point in the interview you don't wish to answer a question please tell me that you don't want to answer it. Everything that you say to me is absolutely confidential and I will not use your real name in any publication.

SECTION 1: PERSONAL DETAILS

I would like to start by talking to you about yourself, your family, and your work situation. If you can tell me about your history – of birth, education, marriage and motherhood (if applicable).

When were you born?

Where were you born?

How long have you lived in Australia?

What language/s are spoken in your home?

Educational history (current and past education and training).

Marriage/motherhood history.

Are you currently married/single/separated/divorced/de facto relationship?

Do you have any children?

What ages are they?

Employment history.

Are you currently employed? Full-time or part-time?

SECTION 2: RELATIONSHIPS TO DEBTOR AND HIS PERSONAL DETAILS

I would like to talk about your relationship with the person who was responsible for instigating the debt. For example, how long you have been in this relationship, his history, children of this relationship etc.

What was/is your relationship to the debtor?

Length of time you were or have been in this relationship?

How long did you/or have you lived together?

Do you have children of this relationship?

What ages are they?

Alias

When was the debtor born?

Was he born in Australia?

Debtor's education/training or qualifications?

Debtor's current employment? Part-time or Full-time?

Debtor's employment at time of relationship?

SECTION 3: KNOWLEDGE OF THE DEBT/S

Now I would like you to talk about how the debt arose, how you came to know about the debt, how you discussed it and what it was for etc.

Did you decide together to incur the debt?

If not, how long before you signed for the loan did you know that the debtor needed or wanted to borrow money?

Did the debtor explain fully why the loan was necessary?

Were you aware when you signed for the loan what type of loan it was?

Did you sign the contract as a co-borrower, surety or guarantor?

Was it a personal loan/business loan etc?

What were you told the money was to be used for?

SECTION 4: REASONS FOR SIGNING THE CONTRACT

I would like you now to think about the reasons why you signed the contract.

Did you have any doubts/anxieties?

Why?

OR: Although you were not forced, did you feel that if you didn't sign the contract you would be letting your partner down in any way?

Who did you think was responsible for paying back the debt/s?

SECTION 5: ACTIONS OF FINANCIAL INSTITUTION/S INVOLVED

I am interested to know what your experience was of the way in which the bank or financial institution was involved and how you felt about that.

How many times and when did you sign financial documents with the debtor?

What was the amount of the loan or was it an 'all monies' contract?

Did you sign the contract/s at a bank or financial institution or somewhere else?

Were you advised by the bank or financial institution of what the loan was to be used for?

Did they explain the legal implications of the contract (eg. what you would be liable for should the debtor not be able to pay)?

Were you advised to seek independent legal advice by the bank or financial institution?

Did the bank or financial institution openly demand any particular actions by you as a condition of signing the loan?

Did you get a copy of the document you signed?

SECTION 6: EXPERIENCES OF MONEY AND DEBT WITHIN THE RELATIONSHIP

I would now like to hear about your experiences of money and debt within the relationship. For example, who brought what money into the household, the extent to which you shared income and who had what knowledge and responsibility for the money and debt/s.

When you were in this relationship, or currently, what was/is your main source of income? (eg. own earnings from work, partner's earnings from work, family business earnings, pensions or other).

Did you know what your partner'/s' total income was/is?

Did you own a house during this relationship?

Was it owned jointly? If not, whose name was it in?

If you had a mortgage on property, who paid this?

Was it joint or separate?

If a family business was involved –

What is your knowledge of the type of business (wholesaler, manufacturer etc)?

Was it a partnership or limited company?

Were you involved in running the business? If yes, how?

Was it regarded as a family business or his business?

Did you know about the financial status of the business (eg. whether or not it was doing well)?

Did financial arrangements within the household change during the course of your relationship?

How?

Do you feel that you and your partner made/make decisions concerning household finances equally?

Do you think you shared the same views about how the household finances should be run?

If not, how do you think that you differed (eg. concepts of whose money paid for what, how much of whose money could be spent on particular items)?

Did you have joint accounts/separate accounts/combination of both?

Who made decisions about the major purchases/daily household expenses of food and clothing?

Did you make joint decisions about how much and how household debts should be incurred?

Did/do you have credit cards?

If yes, were/are they joint or separate?

Who made the decision to sign up for these?

Who makes/made the decision as to when, and for what these were used?

Who do you think was/is responsible for the payment of these?

Do you consider that this was a joint/equal relationship or did one partner have more knowledge or responsibility?

SECTION 7: CONSEQUENCES OF THE DEBT/S

Finally, can you tell me about the consequences of the debt/s and the impact that this/these debts have had on you/and your family?

What benefit did you get from this debt (eg standard of living, use of a car etc)?

What demands did the bank or financial institution make on you to repay the loan (eg. contact by letters, phone calls, debt collectors)?

What length of time did the bank or financial institution give you to repay the debt?

Did you attempt to explain to them the circumstances of how the debt was incurred?

Did this make any difference to the bank's desire to recover, or method of recovery, of the debt?

Have you repaid the debt?

If yes, how did you achieve this?

What sacrifices have you had to make in order to do this?

Was bankruptcy an option?

If so, why or why didn't you take that option?

What has been the impact of this experience on you (eg. emotionally and/or financially)?

What has been the impact on your family?

Did you seek advice from anyone?

If so, who (family, friends, the lender, accountant, solicitor etc)?

Did you find this advice or assistance helpful?

Has this changed your views of relationships, marriage, financial independence and financial responsibility?

If so, how?

Would you act as a guarantor/co-borrower/surety for anyone again in the future?

What advice, if any, would you give to other women about financial matters within relationships?

If relevant, do you think that you can attribute the breakdown of your relationship directly to the debt/s incurred?

If yes, to what extent were they the trigger or the last straw?

Would you like to add anything that I have not covered in this interview?

APPENDIX II: TABLES OF CHARACTERISTICS OF INTERVIEWEES

Table 2.1 *Location*

	N=47	%
Northern	7	14.9
Eastern	20	42.6
Southern	17	36.2
Western	1	2.1
Not Stated	2	4.2

Locations are based on Statistical Subdivisions in Australian Bureau of Statistics, *1996 Census of Population and Housing, South Australia*, Cat. No. 2015.4, ABS, Canberra

Table 2.2 *Age (years)*

	N=47	%
20-29	5	10.6
30-39	6	12.8
40-49	12	25.6
50-59	19	40.4
60-69	2	4.2
70-79	1	2.1
Not Stated	2	4.2

Table 2.3 *Country of Birth*

	N=47	%
Australia	28	59.6
United Kingdom	8	17.0
India	1	2.1
Europe	2	4.2
Africa	1	2.1
Not Stated	7	14.9

Table 2.4 *Marital Status at Time of Interview*

	N=47	%
Never Married	2	4.2
Married	7	14.9
Cohabiting	3	6.4
Separated	8	17.0
Divorced	22	46.8
Widowed	2	4.2
Remarried	2	4.2
Not Stated	1	2.1

Table 2.5 *Children of the Household*

	N=47	%
Dependent Children	17	36.2
Non Dependent Children	18	38.3
No Children	4	8.5
Not Stated	8	17.0

Table 2.6 *Occupation*

	N=47	%
Semi-skilled manual	4	8.5
Home duties	8	17.0
Clerical	12	25.6
Technical	8	17.0
Professional	9	19.1
Self-employed	3	6.4
Retired	3	6.4

Table 2.7 *Approximate Total Amount of Debt (\$)*

	N=47	%
0-9,999	13	27.7
10,000-24,999	11	23.4
25,000-49,999	3	6.4
50,000-74,000	2	4.2
75,000-99,999	3	6.4
100,000-249,000	3	6.4
250,000-499,999	2	4.2
500,000-749,000	3	6.4
750,000-999,999	Nil	Nil
1,000,000	2	4.2
Not Stated	5	10.6

Table 2.8 *Length of Time (Years) in Relationship With Husband/Partner*

	N=47	%
0-4	8	17.0
5-9	11	23.4
10-14	4	8.5
15-19	3	6.4
20-24	7	14.9
25-29	2	4.2
30+	4	8.5
Not Stated	8	17.0

APPENDIX III: LIST OF INTERVIEWEES

Alanna was born in Sydney in 1965. When she left school she worked in various retail jobs until the birth of her first child. She has been married for over ten years and has three sons including pre-school twins. Alanna is jointly responsible for a \$1000 bank overdraft incurred by her husband.

Amelia was born in 1962 in country South Australia. She is married with two teenage children and works full-time. With her marriage close to ending she fears the consequences to her of the joint home loans and joint bankcard debts with her husband totalling \$250,000.

Anita was born in 1962 in Adelaide and has three children. She worked as a shop assistant and for the government for ten years before marrying. Her husband is an alcoholic. Anita has gone to considerable lengths to avoid incurring debt jointly.

Anna was born in 1966 in Australia and has two school age boys. She was married for sixteen years after becoming a 'navy wife' at eighteen. She supplemented the family income with part-time income from quilt making. Following her separation, she has returned to study as a mature-age university student doing a Bachelor of Nursing degree. Her total debt is \$5000 from a joint credit card.

Barbara was born in England in 1946 and emigrated to Australia with her parents in 1957. She initially became a nurse but with further university study at undergraduate and postgraduate level she now works as a health consultant. Barbara has been married for 35 years and has two adult children. Her joint debt, incurred from the business her

husband ran, totalled \$1 million.

Betty was born in the mid 1950s in Queensland and has two children, one of whom is still at school. She qualified as a physiotherapist when she was twenty and married in the same year. After more than twenty years of marriage Betty is now separated and with a joint business and car debt of \$29,000 from her husband's business, felt she had no other option but to declare herself bankrupt.

Carmen was born in Australia in 1920. She married but is now widowed and has three children. Her husband's debt liability of \$14,000 was incurred through an overdraft he organised, without her knowledge, against his work superannuation. Carmen inherited the debt upon the death of her husband by suicide.

Cathy was born in 1955 in South Australia and has two children, one now married with a child of her own. Her marriage of 23 years began when she was eighteen. She and her husband, in partnership, owned five businesses during the course of their marriage. At the time of her separation, Cathy and her husband had two businesses. One was sold with the proceeds shared between them and, her husband continued to run the other business as his own. This business still had a joint debt for machinery of \$28,000. Her husband defaulted on the repayments and Cathy was left with the total liability. She successfully negotiated with the bank to have her share written off. She has recently bought into a franchise business.

Claire was born in Scotland in 1948 and completed a maths/science degree. She emigrated to Australia in 1971, married and has two adult sons. Her debt liability of \$550,000 was incurred through mortgaging the family home to provide equity for the professional business her husband operated. She is a school administrator and teacher.

Cynthia was born in 1975 in Adelaide and has been a clerical assistant since leaving school. She gave her boyfriend two weeks of her wages to pay her car insurance by cheque. Instead he bought an engine for his car with the money. As he did not repay the money to her she was forced to drive her uninsured car until she could afford to reinsure it.

Dana was born in 1958 in Adelaide and joined the public service in a technical field when she left school. She married at 23 and has two school age children. Dana's house was used as security for a furniture business that her husband set up and ran unsuccessfully. Her total debt liability was more than \$100,000. She is divorced and works as a community support worker.

Deidre was born in country Victoria in 1947. She has worked as a telephonist, florist and nurse and did a foundation course for mature-age students at university. She divorced after 23 years of marriage and has since remarried. Deidre acted as guarantor for a car loan during her first marriage and was liable for a total of \$12,500. She has been on a disability pension for many years.

Emily was born in the United Kingdom in 1944. She married at 22 and has raised three children. During her 34 years of marriage she has been very active with charity work. Her husband incurred a gambling debt of \$4000 and borrowed money from a friend of his to cover the debt. As they had no savings, Emily paid back the debt over a long period by cutting down on groceries and using the surplus money from the weekly housekeeping budget.

Evelyn was born in England in 1951 and emigrated to Australia in 1954. Initially she trained as a kindergarten teacher but then completed a Bachelor of Arts in social work and has been employed in that capacity throughout her working life. She was married

for more than 20 years but is now separated, raising her two teenagers and younger daughter. Her debt liability, incurred just prior to her separation, is \$9000 from a joint personal loan with her husband. Evelyn was unaware at that time that her husband was having an extra-marital affair.

Faith was born in Adelaide in 1939 and married in her late teens. She and her husband worked in hotels in country South Australia until he left the marriage when their daughter was young. Faith acted as guarantor for a car loan incurred by her subsequent de facto partner, and became liable for the \$8000 owing when he defaulted on the repayments. At the time of interview, Faith, acting on legal advice, was waiting for the finance company to advise her of her exact personal liability. Her income is derived from a pension.

Fiona was born in 1947 in Adelaide and worked as a clerical assistant when she left school. She has been married for 29 years and has three children aged in their 20s. As a mature-age student, Fiona did her adult matriculation and then a Certificate in Business Studies. She now works as a senior secretary in the health sector. Her debt liability of \$550,000 was incurred through mortgaging the family home to provide equity for the professional business her husband operated.

Gayle was born in country South Australia in 1945 and joined the public service when she left school. As was the policy then, Gayle had to resign from her position when she married. However, she was able to work part-time while her two children were young. Subsequently, Gayle and her husband ran a retail business in partnership, in a country town for six years. She was married for 32 years, is now divorced and works full-time in a post office. Her debt arose from her husband's gambling addiction and totalled \$60,000. The money was borrowed jointly for business purposes but used by her husband, without her knowledge, to support his gambling.

Gina was born in 1963 in Adelaide and worked for the government when she left school. She was married for ten years and has a son at primary school. The family home was used as security for the unsuccessful business ventures undertaken by her ex-husband thus making her liable for more than \$100,000. She is employed part-time as a visual merchandiser after completing a TAFE Certificate.

Heather was born in country Victoria in 1955. When she left school she joined the public service. She married in 1978. She has two daughters and a son living at home. During her marriage of 22 years she worked part-time as a fitness instructor. Now separated she continues with this work and part-time study to complete a Bachelor of Arts degree. Her debt liability is \$10,000 accrued unintentionally through mistakenly signing bank documents, after her separation, thereby allowing her husband to draw that amount against their mortgage.

Helen was born in 1947 in Sydney. She joined the government when she left school and worked there for 32 years as a medical secretary. Helen has been married twice and in both relationships she has incurred debt through acting as a guarantor for vehicles that each of her husbands wanted. She has a grown son and works in the private sector in the medical field.

Ingrid was born in India in 1947 and migrated to Australia in 1966. She trained as a secretary and now works as a bus driver. She has two children from her first marriage. When her second marriage ended she was left with debts of \$5000 from store credit cards, rent and car payments in joint names.

Jane was born in Adelaide in 1973 and married in her late teens. Now separated, she has four children and works part-time as a clerical officer. Her husband set up and managed a family business that they owned for six years. A debt of \$10,000 accrued

from the business.

Josie was born in 1975 in Adelaide and is single with no children. She works as a veterinary nurse. She was twenty when she acted as guarantor for a car loan for her then boyfriend. Her debt liability after the repossession and sale of the car was \$5,000.

Kate was born in 1942 in Australia. She worked in the public service, first in Tasmania and then in Western Australia where she married at age 22. Kate has four adult sons, two of whom are twins. She is now separated after 23 years of marriage and re-entered the workforce as a cleaner. After leaving the marriage, Kate signed for a joint loan with her husband. The loan was to be used to renovate the family home prior to its sale. Now several years later, the house remains unsold and the renovations never started. Kate is left with a \$16,000 debt.

Letitia was born in Victoria in 1955. She has a postgraduate degree and works as a university lecturer. Letitia's debt of \$10,000 was incurred through her joint ownership of residential property with her husband. She became solely responsible for the mortgage when he declared himself bankrupt because of his financial commitments from his previous marriage.

Linda was born in 1956 in country Victoria. She moved to Melbourne at age nineteen to start work in an office. She married at age 23 and has raised two children who are in high school. Linda is separated. She remains responsible for a joint personal loan of \$9000 for the family car that her husband took when he left the marriage. She works part-time as a cleaner.

Mardi was born in Scotland in 1952 and came to Australia in 1964. She initially worked in a factory, before running a childcare centre, owned by her sister, for more

than fifteen years. Separated for fourteen years, Mardi has raised her three teenage children, including twins. From a business partnership with her de facto of three years, Mardi has a \$6,500 debt and now works full-time as a hotel room attendant.

Mel was born in 1970 in Adelaide. She completed a Certificate in Commercial Studies at TAFE when she left school and is a secretary in a university department. Mel married at 25 and is now divorced with no children. Her debt liability of \$7000 was accrued through a car loan and a boat loan that she respectively solely and jointly signed with her husband.

Nina was born in 1947 and started her working life as a public servant. In between raising three children she supplemented the family income with sewing and cleaning. Her husband unsuccessfully owned and operated an engineering business. Nina acted as surety for her husband's business unwittingly signing an "unlimited" guarantee. The bank advanced a total of \$150,000 for the business. The family home was sold to repay this debt. She is separated.

Olivia was born in Adelaide in 1945 and married at age eighteen. She has three adult sons from her first marriage. Widowed after her second marriage, Olivia married for a third time and is now divorced. She has a debt of \$10,000 arising from the failure of a business started by her third husband. The money was borrowed using her home as collateral. She works as a part-time school services officer.

Paula was born in 1952 in Adelaide and is a registered nurse. Now divorced, she has two children at primary school. Her debt liability of \$50,000 was incurred through mortgaging her home to provide equity for the professional business her husband operated.

Pia was born in England in 1950 and emigrated to Australia in 1952. She went to business college when she left school. She gave birth to a daughter at age nineteen. As a single parent, Pia raised her daughter and worked in administrative roles in offices. When her daughter was in her teens Pia went into partnership in a business with her de facto, incurring a joint business debt of approximately \$1 million. She is no longer in this relationship and now works full-time as a clerical officer.

Rita was born in Adelaide in 1959. She has worked in offices since leaving school. She met her daughter's father when she was in her mid-thirties. Her daughter is now in pre-school. Her debt of \$75,000 accrued when she ran a restaurant business with her partner and agreed to mortgage her house as equity. Rita is single and works as a clerical officer.

Serena was born in the late 1930s in Adelaide and is a retired secondary school teacher. She has two adult children and is divorced. Her partner of five years asked her to obtain a loan of \$5000 for his use, promising to repay her. Within a year he had left the relationship with the loan unpaid and filed for bankruptcy shortly afterwards.

Sue was born in England in 1945 and emigrated to Australia in 1957. Since leaving school she has worked in either clerical or secretarial positions and has been in her current job for over twenty years. She met her husband on an overseas trip at age 21 and married at age 23. After a thirteen year relationship she has two children, is divorced and had debts from a joint bankcard of \$3000.

Teresa was born in East Germany in 1940 and emigrated to Australia in 1954. She trained as a nurse. She married in 1957 and has raised three children. Her debt of \$700,000 was accrued as a result of her husband's business partner forging hers and her husband's signatures in order to obtain bank loans.

Tess was born in 1947 and emigrated to Australia from Britain in the 1970s. She has two grown children and is a media personality. Tess acted as guarantor for a business venture her second husband was undertaking. Her total debt liability was \$26,000. She is divorced.

Thea was born in 1948 in country New South Wales. She married her childhood sweetheart in her late teens after she went to business college. She was divorced after thirteen years, and remarried many years later. Her debt liability from her second marriage was \$16,000 accrued from mortgaging her house for the purchase of a small aircraft used to provide a joint income for her and her husband. She has three children from her first marriage and now runs her own business as an interior decorator.

Una was born in Australia in 1958 and has five children including twins. She trained as a florist and now works full-time as a neighbourhood development officer in local government. She married in her late teens and divorced after more than twenty years in the marriage. Her debt liability of \$10,000 arises from joint personal loans.

Valerie was born in 1939 in Adelaide and is a retired bank clerk. She has raised three children. Her debt liability was \$7000, arising from a joint personal loan used by her ex-husband for his hobby business.

Vicki was born in England in 1971 and arrived in Australia with her parents as a nine month old baby. After leaving school she studied at business college and then joined the public service where she is a human resources consultant. Vicki is also studying human resources at university part-time. She was married for six years and has no children. Her accumulated debt is \$23,000 incurred as director of a company her husband ran unsuccessfully.

Violet was born in Australia in 1970 and is raising two preschool children as a sole parent. After leaving school she worked as a retail assistant for four years and completed adult matriculation. Violet began a Bachelor of Arts as a mature age student, but has intermitted her studies. Her debt liability from her de facto relationship is approximately \$4,000 from a bank overdraft and joint visa card.

Wendy was born in 1949 in Sydney. After she left school she worked in a department store for ten years. She has two daughters from her marriage and is now divorced. Wendy's debt liability was \$85,000 from mortgaging her house to provide equity for her de facto's business. She works as a receptionist for a general practitioner.

Winifred was born in 1947 and emigrated to Australia with her family in 1964. After her divorce in 1977, in another relationship she was pressured by her partner to incur a debt of \$20,000. She refused. Winifred has two grown children, three grandchildren and works as a senior project officer in a government department.

Yvonne was born in Finland in 1945 and emigrated to Australia when she was in primary school. When she left school she carried on the family tradition of dressmaking from her grandmother and mother when she left school and ran her own business in this trade. Yvonne married, has two grown children and is now divorced. She was pressured by an ex-boyfriend to incur a debt of \$80,000 to buy a vineyard that they could both operate. Yvonne refused as he had no money to contribute towards the purchase.

Zara was born in 1944 in Australia. She married at age 20. She was a 'silent' partner in her husband's earthmoving business until his death at 39 years of age. With a debt liability of over \$100,000, Zara was forced into bankruptcy and lost the family home. She has raised three children.

Zoe was born in Adelaide in 1960. She started work for the government when she was aged 16. She has worked in the same department for 25 years, and is now a customer services officer. She has a son at primary school. She was encouraged to re-finance her home by her current partner and he contributes half the mortgage payments. Zoe fears that she will lose financially in the event of their relationship finishing. She recently discovered that her partner, in two previous relationships, has similarly benefited financially.

BIBLIOGRAPHY

CASES

- Akins v National Australia Bank* (1994) 34 NSWLR 155
- Bank of Victoria Ltd v Mueller* (1925) VLR 642
- Barclays Bank PLC v O'Brien* [1994] 1 AC 180
- Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
- European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192
- Garcia v National Australia Bank Ltd* (1993) NSWSC 5 BPR 11,996
- Garcia v National Australia Bank Ltd* (1998) HC 72 ALJR 1243
- Gough v Commonwealth Bank of Australia* [1994] ASC 56-270
- Money v Westpac Banking Corporation* (1988) ASC 55-664 (Federal Crt of Aust)
- Manulife v Conlin* (1994) 20 OR (ed) 499 (CA)
- National Australia Bank Ltd v Garcia* (1996) 39 NSWLR 577
- Teachers Health Investments Pty Ltd v Wynne* (1996) 169 ANZ Conv R 40
- Turnbull & Co. v Duval* (1902) AC 429
- Warburton v Whiteley* (1989) 5 BPR 11,628
- Yerkey v Jones* (1939) 63 CLR 649

REFERENCES

Adiba Sohrab, J., 'Avoiding The "Exquisite Trap": A Critical Look At The Equal Treatment/Special Treatment Debate in Law', Feminist Legal Studies, Vol 1 No 2, 1993, pp. 141-162

Adkins, L., Gendered Work: Sexuality, Family and the Labour Market, Open University Press, Buckingham, 1995

Alcorsco, C., "And I'd like to thank my wife...!": Gender Dynamics and the Ethnic 'Family Business', Australian Feminist Studies, No 17, 1993, pp. 93-108

Annual Report by the Inspector-General in Bankruptcy on the Operation of the Bankruptcy Act, 1 July 1999 to 30 June 2000

Astor, H., 'The Weight of Silence: Talking About Violence in Family Mediation' in M. Thornton, (ed.), Public and Private Feminist Legal Debates, Oxford University Press, Melbourne, 1995

Australian Bankers' Association, *Review of the Code of Banking Practice*, July 2000 (Online, accessed 19 Oct. 2000)

URL: <http://www.reviewbankcode.com/index.htm>

Australian Banking Industry Ombudsman Annual Report 1996-97

Australian Banking Industry Ombudsman Annual Report 1998-99

Australian Banking Industry Ombudsman Ltd, Report on Relationship Debt, Bulletin No 22, 1999

Australian Bureau of Statistics, *1996 Census of Population and Housing, South Australia*, Cat. No. 2015.4, ABS, Canberra

Australian Financial Review, 6 May 2000

Australian Law Reform Commission (ALRC), 'Sexually Transmitted Debt' in *Equality Before the Law: Women's Equality*, Report No 69, Part II, Australian Government Printing Service, Canberra, 1994

Australian Law Reform Commission (ALRC), *Multiculturalism: Consumer Contracts*, Discussion Paper 49, Australian Government Printing Service, Canberra, 1991

Australian Trade Practices Commission, *Guarantors: Problems and Perspectives*, Discussion Paper, 1992

Bacchi, C., 'Do Women Need Equal Treatment or Different Treatment?', *The Australian Journal of Law and Society*, Vol 8, 1992, pp. 80-94

Bacchi, C., *Women, Policy and Politics: The Construction of Policy Problems*, Sage Publications Ltd, London, 1999

Bacchi, C., *Same Difference: Feminism and Sexual Difference*, Allen & Unwin, Sydney, 1990

Baron, P., 'The Free Exercise of Her Will: Women and Emotionally Transmitted Debt', *Law in Context*, Vol 13 No 1, 1995, pp. 23-56

Bennetts, K., 'Garcia v National Australia Bank Limited: A Commentary', *Corporate and Business Law Journal*, Vol 11 No 1, 1999, pp. 127-140

Bittman, M., and Lovejoy, F., 'Domestic Power: Negotiating an Unequal Division of Labour within a Framework of Equality', Australian & New Zealand Journal Of Sociology, Vol 29 No 3, 1994, pp. 302-321

Bittman, M., and Pixley, J., The Double Life of the Family, Allen & Unwin, Australia, 1997

Bond, C., How To Get Out Of A Contract Signed At Home, Consumer Credit Legal Service, Victoria, 1991

Breckenridge, J., and Laing, L., (eds), Challenging Silence: Innovative Responses to Sexual and Domestic Violence, Allen & Unwin, 1999

Burgess R., In the Field: An Introduction to Field Research, Allen & Unwin, London, 1984

Business Outlook, *Business Review Weekly* 8 February 1999

M. Butler, 'On Locke' in M. L. Shanley and C. Pateman (eds.), Feminist Interpretations and Political Theory, Polity Press, 1991

Carter, J., and Harland, D., Contract Law in Australia, 3rd edn, Butterworths, Australia, 1996

Collier, B., 'All Debts Clauses in Commercial Contracts of Guarantee', Monash University Law Review, Vol 24 No 1, 1998, pp. 7-37

Collier, B., 'A Lender's Trap In Taking Guarantees From Married Women', The Australian Banker: Journal of the Australian Institute of Bankers, Vol 3 No 5, 1997, pp. 194-195

Collier, B., 'Confusion Now Hath Made This Masterpiece!: The Present Uncertainty Surrounding the Rule in *Yerkey v Jones*', Australian Business Law Review, Vol 25, 1997, pp. 190-202

Collier, B., The Rule in *Yerkey v Jones*: Fundamental Principles and Fundamental Problems, Australian Property Law Journal, Vol 4, 1996, pp. 181-222

Commonwealth Office of the Status of Women, OSW Strategic Directions 2001-2003 [Online, accessed 23 March 2001]

URL: http://www.osw.dpmc.gov.au//content/strategic_directions.html

Cook, J., and Fonow, M., 'Knowledge and Women's Interests: Issues of Epistemology and Methodology in Feminist Sociological Research', Sociological Inquiry, Vol 56 No 1, 1986, pp. 2-29

Consumer Credit Legal Centre (NSW) Inc., *Survey of Financial Services Caseworkers, Joint Consumer Submission to the Code of Banking Practice Review* (Online, accessed 19 Oct. 2000)

URL: <http://www.reviewbankcode.com/index.htm>

Cretney, S., 'The Little Woman and the Big Bad Bank', The Law Quarterly Review, Vol 109, 1992, pp. 534-539

Dempsey, K., Inequalities in Marriage: Australia and Beyond, Oxford University Press, Melbourne, 1997

Dennings, R. and Robinson, T., 'Banker Customer Relations', Australian Banking Law Bulletin, Vol 9 No 7, 1994, pp. 57-59

De Vault, M., Liberating Method: Feminism and Social Research, Temple University Press, Philadelphia, 1999

- Dobash, R. E., and Dobash, R. P., (eds), Rethinking Violence Against Women, Sage Publications, London, 1998
- Dodd, N., The Sociology of Money: Economics, Reason & Contemporary Society, Polity Press, Cambridge, 1994
- duBois, E., Dunlap, M., Gilligan, C., MacKinnon, C., Menkel-Meadow, C., 'Feminist Discourse, Moral Values and the Law – A Conversation', Buffalo Law Review, Vol XXXIV, 1985, pp. 11-87
- Duggan, A., "Til Debt Us Do Part: A Note on National Australia Bank Ltd v Garcia', The Sydney Law Review, Vol 19 No 2, 1997, pp. 220-229
- Eccles, D., '20,000 STD Female Callers', *Eastern Courier Messenger* 11 June 1997
- Eccles, D., 'Love Trap: Can of Worms', *Eastern Courier Messenger* 11 June 1997
- Eccles, D., and Palmer, R., 'Breaking Up Leaves Lasting Financial Scars', *Eastern Courier Messenger* 11 June 1997
- Economic Planning Advisory Council, *Economic and Social Implications of Consumer Debt*, Australian Government Publishing Service, Canberra, 1989
- Edwards, M., The Income Unit in the Australian Tax and Social Security Systems, Institute of Family Studies, Melbourne, 1984
- Edwards, M., 'The Distribution of Income Within Households' in D. Broom, (ed), Unfinished Business: Social Justice for Women In Australia, George Allen & Unwin, 1984

- Edwards, M., Financial Arrangements Within Families, National Women's Advisory Council, Canberra, 1981
- Esser, K., 'An Antidote for STD', Law Institute Journal, September 1991, pp. 822-823
- Eveline, J., 'The Politics of Advantage', Australian Feminist Studies, No 19, Autumn, 1994, pp. 129-154
- Expert Group on Family Financial Vulnerability, Good Relations, High Risks: Financial Transactions Between Families and Friends, Federal Bureau of Consumer Affairs, 1996
- Fehlberg, B., 'Money and Marriage: Sexually Transmitted Debt in England', International Journal of Law, Policy and the Family, Vol 11 No 3, 1997a, pp. 320-343
- Fehlberg, B., Sexually Transmitted Debt: Surety Experience and English Law, Clarendon Press, Oxford, 1997b
- Fehlberg, B., 'The Husband, the Bank, the Wife and her Signature – The Sequel', Modern Law Review, Vol 59, September, 1996, pp. 675-694
- Fehlberg, B., 'The Husband, the Bank, the Wife and her Signature', Modern Law Review, Vol 57 No 1, 1994, pp. 467-475
- Fehlberg, B., Violence and Sexually Transmitted Debt, Current Family Law, Vol 3, 1997d, pp. 76-81
- Fehlberg, B., 'Women in 'Family' Companies: English and Australian Experiences', Company and Securities Law Journal, Vol 15, 1997c, pp. 348-365

- Finch, J., Married to the Job: Wives' Incorporation in Men's Work, George Allen & Unwin, London, 1983
- Finch, J., "'It's Great to Have Someone to Talk to': Ethics and Politics of Interviewing Women" in Hammersley, M., (ed.), Social Research: Philosophy, Politics and Practice, Sage Publications, London, 1993
- Fredman, S., Woman and the Law, Clarendon Press, Oxford, 1997
- Fuss, D., Essentially Speaking: Feminism, Nature and Difference, Routledge, New York, 1989
- Gatens, M., Feminism and Philosophy: Perspectives on Difference and Equality, Polity Press, Cambridge, 1991
- Gilding, M., The Making and Breaking of the Australian Family, Allen & Unwin, Sydney, 1991
- Gilding, M., Australian Families: A Comparative Perspective, Longman, Australia, 1997
- Gilding, M., 'Gender Roles in Contemporary Australia' in Pritchard Hughes, K., (ed.), Contemporary Australian Feminism, Longman, Melbourne, 1995, pp. 102-126
- Gilligan, C., In a Different Voice: Psychological Theory and Women's Development, Harvard University Press, Cambridge, Massachusetts, 1982
- Gilligan, C., "In a Different Voice: Women's Conceptions of Self and Morality" in Pearsall, M., Women and Values: Readings in Recent Feminist Philosophy, Wadsworth Publishing Company, United States of America, 1986

Graycar, R., and Morgan, J., The Hidden Gender of Law, The Federation Press, 1990

Habgood, R., "On His Terms: Gender and the Politics of Domestic Life", in Du Plessis R., (ed), Feminist Voices, Oxford University Press, Auckland, 1992

Harris, A., 'Race and Essentialism in Feminist Legal Theory', Stanford Law Review, Vol 42, 1990, pp. 581-616

Hearn, J., The Violences of Men, Sage Publications, London, 1998

Hochschild, A., The Second Shift, Avon, New York, 1989

House of Representatives Standing Committee on Finance and Public Administration (Martin Committee), *A Pocket Full of Change: Banking and Deregulation*, Australian Government Printing Service, Canberra, 1991

Howell, N., 'Sexually Transmitted Debt: Where Emotion Meets the Law', Consumer Rights Journal, Vol 2 No 3 1998, pp. 3-5

Howell, N., 'Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers', The Australian Feminist Law Journal, Vol 4, 1994, pp. 93-109

Hyman, P., 'The Use of Economic Orthodoxy to Justify Inequality: A Feminist Critique' in Du Plessis R., (ed), Feminist Voices, Oxford University Press, Auckland, 1992

Hyman, P., 'Rethinking Feminist Economics' in Du Plessis, R., & Alice, L., (eds), Feminist Thought in Aotearoa/New Zealand: Differences and Connections, Oxford University Press, Auckland, 1998

- Inspector-General, Bankruptcy, Annual Report on the Operation of the Bankruptcy Act, 1 July 1999 to 30 June 2000 (Online, accessed 12 Jan. 2000)
- URL:http://law.gov.au/aghome/commaff/itsa/documents/itsa_annual_report_2000.pdf
- Jackson, S., 'Credit Card Cinderellas', *The Australian* 27 October 1998
- Jagger, G., and Wright, C., 'Introduction: Changing Family Values' in Jagger, G and Wright, C., (eds.), Changing Family Values, Routledge, London, 1999
- 'Joint Accounts, But Love Overdrawn', *The Australian* 22 February 1999
- Jukic, R., 'Til Debt Us Do Part: The Problem of Company Director Wives Who Guarantee The Debts of Their Husbands' Companies', Consumer Credit Legal Service, 1994
- Kaplan, M., For Love Not Money, Bantam, Sydney, 1999
- Kavanagh, J., 'Deep in Debt', *The Weekend Australian* 21-22 February 1998
- Kavanagh, J., 'Love & Money', *The Weekend Australian* 21-22 February 1998
- Kaye, M., 'Equity's Treatment of Sexually Transmitted Debt', Feminist Legal Studies, Vol V No 1, 1997, pp. 35-55
- Keating, K., Australian Finance 2000 Conference, Relationship Debt & Comparison Rates: A Caseworker's Perspective, Financial Counselling Services (Qld) Inc., February 2000

- Keay, A., Insolvency: Personal and Corporate Law and Practice, 2nd edn, Longman Australia, 1994
- Kelly, L., Surviving Sexual Violence, University of Minnesota Press, Minneapolis, 1988
- Lampe, A., 'Ex-wives Face Debt Collectors': Money Supplement, *The Sydney Morning Herald* 6 August 1997
- Lampe, A., 'Keep 'em Honest': Money Supplement, *The Sydney Morning Herald* 9 February, 2000
- Lane, B., 'Banks Warned of Spouse Debt Trap', *The Australian* 7 August 1998
- Lang, A., 'High Court wipes out Sexually Transmitted Debt', Law Society Journal, September 1998, pp. 50-53
- Lawrence Neuman, W., Social Research Methods: Qualitative and Quantitative Approaches, 3rd edn, Allyn and Bacon, Sydney, 1997
- Lawton, J., 'What is Sexually Transmitted Debt?' in Ministry of consumer Affairs (Victoria), Summary of Proceedings – Women and Credit – A Forum on Sexually Transmitted Debt, 1991
- Lawton, J., Sexually Transmitted Debt: The Distortion of Equality Between the Sexes, St Kilda Community Centre, 1992
- Littleton, C., 'Reconstructing Sexual Equality' in Tietjens Meyers, D., Feminist Social Thought: A Reader, Routledge, London, 1997
- Lyons, M., 'The Perils of Partners', *House and Garden*, February 1997

- Macken, D., 'Great Aussie Home Dream: Only Half Need Apply', *The Australian Financial Review* 13 March 2001
- Mackinolty, J., 'The Married Women's Property Acts' in Mackinolty, J., and Radi, H., (eds.), In Pursuit of Justice: Australian Women and the Law 1788-1979, Hale & Iremonger, Sydney, 1979
- MacKinnon, C., Feminism Unmodified: Discourses on Life and Law, Harvard University Press, Cambridge, Massachusetts, 1987
- MacKinnon, C., Toward a Feminist Theory of the State, Harvard University Press, Cambridge, Massachusetts, 1989
- Mahalingham, S., 'Deep and Meaningful: Dealing With Emotionally Transmitted Debt', Consumer Rights Journal, Vol. 3 No. 6, 1999, pp. 1-4
- Mahoney, K., 'International Strategies to Implement Equality Rights For Women: Overcoming Gender Bias in the Courts', The Australian Feminist Law Journal, Vol 1, 1993, pp. 115-137
- Maynard, M., 'Methods, Practice and Epistemology: The Debate about Feminism and Research' in Maynard, M., and Purvis, J., (eds.), Researching Women's Lives from a Feminist Perspective, Taylor and Francis, London, 1994
- McDonald, G., 'Sexually Transmitted Debt – Can it Affect You?', The Australian Banker, April 1991, pp. 72-74
- McMahon, A., Taking Care of Men: Sexual Politics in the Public Mind, Cambridge University Press, Cambridge, 1999

Media Release, Credit Advantage Limited, 2000 (Online, accessed 2 Aug. 2000)

URL: http://www.creditadvantage.com.au/frequently_asked_questions.htm

Miller, G., 'In Love and Debt: When the Law Hurts Women', *The Northern Herald* 6 June 1996

Miller, T., 'Shifting Layers of Professional, Lay and Personal Narratives' in Ribbens, J., and Edwards, R., (eds), Feminist Dilemmas in Qualitative Research: Public Knowledge and Private Lives, Sage Publications, London, 1998

Minichiello, V., Aroni, R., Timewell, E., Alexander, L., In-Depth Interviewing: Researching People, Longman Cheshire, 1995

Nelson, J., Feminism, Objectivity and Economics, Routledge, London, 1996

New South Wales Law Reform Commission Review, *Guaranteeing Someone Else's Debts*, Issues 17, April 2000 (Online, accessed 25 July 2000)

URL: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip17>

New South Wales Law Reform Commission Submission to the Australian Bankers' Association, *Review of the Code of Banking Practice*, July 2000

Nyman, C., 'Gender Equality in 'the Most Equal Country in the World'?: Money and Marriage in Sweden', The Sociological Review, Vol 47 No 4, 1999, pp. 766-793

Oakley, A., 'Interviewing Women: A Contradiction in Terms' in Roberts, H., (ed.), Doing Feminist Research, Routledge & Kegan Paul, London, 1981

O'Brien, D., 'Sureties – The Latest Word', Journal of Banking and Finance Law and Practice, Vol 9, 1998, pp. 65-67

- O'Donovan, J., and Phillips, J., The Modern Contract of Guarantee, 3rd edn, LBC Information Services, North Ryde, New South Wales, 1996
- O'Donovan, J., The Retreat from *Yerkey v Jones*: From Status Back to Contract, Western Australian Law Review, Vol 26, 1996, pp. 309-331
- O'Donovan, K., "With Sense, Consent, or just a Con? Legal Subjects in the Discourse of Autonomy" in N. Naffine & R. Owens, Sexing the Subject of Law, LBC Information Services, Sweet & Maxwell, 1997
- Office for the Status of Women, 'women'sstatement@sa.gov.1999/2000', November 1999
- Okin, S. M., 'Gender, the Public and the Private' in D. Held, (ed.), Political Theory Today, Polity Press, Cambridge, 1991
- O'Loughlin, T., 'Date Violence: A Third of Girls Are Victims', *The Sydney Morning Herald* 26 April 2000
- Owens, R., 'The Peripheral Worker: Women and the Legal Regulation of Outwork' in M. Thornton., (ed.) Public and Private Feminist Legal Debates, Oxford University Press, Melbourne, 1995
- Pahl, J., Money and Marriage, Macmillan, London, 1989
- Pahl, J., 'Money and Power in Marriage' in Abbott, P., & Wallace, C., (eds), Gender, Power and Sexuality, Macmillan, London, 1991
- Partnerships Against Domestic Violence, *Current perspectives on domestic violence: a review of national and international literature/ Strategic Partners Pty Ltd in collaboration with the Research Centre for Gender Studies, University of South Australia*, Canberra, ACT, 1999

- Pascoe, J., 'Wives, Business Debts and Guarantees', Bond Law Review, Vol 9 No 1, 1997, pp. 58-80
- Pateman, C., The Disorder of Women, Polity Press, Cambridge, 1989
- Pateman, C., The Sexual Contract, Polity Press, Cambridge, 1988
- Pollard, A., Australian Economic Trends, Lumley Corporation Ltd, No 397
- Reinharz, S., Feminist Methods in Social Research, Oxford University Press, Oxford, 1992
- Report of the Expert Group on Family Financial Vulnerability, *Good Relations, High Risks: Financial Transactions Between Families and Friends*, Federal Bureau of Consumer Affairs, 1996
- D. Rose (ed.), Australian Bankruptcy Law, 10th edn, The Law Book Company Limited, 1994
- Safe, G., 'Til Debt Us Do Part', *The Weekend Australian* 22-23 August 1998
- Santow, G. F. K., 'Sex, Lies and Sureties – Touching the Conscience of the Creditor', Journal of Banking and Finance Law and Practice, Vol 10 No 1, 1999, pp. 7-23
- Sarantakos, S., Social Research, MacMillan Education Australia Pty Ltd, Australia, 1993
- Scott, J., Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism, in Tietjens Meyers, D., Feminist Social Thought: A Reader, Routledge, London, 1997

- Scutt, J., 'Of Love, Of Pain, and Money', in The Incredible Women: Power and Sexual Politics, Vol 2, Artemis Publishing, 1997
- Shanley, M. L., 'Suffrage, Protective Labor Legislation, and Married Women's Property Laws in England', Signs, Vol 12 No 1, 1986, pp. 62-77
- Shanley, M. L., and Pateman, C., (eds.), Feminist Interpretations and Political Theory, Polity Press, 1991
- Sheehan, G., and Fehlberg, B., 'Families, Divorce and Family Law', Family Matters, No. 55 Autumn, 2000, pp. 4-9
- Shield, H., 'New Warning for Women Who Mix Debt and Marriage', *The Age* 4 May 1997
- Singh, S., & Lindsay, J., 'Money in Heterosexual Relationships', Australian and New Zealand Journal of Sociology, Vol 32 No 3 1996, pp. 57-69
- Singh, S., For Love Not Money: Women, Information and the Family Business, Consumer Advocacy and Financial Counselling Association of Victoria (Inc.), Melbourne, 1995a
- Singh, S., For Love Not Money: The Stories of Women in Family Business, The Consumer Advocacy and Financial Counselling Association of Victoria (Inc.), Melbourne, 1995b
- Singh, S., Marriage Money: The Social Shaping of Money in Marriage and Banking, Allen & Unwin, 1997
- Singh, S., 'Understanding The Use of Electronic Money: The Challenge for Policy Makers', Australian Banking & Finance Law Bulletin, Vol 15 No 1, 1999, pp. 1-7

- Spender, P., 'Exploring the Corporations Law Using A Gender Analysis', Canberra Law Review, Vol 3 No 1, 1996, pp. 82-98
- Speth, L., The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution? in Weisberg, D. K., (ed.), Women and the Law: A Social Historical Perspective, Schenkman, Cambridge, Massachusetts, 1982
- Stacey, H., 'Legal Discourse and the Feminist Political Economy: Moving Beyond Sameness/Difference', The Australian Feminist Law Journal, Vol 6, 1996, pp. 115-134
- Su-King, H., 'From *Yerkey* to *Garcia*: 60 Years on and Still as Confused as Ever!', Australian Property Law Journal, No 7, 1999, pp. 47-75
- Taylor, A., How To Get Out of Sexually Transmitted Debt: A Guide for Workers Assisting Women in Debt, The Women and Credit Task Group, n.d.
- The New Consumer Credit Code: New Rules - A Better Balance, [Online, accessed 15 Aug. 2000].
URL: <http://www.creditcode.gov.au/whatis.htm>
- Thornton, M., (ed.), Public and Private Feminist Legal Debates, Oxford University Press, Melbourne, 1995
- Thornton, M., 'The Judicial Gendering of Citizenship: A Look at Property Interests During Marriage', Journal of Law and Society, Vol 24 No 4, 1997, pp. 486-503
- Tyree, A., Banking Law in Australia, 2nd edn, Butterworths, Australia, 1995
- Tyree, A., Banking Law in Australia, 3rd edn, Butterworths, Australia, 1998

- Turkel, G., Dividing Public and Private: Law, Politics, and Social Theory, Praeger Publishers, Westport, Connecticut, 1992
- Weaver, G., and Craigie, C., Banker and Customer, 2nd edn, LBC Information Services, New South Wales, 1990
- Webb, C., 'Sexually Transmitted Debt': Money and Investment Supplement, *The Age* 14 February 2000
- Weerasooria, W., Bank Lending and Securities in Australia, Butterworths, Australia, 1998
- West, R., Jurisprudence and Gender, University of Chicago Law Review Vol 55, 1988, pp. 1-72
- Weston, R., and Smyth, B., 'Financial Living Standards After Divorce', Family Matters, No. 55 Autumn, 2000, pp. 10-15
- Weule, B., The Bankruptcy Handbook, Redfern Legal Centre Publishing, Australia, 1998
- Williams, W., 'The Equality Crisis: Some Reflections on Culture, Courts, and Feminism' in Tietjens Meyers, D., Feminist Social Thought: A Reader, Routledge, London, 1997
- Wilson, V., The Secret Life of Money: Exposing the Private Parts of Personal Money, Allen & Unwin, 1999
- Zelizer, V., The Social Meaning of Money, Basic Books, New York, 1994

Zelizer, V., 'The Social Meaning of Money: 'Special Monies'', American Journal of Sociology, Vol 95 No 2, 1989, pp. 342-377