

## NEURODIVERGENT WOMEN IN ‘CLOUDED JUDGMENT’ UNCONSCIONABILITY CASES — AN INTERSECTIONAL FEMINIST PERSPECTIVE

### ABSTRACT

Feminist legal scholars have discussed the impact of gender and class stereotypes on the judgments in *Louth v Diprose*. However, a significant aspect of Ms Louth’s identity is missing from these discussions: her neurodivergence (or mental illness). This article analyses the stereotypical treatment of women through the lenses of gender and neurodivergence in ‘clouded judgment’ unconscionability cases. This analysis is focused on the comparison of the use of stereotypes in *Louth v Diprose* and *Williams v Maalouf*. Each case allows vastly different outcomes for the neurodivergent female parties, but both cases reinforce prejudicial stereotypes. The article concludes with a discussion of how a myopic focus on a singular category of identity can hinder the creation of decisions that are more mindful of intersectional realities.

### I INTRODUCTION

Despite the rise of feminist jurisprudence, equitable doctrines have rarely been examined under the feminist lens.<sup>1</sup> Even more troubling, the small amount of existing Australian feminist equity scholarship tends to treat gender and other social categorisations as mutually exclusive categories of analysis.<sup>2</sup> In other

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<sup>1</sup> Margaret Davies, *Asking the Law Question* (Lawbook, 4<sup>th</sup> ed, 2017) 223; Charles E Rounds Jr, ‘The Common Law is Not Just About Contracts: How Legal Education Has Been Short-Changing Feminism’ (2009) 43 *University of Richmond Law Review* 1185, 1186.

<sup>2</sup> See, eg, Lisa Zhou, ‘Fiduciary Law, Non-Economic Interests and Amici Curiae’ (2008) 32 *Melbourne University Law Review* 1158; Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish Publishing, 2001); Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing, 1996); Lisa Sarmas, ‘A Step in the Wrong Direction: The Emergence of Gender “Neutrality” in the Equitable Presumption of Advancement’ (1994) 19 *Melbourne University Law Review* 758; Dianne Otto, ‘A Barren Future?’

words, equity has escaped analysis through an intersectional lens.<sup>3</sup> Only Sarmas has attempted to address the women at the intersections in Australian equity. Her article 'Storytelling and the Law: A Case Study of *Louth v Diprose*'<sup>4</sup> presents a persuasive analysis of how the official court stories in *Louth v Diprose*<sup>5</sup> relied on stereotypes surrounding gender and class. This article does not seek to repeat Sarmas' analysis, but rather extends this intersectional approach to neurodivergent women.<sup>6</sup>

The intersection of stereotypes involving mentally ill or neurodivergent women in equitable doctrines remains uncharted territory. In addition to gendered oppression, neurodivergent women also face the oppressions linked with being placed on either

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Equity's Conscience and Women's Inequality' (1992) 18 *Melbourne University Law Review* 808; Regina Graycar, 'Telling Tales: Legal Stories About Violence Against Women' (1996) 7 *Australian Feminist Law Journal* 79.

<sup>3</sup> Intersectionality theory originates from Crenshaw's work on the need for intersectional analysis of gender and race in discrimination law: Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139, 139–40.

<sup>4</sup> Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701. As noted by Graycar, this is 'one of the most compelling discussions yet published of any Australian High Court decision.': Graycar, above n 2, 302; see also Lisa Sarmas, 'A Response to Peter Heerey' (1998) 3 *Newcastle Law Review* 82, 91.

<sup>5</sup> (1992) 175 CLR 651.

<sup>6</sup> 'Neurodivergence' describes people with a mental or cognitive illness, disability or disorder. The term comes from the neurodiversity movement, which rejects the pathologisation of neurological differences, instead advocating for neurodivergence to be viewed as a form of human diversity. The neurodiversity model allows neurodivergence to be recognised as a social category rather than a purely medical issue which is separate from personhood. However, stereotypes and myths surrounding neurodivergence are based on the prevailing medical model of 'mental illness.' For this reason, the terms 'disabled,' 'mental illness' and 'neurodivergent' will be used interchangeably in this article. The author prefers Walker's broad definition of neurodivergence: 'Neurodivergent ... means having a brain that functions in ways that diverge significantly from the dominant societal standards of "normal." ... Neurodivergence (the state of being neurodivergent) can be largely or entirely genetic and innate, or it can be largely or entirely produced by brain-altering experience, or some combination of the two ...': Nick Walker, 'Neurodiversity: Some Basic Terms & Definitions' on *Neurocosmopolitanism* (27 September 2014) <<http://neurocosmopolitanism.com/neurodiversity-some-basic-terms-definitions/>>; see Judy Singer, 'Why Can't You Be Normal for Once in Your Life? From a "Problem with No Name" to the Emergence of a New Category of Difference' in Marian Corker and Sally French (eds), *Disability Discourse* (Open University Press, 1999) 64; Katherine Runswick-Cole, "'Us" and "Them": the Limits and Possibilities of a "Politics of Neurodiversity" in Neoliberal Times' (2014) 29 *Disability & Society* 1117, 1123; see also Brigit McWade, Damian Milton and Peter Beresford, 'Mad Studies and Neurodiversity: a Dialogue' (2015) 30 *Disability & Society* 305, 306; Thomas Armstrong, 'Your Brain is a Rain Forest' (April/May 2010) *ODE Magazine* 37.

side of the sane/insane dichotomy, and stigmatisation of ‘mentally ill’ knowledge. Unfortunately, the voices of neurodivergent women are heard or understood far less often than those of neurotypical women in equity.<sup>7</sup> It is often said that equity is not past the age of childbearing,<sup>8</sup> but its progeny were certainly born in times of archaic discrimination against women and neurodivergent people.<sup>9</sup> This is most clearly evident in the reliance on stereotypes in ‘clouded judgment’ unconscionability cases.<sup>10</sup>

This article seeks to begin the process of addressing the intersectional oppression of neurodivergent women in unconscionability cases where emotional dependence is recognised as a ‘special disadvantage.’ Firstly, this article briefly compares feminist and disability theories, and discusses models of intersectionality. Secondly, the characterisation of gender and neurodivergence as a ‘special disadvantage’ in unconscionability law is explored. Thirdly, the article discusses the heavy reliance on stereotypes of neurodivergent women in *Louth v Diprose*<sup>11</sup> and *Williams v Maalouf*<sup>12</sup> These cases present vastly different treatments of neurodivergent women, but both reinforce dangerous stereotypes. Lastly, the importance of a multifaceted intersectional analysis will be reiterated, with a focus on Bartlett’s reimagined feminist judgment of *Louth v Diprose*.<sup>13</sup>

## II BACKGROUND TO FEMINIST AND DISABILITY THEORIES

The intersection of gender and disability is a significant blind spot in feminist equity scholarship. A possible explanation for this is that disability has been so entwined with medicine that it is seldom given priority by social justice advocates and scholars. Despite inconsistencies between the two theoretical approaches, both feminist and disability theories can inform an intersectional analysis of stereotyping neurodivergent women in unconscionability cases.

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<sup>7</sup> The word ‘neurotypical’ describes someone who is not neurodivergent.

<sup>8</sup> See *Eves v Eves* [1975] 1 All ER 768, 771; *Cowcher v Cowcher* [1972] 1 All ER 943; *Muschinski v Dodds* (1985) 160 CLR 583, 615; Justice Michael Kirby, ‘Equity’s Australian Isolationism’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 444, 451–3; P W Young, ‘Perhaps Equity is Beyond Childbearing’ (2003) 77 *Australian Law Journal* 224; R Bailey-Harris, ‘Equity Still Childbearing in Australia?’ (1997) 113 *Law Quarterly Review* 227.

<sup>9</sup> Otto, above n 2, 809.

<sup>10</sup> The term ‘clouded judgment’ is taken from Dilan Thampapillai, ‘What Becomes of the Broken-Hearted? Unconscionable Conduct, Emotional Dependence, and the “Clouded Judgment” Cases’ (2016) 34 *Law in Context* 76.

<sup>11</sup> (1992) 175 CLR 621; *Diprose v Louth [No 1]* (1990) 54 SASR 438; *Diprose v Louth [No 2]* (1990) 54 SASR 450.

<sup>12</sup> [2005] VSC 346 (1 September 2005).

<sup>13</sup> (1992) 175 CLR 621; Francesca Bartlett, ‘Louth v Diprose — Judgment’ in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 196.

Feminist and disability theories deal with similar oppressions and face similar problems, but with very different forms of identities. Feminist theory unites women under one homogenous identity: *women*. On the other hand, the disabled identity is fragmented. As noted by Wendall, '[s]ocial oppression may be the only thing the disabled have in common, our struggles with our bodies are extremely diverse'.<sup>14</sup> Disabled women occupy a precarious place in feminist theory, as they often defy the expectations of the body and social relationships that are usually connected to women by feminist scholars.<sup>15</sup>

In parallel to the feminist notion that society is structured to prioritise masculinity, disability theorists argue that society is structured for people who have 'no weaknesses'.<sup>16</sup> Hence, disability theorists prefer social models to medical models of disability.<sup>17</sup> Disabled people deviate from the ideal 'abled' norm, and are viewed as needing to be fixed or cured by medicine. This means that disability is viewed as an error rather than a consequence of human diversity.

Both strands of critical theories illuminate how power relations determine dominant knowledge; as noted by Wendall, '[l]ike women's particular knowledge, which comes from access to experiences most men do not have, disabled people's knowledge is dismissed as trivial, complaining, mundane (or bizarre), *less than* that of the dominant group'.<sup>18</sup>

*A Mental 'Illness', Mental 'Disability' or 'Neurodivergence'?*

Some scholars and activists have called for the recognition of neurodivergence as a social category on par with race, class, gender, sexuality and other social categorisations.<sup>19</sup> The notions of neurodivergence and neurodiversity reject the pathologisation of mental illnesses, disorders and disabilities. Contrasting the traditional medical model and neurodiversity model in two recent articles published in the Melbourne University Law Review highlights the differences in emphasis between the two approaches.

<sup>14</sup> Susan Wendall, 'Toward a Feminist Theory of Disability' (1989) 4 *Hypatia* 104, 108.

<sup>15</sup> Anita Silvers, 'Reprising Women's Disability: Feminist Identity Strategy and Disability Rights' (1998) 13 *Berkeley Women's Law Journal* 81, 86.

<sup>16</sup> Wendall, above n 14, 104.

<sup>17</sup> Despite the medical origins of the word, disability theorists and advocates have retained the terminology of *disability* but attributed a different meaning: 'When disability is redefined as a social/political category, people with a variety of conditions are identified as *people with disabilities* or *disabled people*, a group bound by common social and political experience.' Simi Linton, *Claiming Disability: Knowledge and Identity* (New York University Press, 1998) 12 (emphasis in original) quoted in Margaret Price, *Mad at School: Rhetorics of Mental Disability and Academic Life* (University of Michigan Press, 2011) 4; see also Silvers, above n 15, 82.

<sup>18</sup> Wendall, above n 14, 120 (emphasis in original).

<sup>19</sup> Singer, above n 6, 64.

The medical approach to mental illness was used in Ulbrick, Flynn and Tyson's distinction between 'cognitive impairment' and 'mental illness':

Cognitive impairment is the broad term comprising a range of disabilities such as, but not limited to, intellectual disability, acquired/traumatic brain injury, foetal alcohol spectrum disorder, neurological disorders, autism spectrum disorder and dementia ... In this article, we consider mental illness (eg bipolar, schizophrenia, depression) and cognitive impairment to be distinct from each other, with disability (forming a part of the personhood) considered separate to an illness (typically episodic) treatable with medication. This distinction is important to make because mental illnesses and cognitive impairments have different implications in terms of service provision.<sup>20</sup>

Conversely, Arnold, Easteal, Easteal and Rice reject the medical construction of mental illness, instead characterising these conditions as examples of cognitive diversity ('diverse ways of thinking') and neurodiversity ('diverse neurologies').<sup>21</sup> In their discussion of Attention Deficit Hyperactivity Disorder ('ADHD'), they characterise mental 'illness' as a difference rather than disability:

Humans are seen as having innate psychological heterogeneity, with individual differences in cognitive abilities that are a legacy of our evolutionary past. In this [neurodiversity] model it is not meaningful to think of 'normal' cognitive ability or to measure cognitive ability by a single yardstick.

In this model, ADHD, as a disorder, is seen as resulting from an interaction between a particular component of this neurodiversity — an innate cognitive style — and the social and organisational environment.<sup>22</sup>

It is important that 'neurotypes' are addressed as a social category in intersectional critical legal theory. Neurodivergent people often 'come into contact with the legal system in either its punitive or protective capacities'.<sup>23</sup> The politics of neurodiversity call for the 'rights of neurodivergent individuals [to] be met, as they would be for any

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<sup>20</sup> Madeline Ulbrick, Asher Flynn and Danielle Tyson, 'The Abolition of Defensive Homicide: A Step Towards Populist Punitivism at the Expense of Mentally Impaired Offenders' (2016) 40 *Melbourne University Law Review* 324, 326 n 4.

<sup>21</sup> Bruce Arnold et al, 'It Just Doesn't Add Up: ADHD/ADD, The Workplace and Discrimination' (2010) 34 *Melbourne University Law Review* 359, 361.

<sup>22</sup> *Ibid* 369–70.

<sup>23</sup> Isabel Karpin and Karen O'Connell, 'Stigmatising the 'Normal': The Legal Regulation of Behaviour as a Disability' (2015) 38 *University of New South Wales Law Journal* 1461, 1462. Karpin and O'Connell do not use the term neurodivergent, but refer to '[p]eople who exhibit challenging behaviour and who do not comply with social values and conventions': this description clearly fits neurodivergent people.

other minority group.’<sup>24</sup> Instead of creating a neurotypical/neurodivergent dichotomy akin to sane/insane, the neurodiversity movement seeks to complicate understandings of disabled identities. Characterising mental illnesses, disorders and disabilities as normal forms of neurodiversity does not reject the category of disability, but rather subscribes to the *social model* of disability.

### B *Models of Intersectionality*

In the broadest sense, ‘intersectionality’ theorises that social inquiries must be organised in order to encompass ‘multiple dimensions of social life and categories of analysis.’<sup>25</sup> The term ‘intersectionality’ was first used by Crenshaw in 1989 in her article ‘Demarginalizing the Intersection of Race and Sex’,<sup>26</sup> which argued that discrimination laws had not contemplated the intersection of discrimination on both bases of gender and race. She argued that like feminist and anti-racist politics, anti-discrimination law was built on a ‘single-axis’ framework.

Intersectionality has developed into a theory and methodological approach that spreads across a wide variety of categories of analysis, such as race, class, sexuality, disability and Indigenous status.<sup>27</sup> Following intersectionality, oppressive institutions should be examined in an interconnected manner, and a person’s social characteristics may mean that they are subject to multiple sources of oppression.

Building on Crenshaw’s work, Ehrenreich created the term ‘hybrid intersectionality’ to describe the intersectional to refer to the intersection of privilege with an axis of subordination.<sup>28</sup> The hybrid intersectionality model also allows for the analysis of the privileges and oppressions which are associated with different disabilities,

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<sup>24</sup> Runswick-Cole, above n 6, 1123; see also Steve Graby, ‘Neurodiversity: Bridging the Gap Between the Disabled People’s Movement and the Mental Health System Survivor Movement?’ in Helen Spandler, Jill Anderson and Bob Sapey (eds) *Madness, Distress and the Politics of Disablement* (University of Chicago Press, 2015) 231, 241 (citations omitted).

<sup>25</sup> Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30 *Signs: Journal of Women in Culture and Society* 1771, 1772 quoted in Julia Mansour, ‘Consolidation of Australian Anti-Discrimination Laws — An Intersectional Perspective’ (2012) 21 *Griffith Law Review* 533, 536.

<sup>26</sup> Crenshaw, above n 3.

<sup>27</sup> Mansour, above n 25, 536; The unique methodology of intersectionality has been aptly summarised by Carbado: ‘Intersectionality reflects a commitment neither to subjects nor to identities per se but, rather, to marking and mapping the production and contingency of both.’ Devon W Carbado, ‘Colorblind Intersectionality’ (2013) 38 *Signs: Journal of Women in Culture and Society* 811, 815.

<sup>28</sup> Nancy Ehrenreich, ‘Subordination and Symbiosis: Mechanisms of Support between Subordinating Systems’ (2002) 71 *University of Missouri–Kansas City Law Review* 251, 257.

and intersections of multiple forms of disability.<sup>29</sup> This model of intersectionality is particularly relevant to disability.<sup>30</sup>

### III INTERSECTIONALITY — AN IDEAL APPROACH?

The recent shift towards intersectional theory has seen the ‘collapse of the category “woman” as a core unit of feminist engagement and critique’.<sup>31</sup> Despite the complexity that it brings to feminist theory, intersectionality has been criticised for its broad-brush approach to multifaceted oppression. In some ways, intersectionality often ‘claims the obvious’ — that all aspects of identity are related.<sup>32</sup>

Intersectionality has also been criticised for ignoring the differences within identity categorisations that result in true diversity of human experience.<sup>33</sup> This criticism is especially relevant to the categories of disability and neurodivergence, which are characterised by highly diverse experiences and identities. As noted by Conaghan, an intersectional approach ‘cannot unpick or unravel the many ways in which inequality is produced and sustained’.<sup>34</sup>

These problems may arise because intersectionality is often discussed in terms of mapping and topographical terms, involving grids, coordinates, crossings, and planes.<sup>35</sup> This often disguises the imprecision of the intersectional ‘mapping’ process, and completely obscures forms of oppression that do not neatly fit within the ‘grid.’ Individual experiences of inequality are far more complex than points on a ‘map’ of intersections.<sup>36</sup> Focusing on intersections encourages ignorance of the social and legal contexts of those experiences.<sup>37</sup> A map is only able to provide a surface-level representation of inequality, and tells a one-dimensional story of the wide-ranging experiences of a particular group. Conaghan suggests that ‘[w]e need a language to

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<sup>29</sup> See Wendall, above n 14, 118.

<sup>30</sup> See David L Hosking, ‘Critical Disability Theory’ (Paper presented at the 4th Biennial Disability Studies Conference at Lancaster University, United Kingdom, 2–4 September 2008) 14 <[http://www.lancaster.ac.uk/fass/events/disabilityconference\\_archive/2008/papers/hosking2008.pdf](http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf)>.

<sup>31</sup> Joanne Conaghan, ‘Intersectionality and the Feminist Project in Law’ in Emily Grabham et al (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge, 2009) 21, 21.

<sup>32</sup> Maria Carbin and Sara Edenheim, ‘The Intersectional Turn in Feminist Theory: A Dream of Common Language?’ (2013) 20 *European Journal of Women’s Studies* 233, 245.

<sup>33</sup> Nancy Levit, ‘Theorising the Connections Among Systems of Subordination’ (2002) 71 *University of Missouri–Kansas City Law Review* 227, 227, as cited in Suzanne B Goldberg, ‘Intersectionality in Theory and Practice’.

<sup>34</sup> Conaghan, above n 31 in Grabham et al (eds) above n 31, 22.

<sup>35</sup> *Ibid* 25.

<sup>36</sup> *Ibid* 26.

<sup>37</sup> *Ibid*.

“relate and connect” diverse experiences of inequality with the structures, processes, practices and institutions in which they occur.”<sup>38</sup> This cannot be achieved with just an intersectional analysis.

By using an intersectionality framework, this article is limited to the crude delimitations of ‘woman’ and ‘neurodivergence’ as categorisations of identity. This approach does not enquire into how those identities are formed, or the diversity of their experiences. It is acknowledged that applying intersectionality to neurodivergent women may lead to universalistic treatment. However, in this case, intersectionality is applied in an effort to shed light on the legal treatment of a group that has previously been neglected in equitable jurisprudence. While intersectionality provides an imperfect framework, it can often provide valuable insights into the experiences of groups that sit on the margins of academic literature.

#### IV NEURODIVERGENCE AS ‘SPECIAL DISADVANTAGE’

Equity recognises that a party can have a ‘special disadvantage’ that can be unconscionably abused, contrary to the equitable principles of fairness and justice.<sup>39</sup> The High Court has allowed claimants to rely on a range of ‘disadvantages that may be characterised as *structural*’,<sup>40</sup> including poverty, age, sickness, sex, infirmity of body or mind, lack of education and unfamiliarity with the English language.<sup>41</sup> In many cases, intersecting disadvantages have been considered collectively as elements of a ‘special disadvantage.’<sup>42</sup>

Following the current medical model of mental illness, neurodivergence could be considered to be ‘sickness’ or ‘infirmity of mind’ amounting to a special disadvantage. Indeed, the High Court has previously recognised ‘feeble-mindedness’ as a source of special disadvantage.<sup>43</sup> The High Court has also allowed relief for a plaintiff that the trial judge described as ‘markedly dull-witted and stupid.’<sup>44</sup> If we

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<sup>38</sup> Ibid 41.

<sup>39</sup> See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (‘Amadio’); *Blomley v Ryan* (1956) 99 CLR 362; *Bridgewater v Leahy* (1998) 194 CLR 457; *Louth v Diprose* (1992) 175 CLR 621.

<sup>40</sup> Otto, above n 2, 815.

<sup>41</sup> *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J); *Wilton v Farnsworth* (1948) 76 CLR 646, 654 (Rich J); *Amadio* (1983) 151 CLR 447, 464 (Mason J).

<sup>42</sup> See, eg, *Amadio* (1983) 151 CLR 447, 462; *Blomley v Ryan* (1956) 99 CLR 362, 405; *Bridgewater v Leahy* (1998) 194 CLR 457, 477.

<sup>43</sup> In *Blomley v Ryan* (1956) 99 CLR 362, the plaintiff was described in this manner because he was an intoxicated alcoholic. However, the term ‘feeble-minded’ is an outdated term for mental disability.

<sup>44</sup> *Wilton v Farnsworth* (1948) 76 CLR 646, 649 (Latham CJ).

were to ignore the ableist descriptions of these disabilities,<sup>45</sup> the unconscionability doctrine might appear to address the oppression faced by neurodivergent people.

#### V EMOTIONAL DEPENDENCE IN ‘CLOUDED JUDGMENT’ UNCONSCIONABILITY CASES

The problematic treatment of neurodivergent women in unconscionability doctrine is most obvious in ‘clouded judgment’ cases. Judicial considerations of emotional dependency in these cases inevitably ‘lack consistency and coherency.’<sup>46</sup> Rather than using social categorisations as indicators of social inequality, clouded judgment cases allow these aspects of identity to receive stereotypical treatment.

Clouded judgment cases require that one party be cast as ‘bad’ and the other as ‘good.’<sup>47</sup> This is largely a symptom of the dichotomies that underpin equity’s liberal roots.<sup>48</sup> These dichotomies reflect the opposition between the ‘self’ and the ‘other’ in a culture designed from the dominant masculine, neurotypical viewpoint. Placing parties on either side of the good/bad dichotomy only serves to reinforce the prejudicial, simplistic stereotypes that are at the heart of liberalism. A more nuanced approach would allow the identification of different ‘shades’ of relationships and identities instead of ‘oppositions’ and ‘divisions.’<sup>49</sup>

No test could quantify the limitless causes or indicators of emotional dependence.<sup>50</sup> Clouded judgment cases require the ‘courts to employ prejudicial stereotypes in order to rationalise the factual matrix of particular ‘emotional’ relationships.’<sup>51</sup> Emotional dependence in unconscionability cases promotes the use of stereotypes that are ‘congruent with prejudice’ rather than stereotyping that is ‘safe and legally relevant’.<sup>52</sup> Unfortunately, both ‘good’ and ‘bad’ stereotypes ignore the individual characteristics, contexts and experiences of social groups.

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<sup>45</sup> The term ‘ableist’ refers to discrimination in favour of people who do not have disabilities (or ‘abled’ people).

<sup>46</sup> Samantha Hepburn, ‘Equity and Infatuation’ (1993) 18 *Alternative Law Journal* 208, 209.

<sup>47</sup> Otto previously recognised this pattern in Australian unconscionability cases involving women: Otto, above n 2, 324.

<sup>48</sup> Liberal ‘male rationality’ divides the world into dichotomies of what is good and what is bad or less. Examples of these dichotomies include objective/subjective, light/shadow, man/woman, and society/nature: Ann C Scales, ‘The Emergence of Feminist Jurisprudence: An Essay’ (1986) 95 *Yale Law Journal* 1373, 1382–3.

<sup>49</sup> Leslie Bender, ‘A Lawyer’s Primer on Feminist Theory and Tort’ (1988) 38 *Journal of Legal Education* 3, 27.

<sup>50</sup> Richard Haigh and Samantha Hepburn, ‘The Bank Manager Always Rings Twice: Stereotyping in Equity after Garcia’ (2000) 26 *Monash University Law Review* 275, 309.

<sup>51</sup> *Ibid* 301.

<sup>52</sup> *Ibid* 311–12.

*A Stereotyping Neurodivergent Women*

Recognising that gender, neurodivergence or other social categorisations impact on an individual's circumstances and identity allows legal facts and decisions to be placed in a social context.<sup>53</sup> Overlooking these social characteristics 'in the name of a hollow liberal individualism merely serves to reinforce existing structural inequalities'.<sup>54</sup> Emotional dependence is not linked to any social categories which could underpin a special disadvantage. In unconscionability cases, neurodivergent women are typecast as ignorant victims, or their neurodivergence is questioned or erased. Justice and fairness can only be promoted if these stereotypes are confronted.<sup>55</sup>

Read together, *Louth v Diprose*<sup>56</sup> and *Williams v Maalouf*<sup>57</sup> present extremely different representations of neurodivergent women. In the first case, Ms Louth is the 'bad' woman — manipulative and seductive.<sup>58</sup> In contrast, Ms Williams is the 'good' woman, who was exploited for acting with her heart instead of her head. Clouded judgment unconscionability cases are just one example of how equity reinforces stereotypes rather than addressing structural inequalities.<sup>59</sup> Some of these stereotypes and assumptions are clear and deliberate, but others are less obvious.

VI *LOUTH V DIPROSE*

Throughout the litigation of *Louth v Diprose*,<sup>60</sup> the trial and appellate majority judges accepted a version of the facts that most accorded with the plaintiff's story. The parties met in 1981 when both of their marriages had broken down. After a brief sexual tryst, Mr Diprose and Ms Louth became friends. In 1982, Ms Louth moved to Adelaide to be with her sister, and her brother-in-law Mr Volkhardt. She moved into their house and paid low rent. In 1983, Mr Diprose visited Ms Louth. He later moved to Adelaide. He sent her a collection of poems expressing his feelings for her.<sup>61</sup>

<sup>53</sup> Merely attributing social characteristics to parties is not stereotyping: Sarmas, 'A Response to Peter Heerey', above n 4, 91.

<sup>54</sup> Ibid.

<sup>55</sup> Jody Armour, 'Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit' (1995) 83 *California Law Review* 733, 772 quoted in Haigh and Hepburn, above n 50, 281.

<sup>56</sup> (1992) 175 CLR 621.

<sup>57</sup> [2005] VSC 346 (1 September 2005).

<sup>58</sup> Otto, above n 2, 824.

<sup>59</sup> See Claire de Than, 'Equitable Remedies: Cypher Wives, Weak Women and Equity's Special Tenderness' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish Publishing, 2001) 197, 197; Otto, above n 2.

<sup>60</sup> (1992) 175 CLR 621; *Diprose v Louth [No 1]* (1990) 54 SASR 438; *Diprose v Louth [No 2]* (1990) 54 SASR 450.

<sup>61</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 439–40 (King CJ); see Sarmas, 'Story-telling and the Law: A Case Study of *Louth v Diprose*', above n 4, 716.

At some stage, Ms Louth's brother in law contacted Mr Diprose to tell him that she 'did not wish to see him.'<sup>62</sup> Later in the year, Ms Louth telephoned Mr Diprose. They had lunch and she told him that she was depressed. Up until June 1985, Mr Diprose visited and telephoned Ms Louth regularly. The parties had vastly different personal circumstances. Mr Diprose was a solicitor, and owned a range of assets. On the other hand, Ms Louth lived off the Supporting Mothers Pension and had a history of mental illness and suicide attempts.

In 1985, Ms Louth's sister and Mr Volkhardt separated. It was suggested to Ms Louth that she would need to move out at some point. The majority accepted that she told Mr Diprose that she would have to move out of the house quickly, and would kill herself if she had to do so.<sup>63</sup> The minority judgments found that there was no urgent need for her to move out, giving weight to a conversation with Mr Volkhardt which would have prevented Mr Diprose from believing that there was any suggestion that Ms Louth needed to move out immediately.<sup>64</sup>

Mr Diprose purchased a house for Ms Louth in her name, and the relationship between the parties continued as it had before. In mid-1988, Mr Diprose was 'without accommodation'<sup>65</sup> between the vacation of his rented home and possession of a house he purchased. During this time, he and his son stayed with Ms Louth. However, she 'became irked by [his] continued presence in the house ... A quarrel occurred'.<sup>66</sup> As stated by King CJ, 'the scales fell from his eyes [and] he bitterly regretted the transfer of the house'.<sup>67</sup> Mr Diprose commenced legal proceedings for recovery of the house. The trial judge rejected Mr Diprose's evidence supporting his primary claim, that the house was not an outright gift as he has stipulated that Ms Louth would retransfer the house to him at a later date. However, he was successful on the basis of a peripheral claim for unconscionability.

The trial judge, King CJ, ordered Ms Louth to transfer the house back to Mr Diprose, on the basis that she had unconscionably exploited his special disadvantage; his emotional dependence on her.<sup>68</sup> He found that her discussion of suicide and leaving the house was an attempt to manipulate him by manufacturing a false atmosphere of crisis.<sup>69</sup> Appeals to the Full Court of the Supreme Court of South Australia,<sup>70</sup> and

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<sup>62</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 440 (King CJ).

<sup>63</sup> *Diprose v Louth [No 2]* (1990) 54 SASR 450, 453 (Jacobs ACJ), 465–6 (Legoe J).

<sup>64</sup> *Ibid* 480 (Matheson J); *Louth v Diprose* (1992) 175 CLR 621, 652 (Toohey J).

<sup>65</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 442 (King CJ).

<sup>66</sup> *Ibid* 442.

<sup>67</sup> *Ibid* 443.

<sup>68</sup> *Ibid* 448.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Diprose v Louth [No 2]* (1990) 54 SASR 450, 453 (Jacobs ACJ), 475 (Legoe J), (Matheson J dissenting).

the High Court were dismissed.<sup>71</sup> Matheson and Toohey JJ's minority judgments did not question the findings of fact, but gave more weight to evidence concerning the conversation with Mr Volkhardt, and Mr Diprose's knowledge of Ms Louth's history with depression.

Ms Louth's vulnerability was downplayed in both the trial and majority appellate judgments. While Mr Diprose was cast as a trustworthy, lovesick, generous man of modest means, Ms Louth was portrayed as a manipulative, gold-digging 'damned whore.'<sup>72</sup> The trial and majority appellate judgments paid little attention to the fact that Ms Louth was neurodivergent, a single mother, and a rape survivor.<sup>73</sup> The minority judgments did put more weight on these aspects of the evidence. Unfortunately, the minority judgments painted her as a victim of tragic personal circumstances, rather than structural inequality and Mr Diprose's conduct.<sup>74</sup>

The use of colourful language in the trial judgment disguises the boundaries between facts and the judge's prejudices.<sup>75</sup> The stereotypes that underpin the judgments remain concealed. Despite the large number of unsupported assertions made by the trial judge, on appeal his findings were upheld as 'findings of fact.'<sup>76</sup> One of the reasons that Ms Louth's challenges to King CJ's stereotype-laden judgment failed was the courts' adherence to the notion that the trial judge is best placed to establish the facts.<sup>77</sup>

Feminist legal scholars have already addressed the impact of gendered stereotypes in the judgments.<sup>78</sup> For this reason, this article will focus on how the trial and appellate

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<sup>71</sup> *Louth v Diprose* (1992) 175 CLR 621, 626 (Mason CJ), 633 (Brennan J), 639 (Deane J), 643 (Dawson, Gaudron and McHugh JJ), (Toohey J dissenting).

<sup>72</sup> Sarma uses the phrase 'damned whore' to describe the stereotypical treatment of Ms Louth in Sarma, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 719 citing Anne Summers, *Damned Whores and God's Police: The Colonisation of Women in Australia* (NewSouth, 3<sup>rd</sup> ed, 2016).

<sup>73</sup> Sarma, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 714.

<sup>74</sup> *Ibid* 719.

<sup>75</sup> Bibi Sangha and Bob Moles, 'Gendered Stereotypes and Unconscionability — Can We Trust the Judges to Get It Right' (1997) 1 *Flinders Journal of Law Reform* 145, 175.

<sup>76</sup> *Ibid* 179; for example, King CJ described Mr Diprose as a 'strange romantic character' and stated that '[w]hen the scales fell from his eyes he bitterly regretted the transfer of the house': *Diprose v Louth [No 1]* (1990) 54 SASR 438, 443, 447.

<sup>77</sup> In both appeals the judges approved the statement that 'the advantage possessed by the trial judge of seeing the parties and estimating their characters and capacities is immeasurable': *Wilton v Farnworth* (1948) 76 CLR 646, 654 (Rich J) quoted in *Diprose v Louth [No 2]* (1990) 54 SASR 450, 453 (Jacobs ACJ), 466 (Legoe J); cited in *Louth v Diprose* (1992) 175 CLR 621, 633 (Deane J), 641 (Dawson, Gummow, McHugh JJ).

<sup>78</sup> Otto, above n 2; Sarma, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4.

judgments revert to the stereotypes of mentally ill women. There are three key issues which highlight the significance of stereotypes in this case: the finding that Ms Louth manufactured an atmosphere of crisis, the treatment of evidence suggesting violence in the relationship, and the dismissal of Ms Louth's evidence and credibility as a witness.

A '*Manufacturing an Atmosphere of Crisis*'

The emphasis on deceit in *Louth v Diprose*<sup>79</sup> has been influential on the unconscionability doctrine.<sup>80</sup> At all stages of litigation, the trial and majority judgments cast Ms Louth as a manipulative woman who deliberately created a false situation of crisis to obtain the gift from Mr Diprose. For example, at trial King CJ stated:

I am satisfied that she *deliberately manufactured the atmosphere of crisis* in order to influence the plaintiff to provide the money for the house. I am satisfied, moreover, that she *played upon his love and concern for her by the suicide threats* in relation to the house. She then refused offers of assistance short of full ownership of the house knowing that his emotional dependence upon her was such as to lead inexorably to the gratification of her unexpressed wish to have him buy the house for her. I am satisfied that it was a *process of manipulation* to which he was utterly vulnerable by reason of his infatuation.<sup>81</sup>

This view was reiterated in most of the High Court judgments.<sup>82</sup> For example, Deane J found that Ms Louth:

deliberately used that love or infatuation and her own deceit to create a situation in which she could unconscientiously manipulate the respondent to part with a large proportion of his property.<sup>83</sup>

Dawson, Gaudron and McHugh JJ's joint judgment acknowledged that Mr Diprose's case involved a 'substantial evidentiary burden,'<sup>84</sup> but upheld King CJ's decision. They acknowledged that the different experiences of judges mean that different

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<sup>79</sup> (1992) 175 CLR 621.

<sup>80</sup> Most recently, in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 293, 439 [161] ('*Kakavas*') the High Court clarified that the unconscionability doctrine can only be applied if the defendant's conduct involves 'victimisation' or 'exploitation' with a 'predatory state of mind.' *Louth v Diprose* (1992) 175 CLR 621 preceded *Kakavas* (2013) 250 CLR 293, however the majority judgments certainly positioned Ms Louth's conduct as exploitation as opposed to mere indifference. See Thampapillai, above n 10, 82–4; *Mackintosh v Johnson* (2013) 37 VR 301; *Xu v Lin* (2005) 12 BPR 23 131.

<sup>81</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 448 (emphasis added).

<sup>82</sup> *Louth v Diprose* (1992) 175 CLR 621, 624–6 (Mason CJ); 630–2 (Brennan J); 637 (Deane J); 642 (Dawson, Gaudron and McHugh JJ).

<sup>83</sup> *Louth v Diprose* (1992) 175 CLR 621, 638.

<sup>84</sup> *Ibid* 639.

judges may make different assessments of character and evidence; however, they viewed this as a reason why they *should not* interfere with King CJ's findings.<sup>85</sup>

The majority appellate judges merely reinforced the view that legal processes establish the truth of events,<sup>86</sup> without interrogating the problematic methods King CJ used to assess the characters of Ms Louth and Mr Diprose, and the stereotypes that underpinned his decision. As Sangha and Moles observe, King CJ's 'findings of fact' are better described as 'attributions and assertions'.<sup>87</sup> Once the courts decided that these 'facts' could not be altered or interfered with, there was no chance that Ms Louth's appeal could succeed.<sup>88</sup> Further, the majority appellate judgments do not account for the fact that the judicial processes of fact-finding and decision-making occur simultaneously.<sup>89</sup> The facts established by King CJ were not independent of his conclusion.

At all levels, the courts reinforced prejudicial stereotypes that legitimised discrimination.<sup>90</sup> This stereotypical treatment served a purpose: to provide Mr Diprose with relief. Mere infatuation would not have been enough to find that Ms Louth's receipt and retention of the gift was unconscionable — she had to exploit him.<sup>91</sup> As stated by Haigh and Hepburn: 'The court could not disregard Diprose's manner as consistent with that of an educated male solicitor and so targeted Louth as the cause of this aberrant behavior'.<sup>92</sup> Stereotypes assisted in the manipulation of the facts to fit within the confines of the unconscionability doctrine.

In order for Ms Louth's identity to fit within this narrative, her mental illness could not be viewed as legitimate. Historically, mentally ill people have been characterised as irrational actors, and denied status as full legal subjects.<sup>93</sup> To ensure that Ms Louth could be cast as a rational individual who could take advantage of Mr Diprose, her neurodivergence had to be concealed. Delegitimising her suicide attempts and depression allowed her discussions of suicide with Mr Diprose to be portrayed as a key part of a process of calculated manipulation.

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<sup>85</sup> Ibid 640.

<sup>86</sup> Carol Smart, *Feminism and the Power of Law* (Routledge, 1989), 10–11 quoted in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002), 65–6.

<sup>87</sup> Sangha and Moles, above n 75, 179.

<sup>88</sup> Ibid.

<sup>89</sup> Kim Lane Scheppele, 'Facing Facts in Legal Interpretation' (1990) 30 *Representations* 42, 60 quoted in Graycar and Morgan, above n 78, 67.

<sup>90</sup> Haigh and Hepburn, above n 50, 308.

<sup>91</sup> Justice Deane reinforced this purpose of the unconscionability doctrine: 'The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimisation': *Louth v Diprose* (1992) 175 CLR 621, 640, 638.

<sup>92</sup> Haigh and Hepburn, above n 50, 300.

<sup>93</sup> Steven T Yannoulidis, 'Mental Illness, Rationality, and Criminal Responsibility (Tropes of Insanity and Related Defences)' (2003) 25 *Sydney Law Review* 189, 210–11.

The characterisation of Ms Louth as a manipulative liar who manufactured suicide attempts to acquire a gift rests on the notion that her mental illness does not exist, or is not as severe as she makes it out to be.<sup>94</sup> This story results from the privileging of neurotypical and abled knowledge in legal discourse and society. Disabled people have been consistently stereotyped as ‘deficient, pitiable, wicked or malign, dangerous or valueless’<sup>95</sup> or ‘needy and inferior.’<sup>96</sup> However, people with mental disabilities are generally more feared and stigmatised.<sup>97</sup>

Mentally ill people are frequently stereotyped as ‘erratic, deviant, morally weak, unattractive, sexually uncontrollable, emotionally unstable, lazy, superstitious, ignorant, and demonstrate a primitive morality.’<sup>98</sup> The portrayal of Ms Louth is not just assisted by these stereotypes of mental illness, but also by the stereotypical treatment of women as liars.<sup>99</sup> These intersecting stereotypes are not only reinforced by the characterisation of Ms Louth as manipulative, but also the court’s treatment of her evidence.

Mythologies surrounding mental illness serve to cast neurodivergent people as the ‘other,’ creating a schism between the ‘sane’ and the ‘insane.’<sup>100</sup> Some of these myths attribute internal weakness; ‘if mentally ill people would only try harder, they would get well.’<sup>101</sup> Others stereotype complex, diverse disabilities as characterised by bizarre, observable ‘mad’ behaviour.<sup>102</sup> These myths underpin the courts’ treatment

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<sup>94</sup> The trial judge found that Ms Louth ‘was a calculating witness who was prepared to tailor her evidence in order to advance her case. In particular, I found her evidence as to the circumstances leading to the house transaction quite unimpressive’. Further, he held that Ms Louth ‘played on his love and concern by [making] the suicide threats ... [i]t was a process of manipulation to which he was utterly vulnerable by reason of his infatuation ... I disbelieve the defendant’s evidence that she thought the plaintiff was a wealthy man.’ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 448.

<sup>95</sup> Hosking, above n 30, 14.

<sup>96</sup> Jane Byeff Korn, ‘Crazy (Mental Illness Under the ADA)’ (2003) 36 *University of Michigan Journal of Law Reform* 585, 586.

<sup>97</sup> *Ibid* 587.

<sup>98</sup> Michael L Perlin, ‘Where the Winds Hit Heavy on the Borderline: Mental Disability Law, Theory and Practice, Us and Them’ (1998) 31 *Loyola of Los Angeles Law Review* 775, 785.

<sup>99</sup> See Lynn Hecht Schafran, ‘Credibility in the Courts: Why Is There a Gender Gap?’ (1995) *Best of the American Bar Association Sections: General Practice, Solo & Small Firm Division* 40, 40 quoted in Amy D Ronner, ‘The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in *Jones v Clinton*’ (1997) 31 *University of California, Davis Law Review* 123, 125, 130.

<sup>100</sup> Perlin, above n 98, 787.

<sup>101</sup> Korn, above n 96, 605. Perlin, above n 98, 787.

<sup>102</sup> Michael L Perlin, ‘“Infinity Goes Up on Trial”: Sanism, Pretextuality, and the Representation of Defendants with Mental Disabilities’ 16 (2016) *Queensland University of Technology Law Review* 106, 113; Perlin, above n 98, 786.

of Ms Louth. The failure of the court to treat her psychiatric condition as a *real* disability reinforces the stereotype that 'disability is always physical and visible.'<sup>103</sup>

As Ms Louth's presentation did not accord with common mythologies surrounding mental illness, the judges could only see one other explanation for her discussions of suicide — calculated manipulation. As noted by Hepburn, 'not only is she presumed to be emotionally balanced and unaffected, she is actually considered to have abused the other party *because* of this presumption.'<sup>104</sup> The trial and majority judgments appear to have little regard for evidence concerning Ms Louth's mental condition and Mr Diprose's knowledge of her disability. Any evidence suggesting that Ms Louth's comments to Mr Diprose were a genuine expression of her suicidal thoughts was ignored or downplayed by the judges.

At each level of litigation, the judges mentioned Ms Louth's shoplifting charge and suicide attempts,<sup>105</sup> but did not discuss any expert evidence regarding her condition.<sup>106</sup> The majority judgments made little of the fact that Mr Diprose acted as her solicitor in the shoplifting matter, and was therefore privy to the contents of reports documenting her psychiatric condition. Instead, the judgments relied on prejudicial stereotypes of gender and mental illness — a methodology that is contrary to the aims of neutrality and impartiality.<sup>107</sup>

The failure to attribute Ms Louth's expressions of suicidal thoughts to her disability demonstrates how judges often fail to comprehend the nature of psychiatric disability.<sup>108</sup> They were unable to relate to Ms Louth's sense of insecurity,<sup>109</sup> and the

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<sup>103</sup> Grace James, 'An Unquiet Mind in the Workplace: Mental Illness and the Disability Discrimination Act 1995' (2004) 24 *Legal Studies* 516, 536; It is arguable that similar stereotypes of mental illness influenced the judgment of *Kakavas*, where the High Court held that a plaintiff with a gambling addiction 'was able to make rational decisions to refrain from gambling altogether had he chosen to do so. He was certainly able to choose to refrain from gambling with Crown': *Kakavas* (2013) 250 CLR 392, 432 [135]. *Kakavas* was not a claim based on emotional dependence, and the mentally ill plaintiff was male. The stereotypes that underpin this important unconscionability case fall outside the scope of this article. See Kate Seear, 'Making Addiction, Making Gender: A Feminist Performativity Analysis of *Kakavas v Crown Melbourne Limited*' (2015) 41 *Australian Feminist Law Journal* 65.

<sup>104</sup> Hepburn, above n 46, 211 (emphasis in the original).

<sup>105</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 440; *Diprose v Louth [No 2]* (1990) 54 SASR 450, 458, 481; *Louth v Diprose* (1992) 175 CLR 621, 642 (Dawson, Gaudron and McHugh JJ).

<sup>106</sup> Without access to the transcript of the trial judgment, it is unclear whether evidence of this kind was ever considered.

<sup>107</sup> See Haigh and Hepburn, above n 50, 301.

<sup>108</sup> 'Judges interpret disability as static, unchanging and consistent across situations and noncontextual': Susan Stefan, 'Remarks at the Mental Disability Law Symposium 3 (15 November, 1997) 7 as quoted in Perlin, above n 98, 786 n 52.

<sup>109</sup> Sangha and Moles, above n 75, 179.

reality of being depressed and suicidal. This shows how stereotypes can render neurodivergence as invisible in case law. *Louth v Diprose*<sup>110</sup> is a stark example of how the power of law can be used to disqualify alternative accounts from people who sit outside of dominant male, neurotypical knowledge.<sup>111</sup>

### *B A Violent Relationship?*

Sarmas has previously addressed how the transcript of the trial suggests that Mr Diprose's conduct towards Ms Louth could be characterised as sexual harassment, and verbal and physical abuse.<sup>112</sup> This must be understood in the context of structural inequality, and the reality that women diagnosed with mental illnesses face higher risks of sexual exploitation.<sup>113</sup> The trial judge trivialised the importance of the violent incident to the case, finding that it was a peripheral matter.<sup>114</sup> This incident of physical violence was not directly relevant to the application of the unconscionability doctrine, 'but it cases the relationship between the parties in an altogether different light.'<sup>115</sup> Downplaying the relevance of this evidence allows the characterisation of Mr Diprose as a 'lovesick fool' to remain plausible, rather than transforming the story into Mr Diprose physically, financially and emotionally dominating the life of a mentally ill woman.

This alternative story would be inconsistent with the claim that Mr Diprose suffered a 'special disadvantage', and prevent his unconscionability claim from succeeding. It is ironic that equity moved to protect Mr Diprose against 'idiosyncratic vulnerabilities which are openly created' when the law failed to protect Ms Louth from being assaulted and sexually harassed by Mr Diprose.<sup>116</sup> The High Court's treatment of the accusations of violence against Ms Louth is illustrative of how 'violence against disabled women and girls continues in a culture of silence, denial and apathy.'<sup>117</sup> The stereotype of the manipulative, 'crazy' woman disguises the reality; women diagnosed with a mental illness frequently experience victimisation.<sup>118</sup>

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<sup>110</sup> (1992) 175 CLR 621.

<sup>111</sup> See Smart, above n 86, 10–11, quoted in Graycar and Morgan, above n 86, 65–6.

<sup>112</sup> Sarmas, 'A Response to Peter Heerey', above n 4, 84–5.

<sup>113</sup> Lauren Mzock and Zlatka Russinova, 'Intersectional Stigma and Acceptance Process of Women with Mental Illness' (2015) 38 *Women & Therapy* 14, 16.

<sup>114</sup> Trial transcript, 169 (King CJ), as quoted in Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 716; See *Diprose v Louth [No 1]* (1990) 54 SASR 438, 442 (King CJ); *Diprose v Louth [No 2]* (1990) 54 SASR 450, 460 (Legoe J); *Louth v Diprose* (1992) 175 CLR 621, 647 (Toohey J).

<sup>115</sup> Thampapillai, above n 10, 86.

<sup>116</sup> Hepburn, above n 46, 210.

<sup>117</sup> Leanne Dowse, Carolyn Frohmader and Helen Meekosha, 'Intersectionality: Disabled Women' in Patricia Easteal (ed), *Women and the Law in Australia* (Lexisnexis Butterworths, 2010) 249, 252.

<sup>118</sup> Mzock and Russinova, above n 113, 16.

Sarmas has dismissed both the majority and minority High Court judgments as stereotypes or 'stock stories'.<sup>119</sup> The story of the majority pits the 'damned whore' against the 'strange romantic character'<sup>120</sup> or 'lovestruck knight in shining armour'.<sup>121</sup> In contrast, the minority judgment stereotypes Ms Louth as the 'pitiful victim' and Mr Diprose as a 'benign romantic suitor'.<sup>122</sup> Both sets of stories rely on dangerous stereotypes that conceal the potentially violent nature of the relationship.

### *C Treatment of Ms Louth's Evidence*

At the trial and appellate levels, the judges mainly focused on Mr Diprose's evidence.<sup>123</sup> This meant that the courts found emotional dependence in a situation where only one party has argued that such a relationship existed. The trial judge found that Mr Diprose had provided false evidence on his primary claim,<sup>124</sup> but accepted his evidence whenever it conflicted with that of Ms Louth;<sup>125</sup> 'Mary [Louth] is not believed by the judge at all, even where her evidence accords with the truth.'<sup>126</sup>

There have been various discussions about how the gendered assumptions about Ms Louth's character contributed to the judiciary side-lining her evidence. Hidden from view are the assumptions the judges made about Ms Louth on the basis of her neurodivergence. Much of Ms Louth's evidence was ignored because King CJ described her evidence in the following terms:

I formed the impression that [Ms Louth] was a calculating witness who was prepared to tailor her evidence in order to advance her case. In particular I found her evidence as to the circumstances leading to the transaction quite unimpressive.<sup>127</sup>

In contrast, King CJ made the following comments about Mr Diprose's evidence:

I found much of his evidence as to the general relationship of the parties and the circumstances in which the subject of the house transaction arose convincing, but

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<sup>119</sup> Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 718.

<sup>120</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 443.

<sup>121</sup> Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 719.

<sup>122</sup> *Ibid.*

<sup>123</sup> Even the minority judgments rely on the evidence of Mr Volkhardt instead of that of Ms Louth. For example, Toohey J stated that it was 'necessary to put to one side the evidence of [Ms Louth] herself [because King CJ] found her testimony to be 'quite unimpressive': *Louth v Diprose* (1992) 175 CLR 621, 652.

<sup>124</sup> *Diprose v Louth [No 2]* (1990) 54 SASR 450, 480 (Matheson J).

<sup>125</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 448 (King CJ).

<sup>126</sup> Sangha and Moles, above n 75, 157.

<sup>127</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 444.

his demeanour was not such as to persuade me to accept evidence which I consider to be improbable or which is in conflict with other convincing evidence.<sup>128</sup>

If the High Court had attempted to justify the Supreme Court's treatment of the evidence, this could have revealed how stereotypes influenced the treatment of Ms Louth's evidence. The failure of the High Court to find any injustice in the construction of the facts highlights the inadequacy of appellate courts in correcting errors made at the trial level.<sup>129</sup>

The fact-finding process itself results in systemic bias as the trial judge can only assess the demeanour of the witnesses.<sup>130</sup> Overemphasising the importance of assessing how a witness speaks or dresses privileges those who can appear to be neurotypical in stressful, unfamiliar circumstances. Assessment of the 'look and sound' of witnesses can unfairly influence whether judges 'hear' neurodivergent witnesses, who often behave, speak or dress differently to the expectations of neurotypical people.<sup>131</sup> This systemic bias was evident in *Louth v Diprose*.<sup>132</sup> While it is unknown how Ms Louth dressed, her manner of giving evidence is reproduced in the transcript.<sup>133</sup>

Contrasting the manners in which Mr Diprose and Ms Louth provided evidence illuminates how the fact-finding process privileges neurotypical knowledge. Sangha and Moles have commented on how Mr Diprose's mastery of legal discourse increased the likelihood that his evidence would be accepted.<sup>134</sup> Mr Diprose's evidence showcases his attention to detail. He remembers dates of telephone conversations and meetings that occurred up to nine years before.<sup>135</sup> He even remembers the date of one of the two occasions which he and Ms Louth had sexual intercourse.<sup>136</sup> It is interesting that the court did not find Mr Diprose's remarkable memory to be an indication that *he* was the one who was tailoring evidence and acting in a calculated manner.

In contrast, Ms Louth's evidence was 'muddled' in regards to the timeline of events.<sup>137</sup> This aspect of the evidence highlights a disconnection between her actual evidence and the finding that she was 'calculating' or 'tailoring' her evidence. Sangha and Moles observed that:

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<sup>128</sup> Ibid 443.

<sup>129</sup> See Sangha and Moles, above n 75, 146.

<sup>130</sup> Ibid 149.

<sup>131</sup> Ibid 150.

<sup>132</sup> (1992) 175 CLR 621.

<sup>133</sup> Sangha and Moles, above n 75.

<sup>134</sup> Ibid 163.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid 164.

<sup>137</sup> Ibid.

Mary was in some ways an unruly witness, not always answering the questions, or restricting her answer to the precise point being asked. On our reading of the transcript, we would suggest that this was not because Mary was being 'manipulative', but because she often did not understand the question.<sup>138</sup>

This explanation is plausible, but ignores the fact that evidence and court procedures consistently privilege neurotypical people. During the time period in question, Ms Louth suffered from mental health issues that greatly affected her day-to-day life. This time period was not only marked by unstable living arrangements and personal problems, but also suicide attempts.<sup>139</sup>

Despite the evidence of Ms Louth's mental condition, her evidence was compared to Mr Diprose's evidence in a manner that focused on attention to detail and memory. Depression and emotional distress can greatly impact on cognitive functioning and memory.<sup>140</sup> There is no acknowledgement that her mental condition could have affected her ability to remember sequences of events as she has been stereotyped as a calculating manipulator.<sup>141</sup> If the judiciary were to stay true to this stereotype, they could not address the effect of her mental condition on her oral evidence.

It is also possible that Ms Louth was perceived to be less credible as she was compared against the male 'genderlect' standard.<sup>142</sup> Indicators of credibility are inherently gendered.<sup>143</sup> It is possible that Ms Louth did not conform the more credible male genderlect as her evidence was emotional, and at times inconsistent. On the other hand, Mr Diprose's evidence adhered to the more masculine indicators of credibility: factual, rational, and consistent. Thus, the judiciary's consideration of Ms Louth's evidence was marred by stereotypes surrounding both gender and neurodivergence.

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<sup>138</sup> Ibid 168.

<sup>139</sup> *Diprose v Louth [No 1]* (1990) 54 SASR 438, 440.

<sup>140</sup> MP Austin et al, 'Cognitive Function in Major Depression' (1992) 25(1) *Journal of Affective Disorder* 21; Diana Byrd Burt, Mary Jo Zembler and George Niederehe, 'Depression and Memory Impairment: A Meta-Analysis of the Association, its Pattern and Specificity' (1995) 117 *Psychological Bulletin* 285.

<sup>141</sup> Ms Louth was consistently imprecise about dates: Sangha and Moles, above n 75, 166.

<sup>142</sup> The term 'genderlect' describes the differences between men and women in terms of their communication styles. As noted by Easteal, 'it is the masculine genderlect that prevails in the adversarial court system 'with its gladiatorial, combative features' Patricia Easteal, 'Setting the Stage: The "Iceberg" Jigsaw Puzzle' in Easteal (ed) above n 117 1, 17 quoting Regina Graycar and Jenny Morgan, *The Hidden Gender of the Law* (Federation Press, 1990) 410.

<sup>143</sup> Easteal, above n 117, 17.

VII *WILLIAMS V MAALOUF*

The more recent case of *Williams v Maalouf* involved a neurodivergent plaintiff seeking equitable relief of a gift provided to a male defendant and his partner.<sup>144</sup> The plaintiff, Ms Williams, became extremely depressed after experiencing an ‘abnormal grief reaction’ to the death of her mother.<sup>145</sup> Ms Williams was also an ovarian cancer survivor, and had strong Christian beliefs.<sup>146</sup> She formed an intense attachment to a co-worker, Ms Jeremic, who had recently been diagnosed with cancer.<sup>147</sup> She had known Ms Jeremic for many years, but their relationship only became close after Ms Williams’ mother passed away in January 2003.<sup>148</sup> Ms Williams cared for Ms Jeremic, believing that God had sent her ‘a sufferer’.<sup>149</sup> In July 2003, she gifted \$200 000 to Ms Jeremic and her partner for them to purchase a house that they could live in while Ms Jeremic was recovering from cancer.<sup>150</sup> Upon Ms Jeremic’s death, her partner sought to retain the gift.<sup>151</sup>

Ms Williams alleged that at the time of giving Ms Jeremic and the defendant the gift, she was suffering from a special disadvantage: ‘she was an elderly woman who was mentally impaired due to depression and clinical distress and, in addition, that she was emotionally dependent on Ms Jeremic.’<sup>152</sup> She argued that at the time the gift was made, the defendant knew or ought to have known that she was suffering from these special disabilities, and thus the receipt of the gift was unconscionable.<sup>153</sup> Ms Williams also alleged that the money was a conditional gift, and the defendant and Ms Jeremic breached the conditions attached to the gift.<sup>154</sup> The conditional gift argument was unsuccessful, but Hargrave J found that the defendant’s receipt and retention of the gift was unconscionable, and that Ms Williams’ emotional dependence on Ms Jeremic was the basis of special disadvantage.<sup>155</sup>

On the surface, it appears that Ms Williams was treated far more favourably than Ms Louth. However, the judgment reinforces prejudicial stereotypes surrounding neurodivergent women. Considered together, *Williams v Maalouf*<sup>156</sup> and *Louth v*

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<sup>144</sup> *Williams v Maalouf* [2005] VSC 346 (1 September 2005).

<sup>145</sup> *Ibid* [151].

<sup>146</sup> *Ibid* [77].

<sup>147</sup> *Ibid* [137].

<sup>148</sup> *Ibid* [30].

<sup>149</sup> *Ibid* [70].

<sup>150</sup> *Ibid* [1].

<sup>151</sup> *Ibid* [82].

<sup>152</sup> *Ibid* [13].

<sup>153</sup> *Ibid* [14].

<sup>154</sup> *Ibid* [4].

<sup>155</sup> *Ibid* [189].

<sup>156</sup> [2005] VSC 346 (1 September 2005).

*Diprose*<sup>157</sup> present vastly different problems in terms of the employment of stereotypes. The most problematic aspects of the *Williams v Maalouf* judgment include: the characterisation of Ms Williams' special disability, treatment of her evidence, reversion to stereotypes about disability and care, and findings of the defendant's knowledge of Ms Williams' special disadvantage.

#### *A Characterisation of 'Special Disadvantage'*

Justice Hargrave considered a psychiatrist's evidence that Ms Williams was depressed and temporarily had below average intelligence due to emotional distress.<sup>158</sup> Interestingly, he did not use this evidence to find that Ms Williams' 'special disadvantage' was a mental disability. Emotional dependence is discussed as the sole source of special disadvantage.<sup>159</sup> He made this finding despite the fact that the medical evidence suggested that the emotional dependence was a result of Ms Williams' depression and 'abnormal grief reaction.'<sup>160</sup> The reasons behind this finding are not discussed in the judgment, but it does seem to reflect that depression is a mental *illness*, foreign to the social category of disability. By characterising Ms Williams' 'special disadvantage' as 'emotional dependence,' the court characterises her as a poor, generous victim rather than addressing the structural inequality faced by neurodivergent people.

#### *B Treatment of Ms Williams' Evidence*

The Court's treatment of Ms Williams' evidence contrasts starkly with the treatment of Ms Louth's evidence. Hargrave J noted that:

Much of her evidence was affected by emotion. She had great difficulty concentrating on the subject matter of many questions and often provided confused and irrelevant responses. She sometimes exaggerated. There were occasions where the plaintiff's recollection is contradicted by objective or other credible evidence. However, from her demeanour as a witness, I am satisfied that the plaintiff did not tell any deliberate untruth in the course of her evidence and, unless specifically mentioned in these Reasons, I accept her evidence.<sup>161</sup>

Many of these statements evidence a comparison of Ms Williams' demeanour to that expected of a neurotypical witness. Hargrave J also devoted two pages of the judgment to the consideration of whether Ms Williams was 'faking bad' to the psychiatrist in testing.<sup>162</sup> This reflects stereotypes of mental illness as not being real.

<sup>157</sup> (1992) 175 CLR 621; *Diprose v Louth [No 1]* (1990) 54 SASR 438; *Diprose v Louth [No 2]* (1990) 54 SASR 450.

<sup>158</sup> *Williams v Maalouf* [2005] VSC 346 (1 September 2005) [141]–[161].

<sup>159</sup> *Ibid* [184].

<sup>160</sup> *Ibid* [151].

<sup>161</sup> *Ibid* [31].

<sup>162</sup> *Ibid* [154]–[161].

Once again, the court has faced the challenge of placing a party on one side of the sane/insane dichotomy.

### *C Stereotypes Surrounding Disabled Women and Care*

Frequently, women face the problem of being stereotyped as caregivers, limiting their ability to properly participate in the public sphere. The dichotomy of cared-for/care-giver also affects the legal treatment of disabled and neurodivergent women,<sup>163</sup> but the stereotype is reversed. As noted by Dowse, Frohmader and Meekosha, '[d]isabled women are all too often stereotyped as people in need of personal assistance and support' and seldom as people who care for others.<sup>164</sup>

The dichotomisation of care and care-giving provides a further explanation for why the court could only see Ms Williams as a non-disabled care-giver. The story told throughout the judgment is that Ms Williams was emotionally dependent on Ms Jeremic by *caring* for her. For example, Hargrave J found that Ms Jeremic's welfare 'dominated' Ms Williams' life:

[From when Ms Williams was informed of Ms Jeremic's illness] until the making of the gift and for a time thereafter, the plaintiff visited Ms Jeremic on a daily basis and devoted her time, energy and resources towards the welfare of Ms Jeremic. During this period, the only time which the plaintiff spent away from Ms Jeremic was whilst she was at work, asleep or performing activities directed at the welfare of Ms Jeremic, such as preparing food for her and purchasing medication and other items for her.

The plaintiff said in evidence that she prepared all the food for Ms Jeremic during this period. This often involved her cooking late into the evening after having worked and spending the earlier part of the evening visiting Ms Jeremic and attending to her needs. During these visits, as well as providing emotional support for Ms Jeremic, the plaintiff attended to cooking and cleaning the Sturrock Street flat.<sup>165</sup>

This extract clearly characterises Ms Williams as the caregiver, and Ms Jeremic as the person who was cared for. Is it possible that Ms Jeremic was also caring for Ms Williams? The fact that Ms Williams often engaged in tearful discussions with Ms Jeremic about her grief points towards the existence of an alternative story of a neurodivergent woman who was engaging in a mutually beneficial caring relationship with Ms Jeremic.<sup>166</sup> The evidence left open the possibility that Ms Williams

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<sup>163</sup> Dowse, Frohmader and Meekosha, above n 117, 260.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Williams v Maalouf* [2005] VSC 346 (1 September 2005) [61].

<sup>166</sup> *Ibid* [75].

was not only 'emotionally depending' on Ms Jeremic by caring for her, but was also receiving some form of emotional care and support from Ms Jeremic.<sup>167</sup>

#### *D Defendant's Knowledge of Special Disadvantage*

The Queensland Supreme Court considered the relevance of knowledge of a psychiatric condition in *Lee v Chai*.<sup>168</sup> In that case, Mr Lee alleged that Ms Chai unconscionably received a gift from him, by exploiting his emotional dependence on her. The court considered the defendant's knowledge of Mr Lee's personality disorder, as it was argued that this psychiatric condition was related to his emotional dependence on Ms Chai.<sup>169</sup> Medical experts were 'uncertain' as to whether the personality disorder impacted on Mr Lee's ability to exercise free will in making decisions.<sup>170</sup> The judge found that the expert medical reports '[did] not provide an adequate basis for me positively to conclude that Mr Lee's mental condition seriously affected his ability to make a judgment as to his own best interest.'<sup>171</sup> The judge considered whether Ms Chai could have been aware of Mr Lee's psychiatric condition, rather than his emotional dependence on her. This involved considering evidence regarding Ms Chai's knowledge of Mr Lee's alcohol abuse, opulent dress and use of psychiatric medication.<sup>172</sup>

In *Williams v Maalouf*<sup>173</sup>, Hargrave J considered the defendant's knowledge of Ms Williams' emotional dependence rather than of her psychiatric condition. He outlined a list of facts and circumstances that he found were evident to Ms Jeremic and the defendant, proving that they were aware of her emotional dependence.<sup>174</sup> However, many of these facts could have also have pointed towards their knowledge of her depression. For example, '[t]he plaintiff was suffering an extreme grief reaction to the death of her mother, such that she would often break into tears when discussing this matter with the defendant and Ms Jeremic,' and '[t]he plaintiff developed a sudden and intense attachment to Ms Jeremic immediately upon learning of her diagnosis with ovarian cancer.'<sup>175</sup>

The judgment does not discuss whether Ms Jeremic or the defendant knew that Ms Williams was seeing a doctor about depression and anxiety, and was prescribed

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<sup>167</sup> In a more subtle manner, this dichotomy is also reflected in the judgments in *Louth v Diprose* (1992) 175 CLR 621. The judiciary's erasure of Ms Louth's disability sits beside their acceptance of her role as a mother.

<sup>168</sup> [2013] QSC 136 (3 May 2013).

<sup>169</sup> *Ibid* [176].

<sup>170</sup> *Ibid* [230].

<sup>171</sup> *Ibid* [232].

<sup>172</sup> *Ibid* [236]–[243].

<sup>173</sup> [2005] VSC 346 (1 September 2005) [188].

<sup>174</sup> *Ibid*.

<sup>175</sup> *Ibid* [189].

an anti-depressant drug shortly after providing the gift.<sup>176</sup> Significantly, Dr Kennedy's evidence indicated that Ms Williams:

was depressed and emotionally dependent on Ms Jeremic whom the plaintiff saw as providing her with a replacement for her deceased mother. The plaintiff was also affected by lowered cognitive functioning, related to her depressive reaction to her mother's death.<sup>177</sup>

By formulating her special disadvantage as emotional dependence, Hargrave J excluded the possibility that her depression was also a disability. Erasing Ms Williams' depression from the construction of the special disadvantage changes the focus of the narrative of the judgment. While her depression is discussed, she is characterised as an elderly, generous, Christian woman who was having an 'extreme grief reaction.'<sup>178</sup> This treatment minimises the effect that depression had on her behaviour and decisions.

Characterising Ms Williams as a neurodivergent woman in difficult circumstances may not have changed the results of the case. However, the judgment missed an opportunity to explore the link between mental illness and emotional dependence in constructing 'special disadvantage.' The case could have challenged the frequently held belief that mentally ill women do not have capacity to enter into any transactions by finding that the exploitation made the transaction unconscionable.<sup>179</sup> Instead, the judgment revolves around a stereotypical story of a poor, old, grieving woman who followed her heart instead of her head.<sup>180</sup>

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<sup>176</sup> Ibid [138].

<sup>177</sup> Ibid [151].

<sup>178</sup> Ibid [189].

<sup>179</sup> At some points, the judgment almost achieved this. However, Ms Williams' actions were constantly linked with the effects of grief rather than depression. See, eg, *Williams v Maalouf* [2005] VSC 346 (1 September 2005) [186].

<sup>180</sup> 'In the plaintiff's own words, at the time of deciding to make the gift, and at the time of making it, her 'head was not working' and she acted spontaneously 'out of my chest, out of my heart': ibid [186]. In *Diprose v Louth [No 2]* (1990) 54 SASR 450, 451–2, Jacobs ACJ used similar language: 'in some respect this is but one more case in the annals of human relationships in which an infatuated but unrequited suitor has lavished gifts upon the subject of his infatuation, well knowing what he was doing and intending to do it, but in a sense allowing his heart to rule his head.'

## VIII IMPORTANCE OF MULTIFACETED INTERSECTIONAL ANALYSIS

Recently, Bartlett reimagined the case of *Louth and Diprose*,<sup>181</sup> creating an alternative feminist version of the High Court judgment.<sup>182</sup> The judgment shows how emphasising different events and interpreting the established 'facts' slightly differently can result in an entirely different outcome.<sup>183</sup> From a narrow gender standpoint, this alternative judgment is certainly a step forward. Bartlett's judgment diffuses the effect of gender stereotypes by focusing on the requirements for a successful action in unconscionability. However, the judgment demonstrates how a myopic focus on gender can hinder the plight of women facing intersectional oppression.

Bartlett does make some attempts to legitimise Ms Louth's mental illness. For example, Bartlett notes that 'Ms Louth made at least one serious attempt on her life after gaining ownership of the house.'<sup>184</sup> Importantly, Mr Diprose's knowledge of these circumstances as her friend and solicitor is acknowledged.<sup>185</sup> But this is where Bartlett's attention to Ms Louth's neurodivergence ends.

Although Bartlett may have avoided the gendered stereotypes linked with liberalised dichotomies, aspects of Bartlett's reimagined judgment echo the real minority judgment characterisations of Ms Louth as a victim:

It was never in contention that Ms. Louth was in an emotionally fragile state throughout her acquaintance with Mr. Diprose in South Australia, at least partially due to a number of traumatic events in her past including a brutal rape. She had attempted suicide after her marriage ended, and again shortly after having two surgical operations to remove a cancerous appendix and a complete hysterectomy.<sup>186</sup>

Just like the stereotypical characterisation of Ms Louth as a 'damned whore,' a 'victim' story only serves to reinforce dominant stereotypes.<sup>187</sup> Like the minority

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<sup>181</sup> *Louth v Diprose* (1992) 175 CLR 621.

<sup>182</sup> Heather Douglas et al 'Introduction: Righting Australian Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 1, 8; see also Heather Roberts and Laura Sweeney, 'Review Essay: Why (Re)Write Judgments?' *Australian Feminist Judgments: Righting and Rewriting Law* (2015) 37 *Sydney Law Review* 457, 458.

<sup>183</sup> See Richard Delgado, 'Story-Telling for Opportunists and Others: A Plea for Narrative' in Richard Delgado (ed), *Critical Race Theory: The Cutting Edge* (Temple University Press, 1995) 68–9 as quoted in Graycar and Morgan, above n 78, 67.

<sup>184</sup> Bartlett, above n 13, 199 (emphasis in original).

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 720.

High Court judgments,<sup>188</sup> Bartlett's reimagined judgments reinforce stereotypes about 'crazy' women and victimhood.<sup>189</sup>

In Bartlett's judgment, the words 'emotionally fragile' not only reinforce toxic stereotypes about women and emotions,<sup>190</sup> but also skirt around the difference between ordinary emotions and depression. In the absence of any medical evidence, Bartlett has presented Ms Louth's difficult circumstances as if they are causatively linked with her suicide attempts. Ms Louth has not just experienced a temporary period of mere emotional instability or sadness. Depressed individuals frequently attempt to take their lives in the absence of other external circumstances. Often, it is the dark experience of depression that causes suicide, not an inability to deal with difficult circumstances, life events, or victimhood. Bartlett's reimagined judgment not only relies on the denial of Ms Louth's neurodivergence, but also is complicit in eliminating this aspect of her identity.

This alternative judgment shows how a narrow focus on a single social category can generate ignorance of other intersecting categories of identity. The judgment views the facts 'through the lens of women's experience' but essentialises that experience in a way that is ignorant of the intersectional realities of the experiences of neurodivergent women. This article has only focused on two prongs of Ms Louth's oppression, in an effort to extend the intersectional analysis of this case. However, it is also acknowledged that by focusing only on Ms Louth's gender and neurodivergence, the role of other social categorisations, such as class, are ignored.

'Neurodivergence' is an emerging social category. Unlike the more traditional categories of gender and class, neurodivergence has made infrequent appearances in critical legal scholarship. This article seeks to serve as a reminder that scholars must refrain from falling-back on well-worn categories of analysis, such as gender, and be open to exploring new categories of identity and oppression.

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<sup>188</sup> Ibid 719.

<sup>189</sup> Later, Bartlett more accurately describes Ms Louth as being in a 'depressive state,' but does not nullify the prejudicial characterisation of Ms Louth earlier in the judgment: Bartlett, above n 13, 205.

<sup>190</sup> Women are frequently stereotyped as more 'emotionally fragile' than men. As noted by Fivush and Buckner: 'Related to stereotypes of women being more emotional than men overall, women are also perceived to have less control over their emotional life than do men': Robyn Fivush and Janine P Buckner, 'Gender, Sadness, and Depression: The Development of Emotional Focus Through Gendered Discourse' in Agneta Fischer (ed), *Gender and Emotion: Social Psychological Perspectives* (Cambridge University Press, 2000) 232, 234 (citations omitted).

## IX CONCLUSION

The judgments of *Louth v Diprose*<sup>191</sup> and *Williams v Maalouf*<sup>192</sup> are both laden with stereotypes and misrepresentations of neurodivergent women. The presentations of Ms Louth and Ms Williams are not nuanced portrayals or different points on a spectrum. Rather, the cases reinforce the dichotomy of 'good' and 'bad' women.<sup>193</sup>

Otto characterises the 'good' women as 'silent, compliant and [willing to] stand behind their man.'<sup>194</sup> This may be true of unconscionability cases involving neurotypical women such as *Amadio*<sup>195</sup> and *Yerkey v Jones*.<sup>196</sup> However, *Williams v Maalouf*<sup>197</sup> relies on a different stereotype of the 'good' neurodivergent woman. Ms Williams was so affected by grief and depression that she made an imprudent gift to a sick coworker — she was *too generous*. Thus, the stereotype of the 'good' woman in the unconscionability doctrine is not restricted to the role of women in their relationships with men. In *Williams v Maalouf*,<sup>198</sup> the stereotype of the altruistic woman was extended to a non-romantic relationship.

On the other hand, 'bad' women such as Ms Louth are 'characterised as relatively autonomous, and as having questionable relationships with men whom they exploit'.<sup>199</sup> In the case of neurodivergent women, implementing this stereotype also relies on the denial of the existence of their mental condition. In order for Ms Louth to be cast as the manipulator, the impact of her mental condition on her behaviour and circumstances needed to be minimised. Ms Louth's suicide attempts are twisted into manipulative actions by a 'sane' woman, while Ms Williams' generosity is just 'mad' enough to warrant protection. In order to move away from 'good' and 'bad' stereotypes in the unconscionability doctrine, judges must be conscious of personal and systemic bias, and be open to emerging or intersecting social categorisations.

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<sup>191</sup> (1992) 175 CLR 621.

<sup>192</sup> [2005] VSC 346.

<sup>193</sup> See Otto, above n 2, 823.

<sup>194</sup> *Ibid.*

<sup>195</sup> (1983) 151 CLR 447.

<sup>196</sup> (1940) 63 CLR 649.

<sup>197</sup> [2005] VSC 346.

<sup>198</sup> *Ibid.*

<sup>199</sup> Otto, above n 2, 824.