
DURESS IN THE ROMAN-DUTCH LAW OF OBLIGATIONS

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1 Introduction

The institutional writers and practitioners of 16th, 17th and 18th century Roman-Dutch law looked to the Roman law of obligations to form the foundation upon which they erected their structure of private law. During the course of the reception, the idea was that Roman law was supposed to be referred to and applied only where the indigenous law did not already cater for a legal problem. As Van Leeuwen stated:

In practice a rule has been introduced that whenever indigenous customs or statutes are silent there shall be had immediate recourse to the Roman law.¹

In areas like mercantile law, and the law of obligations in general, the Roman law was far more advanced than anything the indigenous customary law could offer. As a result, the principles of law espoused by the Romans came to form the basis of the law in these areas.² The main source of authority was the Roman law articulated in Justinian's time – to use a religious allusion, the *Corpus Iuris Civilis* was their Bible, and the *Digest* their Gospel. As far as the doctrine of duress in particular is concerned, this Roman influence was significant: the principles espoused by the Roman-Dutch authorities bear a strikingly close resemblance to the principles discussed by the Romans centuries before. The concept of duress was given various names in the 16th, 17th and 18th centuries. Those who wrote in Latin continued to refer to the

1 Van Leeuwen *Censura Forensis* 1 1 1 2 (Barber & Macfadyen's translation). See too Grotius *Inleiding tot de Hollandsche Rechts-Geleerdheid* 1 2 22; Voet *Commentarius ad Pandectas* 1 1 2; Van Leeuwen *Het Roomsche Hollandsch Recht* 1 1 11 and 12.

2 As well as in much of the rest of Roman-Dutch law, where the Roman law came to be the dominant facet of the legal system. For further comment in this regard, see De Vos *Regsgeschiedenis* (1992) 159-160; Hahlo & Kahn *The South African Legal System and its Background* (1968) 516; Wessels *History of the Roman-Dutch Law* (1908) 566.

Roman term *metus*, whereas those who wrote in Dutch refer to “*vaere*” or “*vrees*”. For ease of reference, as well as for the sake of consistency, I shall use the English term “duress” in this article.

2 Duress and the law of obligations generally

Like the Romans, the Roman-Dutch authorities never drew a distinction between duress cases in the law of contract and what we now know to be the law of unjustified enrichment. For example, Voet refers to the principles underpinning the doctrine of duress as applying, in a wider sense, to all acts, whether it be acts pursuant to a contract, or any other form of payment or transfer.³ The rules, principles, actions and remedies discussed below therefore apply to both contracts and payments or transfers made outside the bounds of contract, in terms of what we would today in South Africa call the law of unjustified enrichment. It should be made clear from the outset, though, that most of the Roman-Dutch authorities did not recognise unjustified enrichment as a distinct branch of the law of obligations, with its own unique character and elements. The approach of the Roman-Dutch authorities to the principle of unjustified enrichment was Romanist, being heavily influenced by the relevant texts in the *Digest*. Justinian’s fourfold classification of obligations into contract, delict, quasi-contract and quasi-delict continued to be embraced by the majority of the leading Roman-Dutch writers,⁴ and cases of enrichment were usually treated as being quasi-contractual. The one exception appears to be Grotius, who in his *Inleiding* wrote a chapter on “*verbintenisse uit baet-trecking*” or obligations deriving from enrichment, all based on the principle that “equity does not permit that one man should be enriched at another man’s expense”.⁵ But his views do not seem to have had much impact, in a systematic sense, on the classical Roman-Dutch law of the 17th century. As in Roman times, the categories of contract and delict were far more significant than the marginal categories of quasi-contract or quasi-delict. By far the majority of the discussion about duress in the law of obligations occurs in the context of the law of contract. I shall follow this pattern in my discussion, although it must be understood that the rules, principles and remedies described below did apply beyond the bounds of contractual agreements, in a general sense.

3 See Voet (n 1) 4 2, and *White Brothers v Treasurer General* (1883) 2 SC 350.

4 See Voet (n 1) 12 6 1 and 44 7 4; Van der Linden *Koopmans Handboek (Institutes)* (tr by Henry) 1 14 5.

5 Grotius (n 1) 3 30 1-2 (Lee’s translation).

As pointed out above, the institutional writers of Roman-Dutch law relied almost exclusively upon the principles espoused by the Romans when describing the Roman-Dutch law of duress in the contractual milieu.⁶ The only major conceptual change that ought to be noted is that the old Roman distinction between contracts *bonae fidei* and contracts *stricti iuris* had disappeared. The Roman-Dutch authorities recognised one general theory of contract, in which all contracts were predicated upon good faith, and where all agreements seriously and deliberately entered into constituted a contract.⁷

3 The general characteristics of legal protection on account of duress

Because the Roman-Dutch authorities were so reliant upon the Roman law set out in the *Corpus Iuris Civilis*, their general approach to the problem of duress was very similar to that of the Romans. Like the Romans, the Roman-Dutch authorities also never got round to expounding a single theoretical framework for duress cases, or listing basic essential elements which would have to be proved before a duress claim would be successful. The authorities discuss the law in a rather disjointed and piecemeal fashion that is reminiscent of the casuistic Roman texts. Indeed, many writers openly model their work on parts of the *Corpus Iuris Civilis*, and simply provide an updated commentary on the law, matching the Roman source passage for passage. Accordingly, the primary texts have to be analysed and interpreted carefully in order to establish what sort of things a person claiming duress would have had to prove in order to be successful. Unsurprisingly, the matters which most Roman-Dutch writers seem to have considered fundamentally important to proving a duress claim mirror those discernable from the writings of the Roman jurists.

6 Van Huyssteen *Onbehoorlike Beïnvloeding en Misbruik van Omstandighede in die Suid-Afrikaanse Verbintenisreg* (1980) 66 shows that because the main Roman-Dutch writers took a Humanist approach to their work, much of the work and proposals of the Glossators and Commentators (which he describes in chapters III-VI) appear to have been ignored in favour of the principles articulated in the original Roman texts.

7 Wessels (n 2) 579 states: "From the twelfth century onwards the German nations strove to get rid of all unnecessary ceremonies in making contracts, and regarded the consensus of the parties as the essential element of every agreement." As such, the old Roman classification of contracts *reales et verbales*; *nominati et innominati*; *bonae fidei et stricti iuris* fell away. Decker (commenting in Van Leeuwen *Het Roomsche Hollandsche Recht* 4 2 1) said the following (Kotze's translation): "Further, we may conveniently dispose with the division of contracts into *stricti iuris* and *bonae fidei*, for according to our customs all contracts are considered to be *bonae fidei*." See too Voet (n 1) 12 1 3; Pothier *Obligations* §9; *Estate Schickerling v Schickerling* 1936 CPD 275.

3 1 Fear caused by a threat of harm

The Roman-Dutch authorities recognised the distinction between physical force (*vis absoluta*) and conditional fear (*vis compulsiva*). A transaction induced by the direct application of physical force was considered to lack the essential element of consent. Any purported agreement of this nature was thus void *ab initio*, and anything which had been handed over could be recovered by means of a *rei vindicatio*. Restitutionary remedies were not relevant to this sort of situation.⁸ The doctrine of duress was designed for instances of *vis compulsiva* – situations where an agreement was concluded or payment made on the basis of a fear of some horrible consequence. But the concept of “fear” requires some explanation. A person could not escape the consequences of his actions on the basis of simple fear which was abstractly perceived. The Roman-Dutch authorities required that the fear had to have been inspired by a threat of some kind which had been made by another person who was in some way party to the negotiation of the agreement. A causal connection between such a threat and the resultant fear was therefore an essential feature of any duress claim.⁹

For this reason a remedy for duress was not available in circumstances where an agreement had been entered into in an emergency situation. By this is meant a situation where the fear was caused by some environmental circumstance, rather than by a threat that had been articulated by a party to the negotiations, and which was designed to induce fear in the victim. Voet gives the following example to draw the distinction between the two scenarios:¹⁰

The case of those who have received something from another or put another under obligation to themselves in order to protect him when undergoing force is quite different. Reason tells us that such persons are not held liable if they have not themselves applied such force. They seem rather to have taken pay for their services than to have enjoyed a gain from another’s fear. On that basis the position can be defended

8 Voet (n 1) 4 2 1.

9 Voet (n 1) 4 2 1; Van Leeuwen (*CF* n 1) 1 4 41 9; Huber *Heedendaegse Rechtsgeleertheit* 4 38 1; Van Huyssteen (n 6) 67.

10 Voet (n 1) 4 2 6. Pothier (n 7) §24 says the same. The inspiration for this is *D* 4 2 9 1. See too Pauw *Observationes Tumultuariae Novae* 1 242. The only dissenting voice is Van Leeuwen (n 1) 4 42 4, who said that in a situation where a girl is in danger on the ice, and promises to marry a passenger aboard a ship if he rescues her, such a promise will not be binding upon her. But he does qualify this by saying that she will be released provided she paid an amount of money to the man in compensation for the service he had performed. This seems to indicate (albeit vaguely) that some form of obligation did come into being.

that a betrothal too would be valid in the case where a girl, scared by justifiable fear of shipwreck or foes or robbers, has promised marriage to a young man who stands free from fraud, if she has escaped to freedom by his help and assistance.

3 1 1 Metus reverentialis

During the Middle Ages some leading jurists began to propose that *metus reverentialis*, or fear arising from the respect or awe one has for people in authority, could constitute legally recognisable duress in certain circumstances. This was particularly true of the Glossator Accursius, who suggested that *metus reverentialis* could be a ground for avoiding an agreement where a particular hierarchical relationship existed between the parties.¹¹ However, the detailed research done by Van Huyssteen and Scholtens shows that this suggestion never became popular – far from it, in fact. By far the bulk of the authorities in the Middle Ages did not recognise *metus reverentialis* as a good ground for avoiding an agreement at all.¹²

This was endorsed by the Roman-Dutch authorities, who were uniformly of the opinion that *metus reverentialis* was not an example of legally recognisable duress. In line with the general rule, the fear had to have been inspired by a threat of some kind, and not the mere existence of some hierarchical relationship. The early legal writers of the Southern Netherlands stated that *metus reverentialis* did not entitle a person to a legal remedy unless there was evidence of threats or violence (*impressio vel violentia*).¹³ Pothier took the same approach:

The fear of displeasing a father or other person to whom we owe regard, is not such a fear as vitiates a contract made under the impression of it.¹⁴

11 Relevant relationships included those between freedmen and patrons, wives and husbands, and priests and bishops. For more on the Accursian gloss, see Van Huyssteen (n 6) 29.

12 For a full analysis of the concept of *metus reverentialis* in the Middle Ages, which falls beyond the scope of this work, see Van Huyssteen (n 6) Chapters III-IV, and Scholtens "Undue influence" 1960 *Acta Juridica* 276.

13 Van Huyssteen (n 6) 58 and Scholtens (n 12) 284 quote Zozius *Commentarius ad Digestorum*, Wesembecius *Commentarii in Pandectas*, Perezius *Praelectiones in Duodecim Libris Codicis* and Christenaeus *Quaestiones et Decisiones* in this regard. These original sources were not available to me.

The writers of the Netherlands who mention *metus reverentialis* (Voet, Van Leeuwen and Huber) are all firmly of the opinion that it was, in itself, no justification for a legal remedy.¹⁵

3.2 The threat must be *contra bonos mores*

The Roman-Dutch writers, like the Romans, allowed themselves the liberty of a little philosophical reflection on the question whether the true juridical basis for the existence of remedies for duress was because of a lack of consent, or because the obligation had been unlawfully induced by the illegitimate nature of the threats that had been uttered. The authorities endorsed the old adage “*coacta voluntas voluntas est*” (a coerced will is nevertheless a will), and were thus of the opinion that an act of duress did not vitiate consensus: the aggrieved party could not argue that he had never intended to enter into the contract, nor that he had not consented to its terms. For example, Voet states:¹⁶

Sound reason moreover shows that he who has done something by fear consents. He chooses in fact the least of two evils. He prefers to deliver property and lose goods to suffering wounds or other serious mischief.

Having rejected the consent (or overborne will) theory, the Roman-Dutch authorities instead preferred the view that the true jurisprudential basis for the existence of remedies for duress was that the agreement had been induced by an illegitimate threat. It was the unlawful conduct of the aggressor that was legally objectionable: the cardinal rule was that the threat which had been made had to be *contra bonos mores*.¹⁷ The Roman-Dutch lawyers also recognised the Roman principle that a threat is not only unlawful for the purposes of the doctrine of duress if the threat (if carried out) would constitute a criminal or delictual act; a *prima facie* valid threat which was made for an unlawful or extortionate purpose was also *contra bonos mores*. Thus, a threat to kill or incarcerate someone to induce an agreement was obviously *contra*

14 Pothier (n 7) §27 (Evans’s translation).

15 Voet (n 1) 4 2 11; Van Leeuwen (*CF* n 1)1 13 8; Huber (n 9) 4 38 5.

16 Voet (n 1) 4 2 2 (Gane’s translation). Others who take the same view are Grotius (n 1) 3 48 6; Van der Keessel *Praelectiones Iuris Hodierni ad Hugonis Grotii* 3 48 6; Huber (n 9) 4 38 3; Decker’s note to Van Leeuwen (n 1) 4 1 6; Van der Linden (n 4) 1 14 2; Pothier (n 7) §21; Goudsmit *Pandecten-Systeem* §51. See also Lee *Introduction to Roman-Dutch Law* (1963) 229-230.

17 Voet (n 1) 4 2 10; Van Leeuwen (*CF* n 1) 1 4 41; Grotius *De Iure Belli ac Pacis* 2 11 7;

bonos mores. But if what appears to be a perfectly valid threat (eg to report someone to the police for theft) is used for an entirely illegitimate purpose (eg to extort a totally arbitrary and fictitious payment from the thief), then that threat too will be considered *contra bonos mores*.¹⁸

In Roman-Dutch law, agreements entered into under duress were therefore voidable, and not void *ab initio*. Voet went on to say:¹⁹

Since then consent is present in those acts that are performed in fear, it follows that as a rule they are not *ipso iure* void, but they hold good until they are set aside and restored to their proper fairness by the magistracy.

Since agreements entered into under duress were voidable, if the element of fear was removed, and the person who made the promise subsequently performed his obligations without any objection, the agreement was considered to have been ratified, and the person's remedies fell away.²⁰

3 3 Serious evil

The third critical element of a valid duress claim in Roman-Dutch law was that the threat had to be of a serious and compelling nature.

Fear is said to be an agitation of the mind because of immediate or future danger; or again a dread of some serious mischief.²¹

As in Roman law, the threat had to be directed against the person of the victim. Grotius sculpts his definition of what constituted serious evil as follows:

18 Pothier (n 7) §26.
See Voet (n 1) 4 2 3, 4 2 10 and 4 2 17; Huber (n 9) 4 38 8. For a full examination of this issue, see Olivier "Onregmatige vreesaanjaging" 1965 *THRHR* 190-191 and 3 4 2 below.

19 Voet (n 1) 4 2 2 (Gane's translation). See too Huber (n 9) 4 38 2; Pothier (n 7) §21; Groenewegen *Tractatus de Legibus Abrogatis in Hollandia Vicinisque Regionibus D 4 2 22*; Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 660; Nathan *The Common Law of South Africa – Vol II* (1904) 573.

20 Van Leeuwen (*CF* n 1) 1 4 41 6 (Barber & Macfadyen's translation) says: "For if a person has done anything; for instance he has made a promise when under the influence of fear, and then, when the fear has been removed, has paid, no restitution will be made, because, before he paid, he could have avoided paying, and by paying spontaneously he is considered to have given fresh consent and to have confirmed the obligation *de novo*." See too Voet (n 1) 4 2 16; Pothier (n 7) §21.

21 Voet (n 1) 4 2 1 and 4 2 13; Van Leeuwen (*CF* n 1) 1 4 41 1; Huber (n 9) 4 38 7; Pothier (n 7) §25; Lee (n 16) 230.

By fear is to be understood a great terror as of death, dishonour, great pain, unlawful imprisonment of oneself or of those belonging to one.²²

Van Leeuwen's definition is to similar effect:

[T]he fear [must be] of some greater evil, for example of death, exile, violation, slavery, imprisonment, bonds, torture, force, treachery....²³

Threats of infamy or mere annoyance were not actionable.²⁴

It was not necessary that the victim had to suffer the intimidation directly – threats directed against one's spouse or children also sufficed.²⁵ Although the Roman-Dutch authorities still required the threat to be one which would make an impression upon a courageous person, the Roman-Dutch lawyers eased the strict objective test of the Roman *homo constantissimus* by introducing a welcome subjective element to the determination of the gravity of the fear: in assessing the impact of the threat upon the victim, the person was entitled to be judged according to the type of person he or she was.

[I]n determining [the seriousness of the fear] the judge must take into consideration the circumstances both of the persons and of the things: eg, that fear which cannot be deemed sufficient to disturb the mind of a person of mature age or a soldier may be quite sufficient in the case of a woman or old man.²⁶

3 4 Other types of threat

The Roman-Dutch attitude to threats directed against property, threats of criminal prosecution, and threats of civil action warrants some consideration.

3 4 1 Threats to property

The vast majority of authorities say nothing at all about whether a threat

22 Grotius (n 1) 3 48 6.

23 Van Leeuwen (*CF* n 1) 1 4 41 1.

24 Voet (n 1) 4 2 12 and 13; Huber (n 9) 4 38 6; Van Leeuwen (*CF* n 1) 1 4 41 2.

25 Voet (n 1) 4 2 11.

26 Van der Linden (n 4) 1 14 2 2 (Juta's translation). See too Voet (n 1) 4 2 11; Pothier (n 7) §25. Huber (n 9) 4 38 4 (Gane's translation) says: "The laws demand that the fear must be such as could influence a very steadfast person; nevertheless this must be understood in a humane sense, and with a distinction of persons, so that more must be

directed against property constituted duress. The Glossators, in their efforts to make some sense of the rather haphazard array of texts in the *Corpus Iuris Civilis*, concluded that remedies for duress could be granted even if the nature of the threat fell outside the strict limits of the *praetor's* edict. Judges were granted an inherent discretion to set aside acts done under compulsion in a wider sense. This was defined as a remedy *per officio iudicis*.²⁷ It was under the guise of this wider discretion *per officio iudicis* that one of the Ultramontani, Jacobus Revigny,²⁸ argued that it was possible to grant a person a remedy for duress where he had contracted under a threat to have his house destroyed. However, Van Huyssteen demonstrates quite correctly that the passages in the *Digest* upon which Revigny relied in fact refer to threats to the person, and provide no support whatsoever for his submission.²⁹ The Commentators appear not to have recognised a threat against property as an example of duress at all.³⁰

As far as the law in the Netherlands was concerned, a few early writers in the southern provinces suggested that a threat directed against property could provide the aggrieved party with a remedy. Christenaeus³¹ refers to a fear of loss of goods (*amissio bonorum vel partis*) as constituting duress, as does Zozius.³² Perezius suggests that loss occasioned to one's fortune (in the sense of assets) would amount to duress.³³ But the leading authorities of the province of Holland are almost entirely silent on the question of threats to property. They continued to define duress by sticking rigidly to the traditional

required of a man than of a woman, according to the varying circumstances."

- 27 The Glossators divided relief for *metus* into four categories on the basis of their understanding of the relevant texts in the *Corpus Iuris Civilis*: (a) relief *ex sententia et verbis* the edict (threats of death or torture); (b) relief *ex sententia vel per interpretationem* the edict (threats of *stuprum*, slavery or where the attack is directed against one's children); (c) relief *per Constitutionem* (situations where relief was granted by the emperors in the post-classical period – see *D* 18 1 46; *C* 2 19(20) 11); and (d) relief *per officio iudicis* (threats of physical incarceration and physical damage – see *D* 4 2 23 1 and 2; 44 5 1 5 and 50 13 3). For a full discussion of the work of the Glossators in this regard, see Van Huyssteen (n 6) 27.
- 28 Revigny (or Jacobus de Ravanis) *Lectura super Codice* ad 2 4 13, as cited by Van Huyssteen (n 6) 34. Revigny was one of the leading jurists of the Middle Ages, and was a member of the School of Orleans. See Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 115-117.
- 29 Van Huyssteen (n 6) 34. He relies on *D* 4 2 23 1 and 2, 44 5 1 5 and 50 13 3, which all concern threats of physical incarceration or physical harm, and have nothing whatsoever to do with threats to property.
- 30 For a full analysis of the thinking of the Commentators see Van Huyssteen (n 6) 37.
- 31 Christenaeus *Decisiones Belgicae* vol 2 dec 114, as cited by Wessels in *Union Government (Minister of Finance) v Gowar* 1915 AD 451.
- 32 Zozius *Commentarius ad Pandectas* 4 2 n 15, as cited in *Union Government (Minister of Finance) v Gowar* 1915 AD 451-452 and Wessels *The Law of Contract in South Africa* (1951) §1175.
- 33 Perezius *Commentarius ad Codicem* 2 20 n 6, as cited by Wessels (n 32) §1175. Both Zozius and Perezius were eminent Professors of Law at the University of Louvain in the early seventeenth century, and Christenaeus was a leading advocate at the Groote Raad van Mechelen. See Van Zyl (n 28) 339-341.

example of threats to the person. Van Leeuwen alone submits that threats to property constitute duress, but he merely mentions the possibility, without discussing the matter at all.³⁴ The weight of evidence would suggest that threats to property were not generally considered to be relevant to the Roman-Dutch doctrine of duress, interpreted in its strict sense.

3 4 2 *Threats of criminal prosecution*

There is not a great deal of authority on the status of threats of criminal prosecution in Roman-Dutch law, and what little there is, is rather vague.³⁵ Pothier seems to indicate that such threats would not be considered *contra bonos mores*.³⁶

The violence which leads to the rescission of a contract, should be an unjust violence, *adversus bonos mores*; and the exercise of a legal right can never be allowed as a violence of this description; therefore a debtor can have no redress against a contract which he enters into with his creditor, upon the mere pretext that he was intimidated by the threats of being arrested, or even of his being actually under arrest, when he made the contract, provided the creditor has a right to arrest him.

The first problem with this passage is that it is uncertain whether it refers to a threat of arrest for the purposes of criminal prosecution, or a threat of civil proceedings and civil imprisonment for debt, which was a common occurrence at the time. The references to “creditor” and “debtor” could indicate that the latter is more likely.³⁷ Secondly, Pothier appears to take quite a restrictive approach to determining whether a threat is *contra bonos mores*, in that a threat to exercise a legal right will not be *contra bonos mores*. This test conflicts with the wider test of unlawfulness promoted by other Roman-Dutch

34 Van Leeuwen (*CF* n 1) 1 1 13 7.

35 This view accords with the perceptions of most commentators on the Roman-Dutch law on this point. See the remarks of Corbett J in *Arend and another v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C) 307-308; Trengove J in *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 4 SA 31 (T) 33-34; Bloch “Duress – threats of civil and criminal prosecution” 1974 *Responsa Meridiana* 44; D’Oliveira “Caught redhanded: Metus and compounding” 1974 *SALJ* 288; Harker “The effect of a threat of criminal prosecution on contract” 1977 *THRHR* 141.

36 Pothier (n 7) § 26 (Evans’s translation). Trengove J (n 35) 34F incorrectly cites the passage as § 56.

37 Both Corbett J in *Arend and another v Astra Furnishers (Pty) Ltd* (n 35) 308C, and Bloch (n 35) 43 suggest that this passage refers to civil imprisonment for debt, and not to threats of criminal prosecution.

authorities, who looked both to the nature of the threat as well as the purpose for which it was made to ascertain whether the threat was *contra bonos mores*.

On the other hand, Voet has been cited as authority for the view that threats to prosecute are indeed *contra bonos mores*.³⁸ He stated:³⁹

On these lines even if a person caught in debauchery, adultery or some other shameful act gave or promised something in order to avoid the wounds, fettering or death which he feared at the hands of those who caught him, the *praetor* applied this action [based on fear] to him.

Again, however, this passage is not explicit. It does not refer directly to threats of prosecution, and can easily be interpreted to refer only to threats of physical harm made by those who apprehended the criminal. Secondly (in the light of the fact that Voet relies on *D 4 2 7 1* and *4 2 8 pr* for his authority), the passage suffers from the same problem of vagueness as the corresponding passages in the *Digest* – what is meant by “promised something”? What would be the position where a thief were apprehended, and agreed, under threat of prosecution, merely to pay back that which he had stolen? This issue is not addressed by Voet at all.

The only authority who deals directly with the question whether a threat of criminal prosecution is actionable is Huber. He is firmly of the opinion that such threats are *contra bonos mores*:⁴⁰

Though a person suffered duress in the course of an unlawful action, he could still obtain restitution; as if a thief, adulterer or other criminal were caught in the act, and *money extorted from him*; he would be able to get it back if he had the courage to make a clean breast of it, or had already suffered the punishment of the law; for *private persons are not allowed to extort money from criminals*, but they must inform against them, and have them arraigned in the proper place.

But Huber’s comments do not take into account that in the Netherlands, individuals were fully entitled by private law means to compromise or settle

38 See in particular *Arend and another v Astra Furnishers (Pty) Ltd* (n 35) 307G-H.

39 Voet (n 1) 4 2 3 (Gane’s translation).

40 Huber (n 9) 4 38 8 (Gane’s translation). The emphasis in the passage is my own. Those who indicate that this passage may provide authority that threats of criminal prosecution

claims for loss arising out of the commission of a crime.⁴¹ As such, the injured party and the wrongdoer could settle their dispute by way of agreement, rather than by having recourse to the criminal courts. This would seem to indicate (contrary to Huber's opinion) that a threat to prosecute in order to induce a valid compromise or payment of what had been lost might not automatically have been considered *contra bonos mores*. However, the authorities do make it clear that the law stated above was not designed to allow an accuser to make such arrangements vexatiously, and to extort an unfair or undue profit out of the accused person.⁴² These passages suggest (rather than such threats being considered (a) lawful; or (b) unlawful, in a binary fashion) that the general rule about assessing the illegitimacy of a threat may have applied in cases of where threats of criminal prosecution were at issue: a *prima facie* valid threat would be illegitimate only if the purpose for which it was made was illegitimate. In this context, making a threat to prosecute in order to get back what one owed may have been acceptable, but if the threat were made to induce a private payment of an entirely fictitious amount, bearing no resemblance to the loss occasioned by the crime (eg theft), that would be construed as *contra bonos mores*.⁴³

In sum, one can see that as far as the question of threats of criminal prosecution are concerned, the Roman-Dutch authorities are vague and contradictory.

3 4 3 *Threats of civil action or litigation*

Although there is very little authority on the point, the Roman-Dutch authorities that address the issue of threats of civil action are of the opinion that such threats do not constitute actionable duress, and that a person is fully entitled to threaten legal proceedings against another.⁴⁴ The position was thus the same as that which applied in Roman law.⁴⁵

41 are improper are Corbett J (n 35) 307, and Bloch (n 35) 44.
 Voet (n 1) 2 15 17-20; Grotius (n 1) 3 4 5; Van der Keessel *Theses Selectae* 520; Wessels (n 32) § 500-505; Harker (n 35) 141.

42 See in particular Voet (n 1) 2 15 19.

43 This is the view of the authorities supported by Trengove J (n 35) 34G-H.

44 Voet (n 1) 4 2 10; Huber (n 9) 4 38 6.

45 See C 2 19(20) 10.

4 Actions and remedies

4.1 General comments

The Roman-Dutch authorities do not provide a clear and systematic analysis of the actions and remedies available for duress. This problem can be attributed mainly to the haphazard and truncated nature of the title on *metus* in the *Digest*, which presents peculiar difficulties for any interpreter. Since the Roman-Dutch authorities relied so heavily on the *Digest* to craft their law of duress, their rather unsystematic approach to remedies for duress can probably be attributed to the lack of clarity in their main source of authority, and the fact that debate still rages about the nature of remedies for duress among those who have attempted to interpolate the classical texts.⁴⁶

However, when one analyses the authorities, it appears that the Roman-Dutch lawyers traditionally recognised three sorts of remedy in cases of duress: These are, firstly, a delictual remedy; secondly, a remedy of *restitutio in integrum*; and thirdly, a defence of duress in situations where an aggrieved party had been sued for performance of an obligation. Since the rigid Roman distinction between contracts *stricti iuris* and contracts *bonae fidei* had fallen away, the need to distinguish between different types of procedural actions had also fallen away in Roman-Dutch law. The main consequence of this is that the *actio quod metus causa* (which was a *stricti iuris* action in Roman law) appears not to have been absorbed into legal practice in the Netherlands, either as a distinct action, or even as a feature of the Roman-Dutch law from a terminological perspective. The authorities (with the singular exception of Voet)⁴⁷ do not refer to the phrase *actio quod metus causa* at all, but refer generally to remedies for duress, without giving them any special name. It appears likely that the term “*actio quod metus causa*” had no application in Roman-Dutch law,⁴⁸ even if many of the characteristics of the old action of that name continued to flourish under the guise of the various remedies available

46 For an overview of this debate, see Zimmermann (n 19) 654ff.

47 Voet (n 1) refers to the *actio quod metus causa* in his original Latin, but he does so only twice throughout his lengthy exposition on restitution for duress (4 2 3 and 4 2 18), and without any particular emphasis, or suggestion that the term was critically important.

48 Those authors who wrote in Dutch certainly do not mention the *actio quod metus causa* by name. See Grotius (n 1) 3 48 6; Huber (n 9) 4 38 11; Van Leeuwen (*RHR* n 1) 4 42 4; Scheltinga *Dictata* 3 48. Nor do Van Leeuwen (*CF* n 1) 1 4 41, Groenewegen (n 19) *ad C* 2 19(20) and *ad D* 4 2, Van der Keesel (n 41) §881, who wrote in Latin. O'Brien “*Restitutio in Integrum in die Suid-Afrikaanse Kontraktereg*” LLD thesis (1996) 20 and “*Restitutio in integrum by onbehoorlik verkreeë wilsooreenstemming*” 1999 *TSAR* 648-649 is also of the opinion that the *actio quod metus causa* had no place in Roman-Dutch law.

for duress in Roman-Dutch law.

4 2 A delictual remedy

Van Leeuwen draws a clear distinction between the existence of a delictual remedy for duress on the one hand, and the restitutionary remedy on the other hand. He states:⁴⁹

From what has been done through fear a twofold action arises, one action for the restitution of the thing ...; the other for damage done and injury, which is in the nature of a punishment for wrong-doing

This demonstrates that an aggrieved party who had suffered patrimonial harm as a result of an act of duress was entitled to a delictual claim for financial compensation in Roman-Dutch law. It should be emphasised that in Roman-Dutch law the fourfold penalty that could have been imposed upon the defendant in Roman law had become obsolete.⁵⁰ Like the law of misrepresentation, a delictual claim for financial compensation would exist whether or not the aggrieved party sought to rescind the agreement induced by duress and claim restitution. Unfortunately there is almost nothing more said about the delictual action in cases of duress in the work of the leading authorities. It is possible that the Roman-Dutch lawyers would have fitted such a delictual claim under the auspices of the *lex Aquilia*, which was the general delictual remedy for patrimonial loss in Roman-Dutch law. Some support for this may be found in the delict title in Voet's *Commentarius*, where he says that "[t]hose who cause damage by compulsion or instigation" are "[p]ersons subject to the Aquilian law".⁵¹ But that is as far as the delict passages take us, which may be due to the fact that there were very few examples of delictual claims for duress in Roman-Dutch times – a trend that is replicated in modern law.

4 3 An order of *restitutio in integrum*

The main remedy for duress in Roman-Dutch times was the remedy that flowed from an order of *restitutio in integrum*. Unlike in Roman law (where the *restitutio in integrum* had a very limited field of application in *iudiciae stricti iuris*, and

49 Van Leeuwen (CF n 1) 1 4 41 4 (Barber & Macfadyen's translation).

50 Voet (n 1) 4 2 8; Van Leeuwen (CF n 1) 1 4 41 8; Groenewegen (n 19) *ad D* 4 2 9 and *ad C* 2 19(20) 4; Voet *Observationes ad Hugonis Grotii Manudictionem* 3 48 33.

51 Voet (n 1) 9 2 25. See too Olivier (n 18) 190; Van der Merwe & Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 229, who also believe the delictual action fell under the *lex Aquilia*.

appears to have fallen into desuetude by the time of Justinian), *restitutio in integrum* was an extremely important general remedy that could be granted by the courts in the Netherlands where an agreement had either been declared void, or cancelled. Due to the fact that the nature of the law of contract was so different in the 16th and 17th centuries, this Roman-Dutch remedy was not equivalent to the Roman *restitutio in integrum*. Rather, it became the common name for the remedy (also known as “relief” or “herstelling”) that existed in the customary law of the Middle Ages.⁵² The Roman-Dutch authorities commonly described customary institutions by using Roman names, as occurred in this case. The process of *relief* entitled a person to request (initially from the government, but later from the courts), an order nullifying and reversing a legal transaction, on good cause shown.⁵³ An act of duress was considered to be a good cause (*iusta causa*) for seeking an order of *restitutio in integrum* in Roman-Dutch law.⁵⁴ This was so because an act of duress was antithetical to the requirement of good faith that underpinned all contracts in Roman-Dutch law.⁵⁵ Since the power to grant *restitutio in integrum* (or “relief”, as it was originally called) derived its origins from powers held by the executive, the power was not inherent in the judiciary. As a result, *restitutio in integrum* is usually described as an extraordinary remedy, rather than a mere action.⁵⁶ The majority of the Roman-Dutch authorities dedicated some energy to discussing the availability of *restitutio in integrum* in cases of duress, and the characteristics of such relief. The characteristic elements of an order of *restitutio in integrum* based on duress are discussed below:

Firstly, the main rationale behind the *restitutio in integrum* appears to have been restitutionary.⁵⁷ The aim of a *restitutio in integrum* was to restore both parties to the *status quo ante*. As such, the order would not only require the defendant to restore any performance to the plaintiff; it also required the plaintiff to restore anything that he or she had received to the defendant.⁵⁸ This included money or property,⁵⁹ any fruits, and restitutionary damages.⁶⁰

52 O'Brien (n 48) 649.

53 I concentrate here on the private law implications of *restitutio in integrum*. It should be noted that *restitutio in integrum* applied to a wide field of issues, including the issue of clemency in criminal law. For a discussion of this issue, which falls beyond the scope of this article, see O'Brien (n 48) 23 and Visser “Rethinking unjustified enrichment” 1992 *Acta Juridica* 221.

54 See generally Voet (n 1) 4 2; Grotius (n 1) 3 48; Van Leeuwen (*RHR* n 1) 4 42; Huber (n 9) 4 38. See too Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 243ff; Nathan (n 19) 574.

55 O'Brien (n 48) 20 and 30.

56 See Huber (n 9) 4 37 1 and O'Brien (n 48) 23.

57 For a convincing discussion of this approach, see O'Brien (n 48) 30-32.

58 Voet (n 1) 4 1 22; Grotius (n 1) 3 48 5.

59 See Voet (n 1) 4 2 7; Huber (n 9) 4 38 11; Van Leeuwen (*CF* n 1) 1 4 41 5; Grotius (n 1)

Secondly, the action entitled a party to claim both rescission of the original agreement, and restitution, all in one order. Rescission and restitution were not understood as two separate and distinct remedies that had a separate conceptual existence.⁶¹ Since the main rationale behind a *restitutio in integrum* was restitution, a curious feature of the Roman-Dutch remedy (from a modern viewpoint) is that rather than rescission being a preliminary step to restitution, rescission was in fact a *consequence of* the decision to grant restitution in Roman-Dutch law.⁶² In all circumstances where the main remedy of restitution was granted, the original transaction was automatically rescinded at the same time.⁶³

Thirdly, since an order of *restitutio in integrum* was considered to be an extraordinary remedy, a plaintiff had to approach the Supreme Court (or *Hooge Raad*) for this relief.⁶⁴ The nature of the order of *restitutio in integrum* was such that the discretion to award it could be entrusted only to a senior judicial officer.⁶⁵

Fourthly, the remedy could be sought against any person who had benefited from the transaction or was in possession of property handed over as a result of duress (whether in good faith or in bad), and not just the person who was responsible for the duress.⁶⁶ Thus, in situations where the agreement had been inspired by the duress of a third party unconnected with the two contracting parties, the agreement could be rescinded. The heirs of the person who had originally been exposed to the act of duress were also entitled to bring an action for restitution against the person responsible for the act of intimidation.⁶⁷ Interestingly, even the heirs of the original intimidator could be sued if some benefit had accrued to them as a result of the act of duress.⁶⁸ In cases where

3 48 5.

60 Voet (n 1) 4 2 7 and 4 1 22; Huber (n 9) 4 38 11; Grotius (n 1) 3 48 5; Van Leeuwen (*CF* n 1) 1 4 41 7.

61 Voet (n 1) 4 1 21 (Gane's translation) said: "The effect of *restitutio in integrum* is that all things are put back into their original condition, and that indeed in a *single judicial proceeding* ... The opinion of old writers as to the proceeding being double – one of restitution, and one giving the effects of the rescission – is rejected" (my emphasis).

62 Van Leeuwen (*CF* n 1) 4 40 7 says "per *restitutionem petitur rescissio*". See too O'Brien (n 48) 25.

63 Voet (n 1) 4 1 21 discusses at length the fact that an order of *restitutio in integrum* combined both rescission and restitution, and cites both Bachovius and Vinnius in support of this view. See too Van Leeuwen (*CF* n 1) 1 4 41 5.

64 Grotius (n 1) 3 48 5; Scheltinga *Dictata oor De Groot* 3 48 5; Groenewegen (n 48) *ad D* 4 2 9.

65 Voet (n 1) 4 1 3; Huber (n 9) 4 37 1.

66 Voet (n 1) 4 2 3 and 4; Huber (n 9) 4 38 11; Van Leeuwen (*CF* n 1) 1 4 41 9; Pothier (n 7) §23.

67 Voet (n 1) 4 2 3; Van Leeuwen (*CF* n 1) 1 4 41 9.

68 Voet (n 1) 4 2 5; Huber (n 9) 4 38 12.

there were joint wrongdoers, full restitution by one defendant would absolve all the others.⁶⁹

The suggestion by some authorities that before an action for restitution would be successful, the plaintiff must demonstrate that some loss has been suffered, is misleading, and requires the most careful interpretation. What it means is that the aggrieved party has been prejudiced by transferring some benefit (consisting in either money or property) to the defendant, that this transfer has occurred unjustly as a result of the duress and that the aggrieved party consequently seeks to reclaim the benefit which was transferred. To put it in another way, the undue transfer of the benefit has unjustifiably enriched the defendant, and the order of restitution allows the aggrieved party to recover that benefit. A restitutionary remedy is not designed (like a delictual remedy) for financial compensation for loss or damage suffered. Rather, it is designed to allow the plaintiff to *recover* exactly that which was unduly handed over pursuant to an agreement, whether it consists in money or property.⁷⁰ The term “loss” as used by the Roman-Dutch authorities must not be understood in the delictual sense. As a result, it is submitted that Voet’s comments on the question of “loss” are overstated, and do not reflect the true position in Roman-Dutch law.⁷¹ Voet stated:⁷²

Action fails when no loss sustained. Examples.— For the reason that no damage has been caused to the sufferer from fear by the fear inspired there is no need of restitution when a person has been compelled by the immediate inspiring of a later fear to restore what he himself had shortly before illegally acquired by an excitation of alarm as was said above on the strength of the law cited below. It is the same when one who was protected by a peremptory exception has compelled his creditor to release him; or when a creditor has inspired fear in a debtor

69 Voet (n 1) 4 2 8. Voet’s suggestion in the same passage that the liability of joint wrongdoers under the *lex Aquilia* was different (joint wrongdoers were not jointly liable) is clearly not correct. Voet contradicts himself by stating elsewhere that wrongdoers are jointly liable under the *lex Aquilia* (9 2 12; 13 1 5), and Grotius (n 1) 3 32 12 and 15; 3 34 6 says the same. See on this point Van der Merwe & Olivier (n 51) 229.

70 The terms “recovery” or “restoration” are commonly used by the authorities. See Huber (n 9) 4 38 11; Grotius (n 1) 3 48 5. Eg, Van Leeuwen (n 1) 1 4 41 5 (Barber & Macfadyen’s translation) says: “By this action, that which has been given up through fear, is *restored* to him who has suffered the violence Hence, whatever has been extorted from any one by force or through fear ... is *restored* by means of a personal action.”, and in 1 4 41 7: “On the delivery of a thing, the *Praetor* orders it to be *restored* ...”

71 After a careful analysis of the authorities cited by Voet, Kerr *The Principles of the Law of Contract* (2002) 323 n 437 comes to the same conclusion.

72 Voet (n 1) 4 2 17 (Gane’s translation) (my emphasis). He repeats the requirement in 4 2 7; 4 2 10; 4 1 9 and 4 1 29.

to make him pay what is really due. *Since the nature of the action because of fear demands a loss which can be repaired*, and in such cases the sufferer from fear has parted with nothing, the edict is bound not to apply. Hence also the opinion was given that, if a person who owes forty has been constrained to promise and pay three hundred, he would in the event of disobedience obtain not four times three hundred but four times two hundred and sixty.

This statement appears to blur the ordinary conceptual distinction between delictual compensation (an award of damages) for loss, and the restoration of a person to the position they were in before the transaction was concluded by a process of restitution. First of all, Voet appears to focus on the overall patrimonial consequences of at least two transactions, rather than examining the transaction which was induced by duress. His first example (where A uses duress to acquire something from B, and B uses duress to get it back from A) seems to be an example of the application of the *in pari delicto* rule, rather than a situation where restitution for duress is not suitable. His third example (a creditor using threats to compel a debtor to pay what is due) ignores completely the critical question of the nature of the threat, which, if illegitimate, would render the agreement voidable for duress regardless of what was being claimed. His second example (concerning a situation where a debtor forces a creditor to release him from a debt, in a situation where the debtor is already protected by an exemption from payment unlimited as to time) is vaguely articulated, would in all likelihood be a very rare occurrence, and could hardly be considered authority for a general requirement of damage for restitution. In fact, the example is derived from the *Digest*,⁷³ and a passage from the work of the jurist Ulpian that discusses the penal component of the *actio quod metus causa*. The numerical example Voet gives at the end of the passage is derived from the same fragment of the *Digest*,⁷⁴ and may also be interpreted as an example relating to the residual delictual and penal character of the Roman *actio quod metus causa*. Furthermore, the fourfold penalty Voet refers to in the example was obsolete in Roman-Dutch law, as has been demonstrated above, and this makes his example questionable authority.

In sum, it is submitted that in the ordinary course of events, evidence of economic or patrimonial damage was not a *sine qua non* of a claim for an order

73 *D* 4 2 14 *pr.*

74 See *D* 4 2 14 14.

of *restitutio in integrum*. The order was designed to facilitate the recovery of any performance which has been unduly made, and not for financial compensation. Any use of the term “loss” by the Roman-Dutch authorities (and Voet in particular) should be understood in this sense.

4 4 Duress as a defence to an action

Any person sued for performance of an obligation concluded under duress was entitled to raise the act of duress as a complete defence to the action in Roman-Dutch law.⁷⁵ Provided duress could be proved, this defence or exception would constitute a bar to the plaintiff's claim, and the defendant would be entitled to rescission of the agreement. The defence could be raised against any person who attempted to enforce the obligation, and not just the person responsible for the intimidation alone.⁷⁶ If the agreement had been executed in any form, the defendant was also entitled to claim restitution of any performance which he had made in terms of this defence.⁷⁷

5 Duress and the *condictiones*

5 1 The *condictiones* generally

Up to this point the focus of this chapter has been on the position in the law of contract. But, as was stated at the beginning of this chapter, duress was not relevant exclusively to contracting. The question that arises is how the *condictiones* of Roman-Dutch law might have applied to cases of duress in Roman-Dutch law. But before this specific issue can be examined, a word needs to be said about the status of enrichment law and enrichment actions in Roman-Dutch law.

The Roman-Dutch institutional writers continued to treat instances of what we today would call unjustified enrichment on an *ad hoc* basis: relief could be obtained by instituting a *condictio*, as had been the position in Roman law. From a procedural perspective, in Roman-Dutch law a *condictio* amounted to no more than a *sui generis* form of action. Although Groenewegen stated that it was unnecessary to name the particular *condictio* upon which a litigant was

75 Voet (n 1) 44 4 4; Huber (n 9) 4 38 13; Van Leeuwen (*CF* n 1) 1 4 41 5.

76 Voet (n 1) 44 4 4.

77 Huber (n 9) 4 38 11.

relying when instituting an action before the courts,⁷⁸ all the enrichment actions or *condictiones* of Roman law – the *condictio causa data causa non secuta*; the *condictio ob turpem vel iniustam causam*; the *condictio indebiti*; the *condictio furtiva*; and the *condictio sine causa* – were received into the Netherlands and became part and parcel of the classical Roman-Dutch law of the 16th and 17th centuries. The Roman-Dutch lawyers of this time seem to have been content to classify and to use the Roman enrichment actions (especially the *condictiones*) in the same way that the Romans of Justinian’s time had, and to expand upon them in small, piecemeal ways only when circumstances necessitated it.⁷⁹ Whether the Roman-Dutch law of the late 18th century came to abandon the rigid structural formalism of the *condictiones*, and ultimately developed one general enrichment action based on general principles, was a matter of some debate between the courts and academic writers in South Africa. The possibility that this had occurred was initially rejected by the Appellate Division, which undertook an intensive historical analysis of the Roman-Dutch sources in *Nortje en ’n ander v Pool NO*⁸⁰ in the 1960s. On the other hand, Scholtens produced authorities from certain decisions of the Hoge Raad in the 18th century, reported by Van Bynkershoek and Pauw, that such a general enrichment action had indeed developed in the Netherlands before codification.⁸¹ The majority of authors⁸² have adopted Scholtens’s views, which are convincing, and the Supreme Court of Appeal has finally accepted that this development had occurred in the late 18th century in the Netherlands in the case of *McCarthy Retail Ltd v Shortdistance Carriers CC*.⁸³

5 2 The position with regard to cases of duress

The impact of a general enrichment action on the Roman-Dutch practice of law in the period before codification is not discussed by any of the institutional

78 Groenewegen (n 19) *D* 13 1 1.

79 For a comprehensive analysis of the classical Roman-Dutch approach to enrichment actions, see De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987) 61-119; Zimmermann (n 19) 857ff.

80 1966 3 SA 96 (A) 135ff. His lordship relied *inter alia* on the emphatic rejection of this possibility in a number of judgments in provincial divisions in South Africa. See eg *Pucjowski v Johnston’s Executors* 1946 WLD 3 (Van den Heever J) and *Le Roux v Van Biljon* 1956 2 SA 17 (T) 20.

81 See Scholtens “The general enrichment action that was” 1966 *SALJ* 391. His authority comes from Van Bynkershoek *Observationes Tumultuariae* 277; 303; 2751 and 2754, as well as Pauw (n 10) 12; 196 and 558.

82 See De Vos (n 79) 110ff; Eiselen & Pienaar *Unjustified Enrichment: A Casebook* (1999) 10; Hutchison *et al* (eds) *Wille’s Principles of South African Law* (1991) 630.

83 2001 3 SA 482 (SCA) 488H. The reasons that Schutz JA gives for why this was not accepted for so long was that the sources upon which Scholtens relied (the *Observationes Tumultuariae* containing the decisions of the *Hoge Raad*) were not available in published form for more than two centuries.

writers, and thus the “classical” 17th century position must be analysed. The right to claim *restitutio in integrum* or relief was, of course, broadly framed, and a claim for the recovery of payments made or property transferred outside the traditional boundaries of contract could have been instituted using this extraordinary procedure. But like the Roman law, the substantive requirements to make out a case for *restitutio in integrum* required the proof of a threat of serious evil to the person. The question that needs to be examined is whether the *condictiones* of Roman-Dutch law, which existed mainly to deal with enrichment matters, could have overlapped with the more traditional remedies, or extended the bounds of the doctrine as it was traditionally understood, in a similar fashion to the Roman law.

In Roman law it was possible for a litigant to have brought a *condictio ob turpem vel iniustam causam* for the recovery of money or property handed over under duress. But this was exclusively a *stricti iuris* action (mainly designed to deal with unilateral payments or transfers made by *stipulatio* that were discovered to be illegal or immoral), and by the 17th century the Roman-Dutch legal system had of course dispensed with the distinction between obligations *stricti iuris* and obligations *bonae fidei*. So, from a technical perspective, the *condictio ob turpem vel iniustam causam* ought not to have been a competent action for duress.⁸⁴ Voet initially acknowledges this. After stating that such a *condictio* would have been available in cases where a transaction occurred for immoral or illegal purposes, he said:⁸⁵

In *bonae fidei* transactions, however, what has been given with a view to restoration can also be reclaimed by way of action on the [transaction] itself, and thus such actions may run together with this action on a base cause, a thing which does not happen in transactions *stricti iuris*.

Despite this, it appears that the Roman-Dutch authorities were content to ignore this particular formal issue and, finding the substance of the *condictio ob turpem vel iniustam causam* useful from a practical perspective, chose to ignore the straitjacket, and continued to recognise its existence in suitable

84 Cf Du Plessis *Compulsion and Restitution. A Historical and Comparative Study of the Treatment of Compulsion in Scottish Private Law with particular reference to the Law of Restitution or Unjustified Enrichment* PhD thesis (1997) 122, and generally Zimmermann (n 19) 862.

85 Voet (n 1) 12 5 1 (Gane's translation).

cases where immorality or illegality had tainted a transaction in some way.⁸⁶ As far as cases of duress were concerned, Voet, following *Digest* 12 5 7, states that this *condictio* (more particularly the *condictio ob iniustam causam*) could be instituted to allow an aggrieved party to reclaim a stipulation that had been extorted by force.⁸⁷ But it is unclear whether Voet was merely referring to the Roman law, or whether he in fact considered this to be the position in the Roman-Dutch law. Seeing that a *stipulatio* was a form of contract, and the Roman-Dutch authorities had embraced a generalised theory of contract, it would seem that in such cases the more appropriate action would have been for *restitutio in integrum* based on duress, and allowing the *condictio* in such circumstances would simply have created an unnecessary duplication. Groenewegen in fact argues that in Roman-Dutch law an action for restitution on account of duress would have applied to a situation analogous to *Digest* 12 5 7, not a *condictio ob iniustam causam*.⁸⁸

Voet also refers to two other situations where the *condictio ob turpem vel iniustam causam* could potentially have been instituted where a transaction was induced by coercion. These cover situations where the relatively strict requirements that had to be proved in terms of the traditional action for restitution based on duress (the strict requirements of threats of serious evil to the person) would not have applied. The two examples Voet gives are clearly derived from the *Digest*.⁸⁹ The first situation was where something had been transferred as a result of a threat of vexatious litigation, the commission of an actionable wrong, or theft. The second situation was where some illegitimate payment had been made in order to recover property or money that the other person was duty-bound to restore in any event.⁹⁰ In both these situations the applicability of the *condictio ob turpem vel iniustam causam* would have extended the scope of the doctrine of duress beyond the traditional bounds of serious threats to person, and would have allowed a litigant to seek a restitutionary remedy in situations where the coercion was of a less blatant nature, and directed at harm to property or the unpleasant consequences of litigation – situations usually not covered by the traditional actions for duress. The rather sparse and muted discussion of this point amongst the Roman-

86 See Grotius (n 1) 3 30 17; Voet (n 1) 12 5; Van Leeuwen (*CF* n 1) 1 4 14 8-15 and (*HRH* n 1) 4 14 4-6; De Vos (n 79) 66; Du Plessis (n 84) 123.

87 Voet (n 1) 12 5 4 (Gane's translation): "Such action finds place not on the ground of a future cause ... but rather on the ground of one that is past, as when something is reclaimed which has been paid on a stipulation wrung out by force."

88 Groenewegen (n 19) *ad D* 12 5.

89 See *D* 12 5 2 1.

90 Both examples are contained in Voet (n 9) 12 5 1.

Dutch authorities would suggest, though, that actions of this nature were probably very rare, and were considered to be peripheral, from a legal perspective.

What of the *condictio indebiti*? Since the Roman-Dutch authorities had come to recognise that all transactions were *bonae fidei* in nature, and had adopted the view that *ex nudo pacto oritur actio*, the *condictio indebiti* had increased significantly in importance as an action. The reason was that most payments or transfers are made on the understanding that an obligation of some kind was being performed (*solvendi causa*), and where it was discovered that the obligation did not in fact exist (either because no valid contract existed, or for some other reason), then the payment or transfer would have been *indebitum*, and the *condictio indebiti* would have been the natural action. Indeed, both Zimmermann and Du Plessis have shown that the *condictio indebiti*'s star rose under Roman-Dutch law, whereas *condictiones* like the *condictio causa data causa non secuta* and the *condictio ob turpem vel iniustam causam* depreciated in importance.⁹¹ The problem as far as duress cases is concerned was that the bulk of the Roman-Dutch authorities, like their Roman counterparts, required proof that the payment or transfer had occurred in error before the *condictio indebiti* could be instituted.⁹² Since a transfer of money or property under duress was usually made with knowledge that it was coerced rather than being due, it is unlikely that the Roman-Dutch authorities would have considered the *condictio indebiti* to be an appropriate alternative action in cases of duress.

6 Conclusion

The aim of this article has been to analyse how the Roman-Dutch lawyers treated cases of duress in the law of obligations. The analysis has provided evidence of the enormous influence that Roman law had on the doctrine of duress as it was articulated by the institutional Roman-Dutch authorities in the 16th, 17th and 18th centuries. In particular, the substantive law was almost identical to that articulated by the Roman jurists.

91 Zimmermann (n 19) 866ff; Du Plessis (n 84) 122 and 126-127.

92 See Voet (n 1) 12 6 7 and 44 7 5; Huber (n 9) 35 1 and 2; De Vos (n 79) 69. Contra Grotius (n 1) 3 30 6, who regarded the basis of the *condictio indebiti* as unjustified enrichment rather than error. For a full discussion, see Visser *Die Rol van Dwaling by die Condictio Indebiti. 'n Regshistoriese Ondersoek met 'n Regsvergelykende Ekskursus* Dr Jur thesis (1985) 144-177.

The broad structural nature of the remedies available for duress did, however, undergo some changes from the Roman position. The exercise of analysing the characteristics of the Roman-Dutch law of duress as it was articulated in the 16th, 17th and 18th centuries is an interesting and valuable one, since this was the law that was brought to the Cape by the Dutch, and is the law that forms the basis of the current South African doctrine of duress.⁹³

93 See *Broodryk v Smuts* 1942 TPD 47; *White Brothers v Treasurer-General* (1883) 2 SC 322; *Union Government (Minister of Finance) v Gowar* 1915 AD 426; Christie *The Law of Contract in South Africa* (2001) 349; Kerr (n 71) 318.