METUS IN THE ROMAN LAW OF OBLIGATIONS

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The question arises ... whether agreements and promises must always be kept when, in the language of the praetor’s edicts, they have been secured through force.1

1 Introduction

An entire title of book four of Justinian’s Digest2 is devoted to explaining the doctrine of metus3 as it was understood at the time of the codification of the Roman law. That title begins with the following statement: “The praetor says: ‘I will not hold valid what has been done under duress.’”4 This unequivocal statement of legal principle illustrates, in very general terms, that by the time the Corpus Iuris Civilis was compiled, the Romans disapproved of persons using threats to inspire the creation of legal obligations, and that it was possible to avoid the legal consequences of an obligation because it was induced by metus. The Corpus Iuris Civilis remains our most valuable source of authority with regard to how duress cases were treated in Roman times. But the relevant textual sources pose some fundamental difficulties. Far from containing a coherent, structured analysis of the law, the relevant passages in fact amount to a jigsaw-puzzle of uncoordinated, haphazard, and occasionally contradictory legal propositions. As Schulz states:

The compilers ... drastically modified the classical law by ruthlessly shortening and interpolating the classical texts; for that reason the short Digest title 4 2 presents unusual difficulties.5

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1 Cicero De Officiis 3 24 92 (Loeb translation).
2 D 4 2.
3 South African law has adopted the English (or Norman-French) word “duress” to describe the situation where an agreement or transaction is induced by threats which invoke fear in the mind of the victim. See Christie The Law of Contract in South Africa (2001) 337. The traditional Latin term for duress was metus, meaning fear, oppression or dread. See Lewis & Short A Latin Dictionary (1962) sv metus 1141.
4 D 4 2 1 (Watson’s edition).
5 Schulz Classical Roman Law (1951) 604.
Much of the *Corpus Iuris Civilis* is beset by this problem to some degree, since it constitutes a small, selected compilation of almost 1000 years worth of legal source material, but *D 4 2* is an extreme case. The sources thus require very careful analysis and interpretation before any vaguely coherent structural pattern of legal principles can be discerned. The Romans never got to the point of listing the substantive elements of a claim based on *metus* explicitly, and the nature and scope of the remedies available to an aggrieved party remain a matter of some conjecture.

One point must be made quite clear from the outset. The Romans discussed *metus* in the context of obligations generally. They did not set out to discriminate between cases of *metus* in contract or quasi-contract, for example. The rules, principles and remedies discussed in *D 4 2* covered both coerced contracts and coerced acts of payment or transfer of property that strictly speaking fell outside the bounds of contract. But from a practical perspective, *metus* was most significant, and is generally discussed by the Romans in the context of the law of contract. As a result, I shall focus mainly on the position in contract, but will touch on the relevance of the doctrine to the *condictiones* towards the end of the article.

2 The nature and classification of contracts in Roman law

An understanding of the nature of the Roman law of contracts is essential in order to understand how cases concerning *metus* were treated in Roman law and why certain matters about this area of Roman law remain controversial to this day. The Romans never reached the stage where they developed a general theory of contract based upon the essential element of mutual agreement. Rather, the Romans had a law of contracts — a particular type of contract was identified principally by the nature of the act that had to be performed, and each type of contract had its own special rules and requirements. The existence of an agreement was not of singular importance. It was the form of the arrangement that was significant. The Romans classified their contracts in an assortment of ways. First, they categorised them in terms of the manner in which the various contracts were concluded. In this sense the Romans recognised four categories of...
contracts: contracts re, contracts verbis, contracts litteris and contracts consensu. Secondly, contracts could be classified in terms of whether they were bilateral or unilateral. And thirdly, they could be classified procedurally in terms of whether they were contracts stricti iuris or contracts bonae fidei. It is this third classification that is important for the investigation into the Roman doctrine of metus.

Stricti iuris contracts were normally unilateral in nature, and were regulated by strict rules and procedures set down in the ius civile. The validity of such contracts was dependant upon the parties reciting specific questions and answers laid down by the ius civile. For the contract to be valid, the formal words that constituted the promise or undertaking had to be complied with to the letter; any deviation from the formalities rendered the agreement void. Secondly, the content of the arrangement was to be interpreted and enforced strictly; issues of equity were not relevant in situations where a dispute concerning a contract stricti iuris arose. The main examples of contracts stricti iuris were the dotis dictio, the iusiurandum liberti and the stipulatio. The stipulatio was easily the most important of the three, since it was an extremely popular and common method of entering into a transaction in Roman law. Its attraction lay in the fact that it was a highly versatile type of contract: almost any sort of legal undertaking could be the subject of a legally enforceable stipulatio, provided the appropriate formalities were uttered.

On the other hand there were the contracts bonae fidei. Contracts bonae fidei, or contracts of good faith, were governed by equitable principles rather than the strict and formal rules of the ius civile. The informing basis of such contracts was that the parties, in the negotiation and performance of the arrangement, should at all times act in good faith towards one another. In situations where a dispute concerning a contract bonae fidei arose, the iudex was at liberty to decide the case on equitable grounds, and was not confined to merely interpreting and enforcing the contract, regardless of the consequences. Originally the most common types of contract bonae fidei were the more complex and theoretically
advanced consensual contracts — the sale contract (*emptio venditio*), the contract of hire (*locatio conductio*), the contract of partnership (*societas*) and the contract of mandate (*mandatum*). But by the late Republican period the real contract of deposit (*depositum*) had also been classified as a contract *bonae fidei*.11

Determining whether a particular contract was *stricti iuris* or *bonae fidei* was highly significant for cases involving *metus*, since the nature of the contract determined the nature of the action that the aggrieved party could claim for relief, if the party had any action at all, that is. First of all, the nature of the actions available in situations where a contract *stricti iuris* was induced by *metus* will be discussed. Secondly, the position with regard to contracts *bonae fidei* will be examined.

3  *Metus* and contracts *stricti iuris*

3.1  The traditional approach

Until the first century BC, if a contract *stricti iuris* was concluded in accordance with the formalities laid down in the *ius civile*, the contract was valid and enforceable, and a complaint that one party had forced the other by threats to conclude the transaction had no effect upon the transaction at all.

> Suppose, for instance that, being coerced by duress ... you promise, in response to Titius’s demand what you had no need to promise, obviously you are bound at civil law and the action which claims that you "ought to give" is operative.12

So, during the formative and pre-classical period of Roman law, the fact that a contract *stricti iuris* was concluded as a result of *metus* was irrelevant both to the question whether the contract was valid and the question whether the contract should be enforced. The same rule applied to contracts *stricti iuris* entered into by fraud or mistake — no escape was possible.

11 Kaser (n 10) 142. He states further that there is controversy as to whether the real contract of loan (*commodatum*) was classified as a *bona fide* contract in the classical period. Van Zyl (n 8) 279 alleges it was, citing Justinian *Institutes* 4 6 28 as authority.
However, as Roman society developed, and that society’s legal system became more sophisticated, the Romans of the late Republican era began to question the idea that a contract *stricti iuris* (particularly the very common *stipulatio*) could be completely valid and enforceable despite the agreement having been coerced by threats. It was in the first century BC that the idea that one should be entitled to institute legal proceedings to nullify obligations *stricti iuris* induced by force or fear, or to raise *metus* as a defence to an action for performance, took seed and began to germinate. Legal innovations are often inspired by socio-political circumstances, and the developments in this particular area of the law were no different.

### 3.2 The socio-political situation in the latter part of the Republican period

The first century BC was a time of constant social and political upheaval in Rome. Violence, it appears, became a way of life. Historical accounts of the time chronicle gangs being employed to patrol the streets and intimidate political opponents, high ranking officials being lynched, legal trials and elections constantly being marred by acts of brutality, and the ordinary citizens, both in Rome and the provinces, being exploited by the ruling elite. For example, Cicero illustrates in graphic detail how Verres and his henchman Apronius forced the farmers of Sicily to hand over their corn crop by threats of criminal prosecution and flogging. Zimmermann lists several startling examples of the anarchy that came to grip the Republic after the reforms of the Gracchi; examples drawn mainly from Lintott’s book *Violence in Republican Rome*, which provides detailed evidence of how the turbulent nature of social and political life was a leading factor in the downfall of the Roman Republic. Having reviewed these historical events, Lintott states:

> The Romans of the Republic seem genuinely to have considered it an essential constituent of libertas that a man should be allowed to use force in his personal interest to secure what he believed to be his due.

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13 *In Verrem Oratio* 2 2 30 71. Gaius Verres had been propraetor in Sicily from 73 to 71 BC, and during his period of office had plundered the province mercilessly for his own gain. Cicero was appointed by the Sicilians to lead the case for the prosecution of Verres on charges of extortion. See Cary & Scullard *A History of Rome* (1975) 243; Jashemski *The Origins and History of the Proconsular and Propraetorian Imperium to 27BC* (1950) 117.

14 (n 12) 651-652.

15 *Violence in Republican Rome* (1968) 204.
In particular, the period between 90 and 80 BC was a time of fierce civil war in Italy: a period dominated by L Cornelius Sulla Felix (more commonly known as Sulla) — renowned army general, eventual winner of the civil war, and self-proclaimed dictator of the Roman Republic. Perhaps the event for which Sulla was most notorious was his proscriptions, whereby supporters of the opposing Marian faction were listed upon public noticeboards as "outlaws", and prices were put on their heads. Thousands of people were killed in this Stalinesque purge. Sulla also took the step of emancipating about 10,000 of the proscribed men's slaves and recruiting them as his private army, known as the *Cornelii*. Many of these men, freed from the shackles of slavery, and intoxicated by their new powers, went rampaging across the countryside, forcing innocent people to give up their land and robbing these people of their possessions.

Once Sulla's dictatorship ended, it appears that the new leaders of Rome took a policy decision to treat any lawless and extortionate behaviour in a very serious light, particularly in the context of the anarchy and depredations of the civil war period and its aftermath. In the four years after Sulla's departure, some important legal developments were implemented to arrest the anarchy that had become a way of life in Rome. In the criminal context, there were two important innovations. First, there was the *lex Cornelia repetundarum*, which could be used to prosecute provincial governors allegedly guilty of extortion. Secondly, the *actio vi bonorum raptorum* was introduced in 76 BC, which was designed to punish robbery, or theft with violence. Thirdly, there was the *lex Julia de vi privata*, which was designed to punish people taking the law into their own hands and forcing debts out of debtors by criminal means. But how did the Romans come to deal with intimidation in the private law context?

### 3.3 The formula Octaviana

It would come as no surprise, considering the socio-political background outlined above, that individuals were frequently forced to part with property or money, or to enter into agreements, as a result of intimidation. We have already seen that the *ius civile* provided no relief for the victims of such intimidatory tactics,
particularly in the context of obligations *stricti iuris*. But because the use of such tactics had become so prevalent, and had created something of a social dilemma, it was left to the great Roman legal innovators, the praetors, to address the problem and to provide some form of relief for those who had been compelled to enter into legal transactions.\footnote{22} It was just after the Sullan dictatorship came to an end that a *formula Octaviana* was introduced — named after the praetor who was responsible for the innovation. The *formula Octaviana* allowed a person coerced into concluding a contract *stricti iuris* by threats to have an action against his oppressor. The *formula Octaviana* provided the foundations\footnote{23} for the classical Roman remedies for *metus* that will be discussed below.

The earliest reference to the *formula Octaviana* may be found in Cicero's *In Verrem Oratio*:\footnote{24}

> Apronius was brought before him; his accuser was a man of the highest consideration, Gaius Gallus, a senator. He demanded of Metellus to give him a right of action according to the terms of his edict against Apronius, "for having taken away property by force or by fear", which formula of Octavius Metellus had both adopted at Rome, and now imported into the province.

There are several other passages in the works of Cicero that make reference to the *formula Octaviana*:\footnote{25}

There is some debate about the Octavius whom Cicero identifies as having introduced the *formula* into the edict.\footnote{26} It is likely that the *formula Octaviana* was

\begin{footnotes}
\footnote{22}{For an analysis of the reforming role of the praetor in Roman law, and particularly the praetor's role in developing the formulary process, see Jolowicz & Nicholas *Historical Introduction to the Study of Roman Law* (1972) 199ff; Turner *Introduction to the Study of Roman Private Law* (1953) 34ff.}
\footnote{23}{Hartkamp (n 20) 4-5.}
\footnote{24}{3 65 152 (Loeb translation). The speech was delivered in 70BC. See too 2 3 61 143.}
\footnote{25}{In *De Officiis* 1 10 32, Cicero said: "[W]ho fails to see that those promises are not binding which are extorted by intimidation or which we make when misled by false pretences. Such obligations are annulled in most cases by the praetor's edict in equity, and in some cases by the laws" (Loeb translation). See too *De Officiis* 3 24 92; 3 28 103; 3 30 110; *pro Flacco* 21 49; *ad Quintum Fratrem* 1 1 21; *Pro Roscio Amerino* 145. For a philosophical discussion of the question of *metus*, see *Tusculanarum Disputationum* 4 6 11; 4 30 64.}
\footnote{26}{Jolowicz & Nicholas (n 22) 278 n 6 state that it is "uncertain" which Octavius introduced the *formula*. The main problem is that the gens Octavia supplied over twenty men who were magistrates of one sort or another from the 3rd century BC to the end of the Republic, and there is no mention in the Verrine Orations of this particular Octavius's praenomen, which would help isolate the relevant individual. It is certain that the Metellus referred to was in fact L. Caeccilius Metellus, praetor in 71 BC, and propraetor in Sicily in 70 BC as successor to the infamous Verres. See Broughton *The Magistrates of the Roman Republic* (1952) 122 128.}
\end{footnotes}
introduced somewhere around 80 BC, since two members of the gens Octavia held public office around that time. First, there was Gnaeus Octavius, who was consul in 76 BC, and who (in terms of a lex Cornelia concerning time periods for promotion up the cursus honorum) would have been praetor in 79 BC. Secondly, there was Lucius Octavius, who was consul in 75 BC, proconsul in 74 BC, and praetor in 78 BC. Most authorities argue that the introduction of the formula Octaviana should be attributed to Gnaeus Octavius.

The introduction of the formula Octaviana marked the point at which the Roman legal system came to recognise, as a matter of principle, that a contract stricti iuris induced by coercion could be impeached. The formula took its place in the praetorian edict, and by the time of the creation of the Perpetual Edict in Hadrian’s time, had become a permanent feature of that edict. Like all special formulae, an aggrieved party who wanted to raise the question of metus in a dispute concerning a contract stricti iuris would have to petition the praetor to have the matter specifically inserted into the formulation of the case that went before the iudex. In the absence of an express direction to this end, the iudex would have been bound to decide the case under the strict rules of the ius civile.

According to Roman procedure, the formula constituted the written exposition of the claim (or cause of action) that was drafted according to specific guidelines by

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27 See Olivier “Onregmatige vreesaanjaging” 1965 THRHR 187; Schulz (n 5) 600; Jolowicz & Nicholas (n 22) 278; Zimmermann (n 12) 653.
28 Broughton (n 26) 83.
29 Broughton (n 26) 86; Jashemski (n 13) 147.
30 Both Broughton (n 26) 86 and the commentary in the Loeb Classical Library translation of the speeches against Verres suggest that Lucius Octavius was the person responsible for introducing the formula. Yet Sallust describes Lucius Octavius as “a tired man, not wanting to be bothered” — not a description one would associate with a vibrant legal innovator. Sallust Hist 2 26 described him as mitis, meaning “gentle”. On the other hand, Kelly (n 17) 15 n 3 suggests that Gnaeus Octavius is more likely to have been the creator of the formula. He was a friend of Cicero, and was described as “an excellent and amiable man”. See Cicero De Finibus 2 28 93. Kelly also points out that Gnaeus Octavius suffered from acute arthritis, and suggests tentatively that enduring this debilitating physical condition may have provided the inspiration for Gnaeus Octavius to use his powers to provide a method of relief for those people who had been the victims of intimidation. Hartkamp (n 20) 247 also submits that Gnaeus Octavius was most likely the author of the formula, and cites an eminent array of continental jurists who have reached the same conclusion. This is significant. Van Zyl “Der Zwang im Römischen Privatrecht” 1972 THRHR 311 at 313 describes the work as “The authoritative work on duress and related topics in the Roman law”. This is my translation of the original Afrikaans “die gesaghebbende werk oor dwang en aanverwante onderwerpe in die Romeinse reg”. Poste (n 19) 417 suggests that Cicero was actually referring to the Octavius who was the father of the first emperor of Rome, Augustus. With respect, this is impossible. It is quite clear that the formula had been introduced before 70 BC — the year in which Cicero delivered his speeches against Verres. Augustus’s father (Gaius Octavius) was only elected to the praetorship in 61 BC; nine years later. See Shuckburgh Augustus: The Life and Times of the Founder of the Roman Empire (1908) 1 2. From a purely chronological point of view, Cicero could not have been referring to Gaius Octavius.
31 Schulz (n 5) 601.
the praetor in iure, and which crystallised the issues to be investigated and pronounced upon by the iudex during the hearing apud iudicum. The cause of action which supported an argument for the inclusion of the relevant formula was known as an actio. In circumstances where a litigant sought to bring an action on the grounds that a contract stricti iuris had been coerced by metus, the relevant action was known as the actio quod metus causa. It was classified as an actio in factum, since it derived its origin from the praetorian edict.32

3.4 The actio quod metus causa

3.4.1 The name of the action

The precise name of this action is a matter of modern debate. Schulz33 suggests that the classical Roman lawyers probably stuck closely to the formula, and called it the actio de eo quod vi metusve causa factum est. He then goes on to say that by the Byzantine era and the reign of Justinian, it had become known as the actio metus causa, although he provides no authority for this. Lee34 and Borkowski35 both refer to the actio metus with Lee stating (again without giving any reasons or authority) that the action is "commonly, but incorrectly called the actio quod metus causa". Yet the overwhelming number of expert Roman law writers tacitly disagree with these two schools of thought, preferring to call the action the actio quod metus causa.36 In this article the action will be called the actio quod metus causa for consistency’s sake.

3.4.2 The characteristics of the actio quod metus causa

The actio quod metus causa could be brought by a plaintiff who had been coerced into a contract stricti iuris by metus, and who had been forced to perform in some way in terms of the contract. The actio quod metus causa had seven important
characteristics, a number of which are apparent from the formula reconstructed by Lenel.\(^{37}\)

First, a successful action would entail the rescission of the contract by the *iudex*. Although this was a natural consequence of a successful action, the Romans did not consider this to be a significant legal issue, but rather a matter of common sense.\(^{38}\) The impeachment of the contract was merely a preliminary step to the more important legal remedies that were identified specifically in the formula.

Secondly, and far more significantly, the formula also made provision for an extra punitive measure or penal element to be used against the defendant, and which was to be bestowed upon the plaintiff. If the action was brought within a year, the formula enjoined the *iudex* to order that a sum amounting to four times the value of what had originally been handed over to be paid by the defendant.\(^{39}\) This in effect amounted to restitution of the original amount handed over, plus an additional penalty of three times that amount.\(^{40}\) But there was a time limit on this sort of penalty. If the action was brought after a year had passed since the contract had been concluded, liability was limited to the restoration of the performance that had originally been made, and this remedy could be claimed only if the plaintiff had good cause to bring the action after such a long time: for example, if the plaintiff had had no other remedy at his or her disposal.\(^{41}\)

But the third interesting characteristic of the action was that although the action could involve a penal element, in practice this penalty was never automatic, nor was it very commonly awarded. In fact, the action was also *arbitraria*, meaning that the judge would always order simple restitution first, and the defendant would be able to escape the payment of the penalty simply by restoring the money or property which had been acquired as a result of *metus*. Only if the defendant

\(^{37}\) Lenel *Das Edictum Perpetuum* (1985) 112 provides a Latin reconstruction of how this formula would probably have been composed: *Si paret metus causa Aulum Agerium fundum illum Numerio Negidio mancipio dedisse neque ea res arbitrio tuo restituetur neque plus quam annus est cum experiundi potestas sibi, quanti ea res erit, tantae pecuniae quadruplum iudex Numerium Negidium Aulo Agerio condemnatio: Si non paret absolvito.*

\(^{38}\) See on this point O’Brien *Restitutio in Integrum in die Suid-Afrikaanse Kontraktereg* (LLD thesis 1996) 16.

\(^{39}\) See D 4 2 14 1; 4 2 14 9; 4 2 14 14; Zimmermann (n 12) 655; Borkowski (n 10) 354.

\(^{40}\) See D 4 2 14 10; Zimmermann (n 12) 655 n 34; Hartkamp (n 20) 285. The plaintiff would have to have shown that he or she had rendered some performance in terms of the contract, whether it had been in the payment of money or the transfer of property. See D 4 2 12 2; 4 2 14 pr, and particularly 4 2 14 14 (Watson’s edition), which states: “Julian says that only the extent of a person’s interest is quadrupled, and therefore, where someone who owed forty under a *fideicommissum* was forced to promise three hundred and paid this amount, he will recover four times two hundred sixty; for it was this amount that the force to which he was subjected took effect.”

\(^{41}\) See D 4 2 14 1; Zimmermann (n 12) 355 n 34; Borkowski (n 10) 354; Poste (n 19) 576.
failed to comply with this preliminary order would the defendant be brought back before the *iudex* and condemned to pay the penal damages.\(^{42}\) This penal character has led to some characterising the *actio quod metus causa* as a *praetorian delictual action*,\(^{43}\) although this is probably not strictly accurate.\(^{44}\) Although the effect of the *actio quod metus causa* could be to penalise the defendant financially for his or her conduct, in practice the true aim of the action was restitutionary.\(^{45}\)

The fourth characteristic of the action (certainly by the time of Justinian)\(^{46}\) was that it was an *actio in rem scripta*; that is, it was general or impersonal, and could be invoked not only against the intimidator, but also against anyone (even a *bona fide* third party) who had benefited from the transaction which had been inspired by *metus*.

In this action, no inquiry is made as to whether it was the defendant who used duress or someone else. For it suffices that the plaintiff shows that duress or force was brought to bear on him and that the person sued on account of the affair has made a gain although he has committed no offence.\(^{47}\)

The fifth important characteristic of the action was that it was not infaming.\(^{48}\) *Infamia* involved an order reducing a person’s status from that person’s accustomed class to a lower social class, accompanied by the attendant legal disabilities. In this respect, the *actio quod metus causa* was different to the *actio doli*, which was infaming.\(^{49}\) Kelly submits convincingly that the reason why the action was not infaming was due to the historical context out of which the action

\(^{42}\) *D 4 2 14 1; 4 2 14 3-4; Justinian Institutes 4 6 31; Zimmermann (n 12) 655; Buckland (n 9) 593; Thomas (n 6) 374; Leage (n 36) 380.*

\(^{43}\) See Thomas (n 6) 373; Borkowski (n 10) 353; Van Zyl (n 8) 348.


\(^{45}\) O’Brien (n 38) 16; Zimmermann (n 12) 656.

\(^{46}\) There is some polemic about whether this was indeed the position in classical times. Some believe that this only became the position at the time of Justinian, and that in classical times, the action was a personal action which enured against the intimidator alone. See on this point Schulz (n 5) 601; Buckland (n 9) 593 n 9.

\(^{47}\) *D 4 2 14 3 (Watson’s edition). See too D 4 2 9 1; 4 2 9 8; 4 2 14 5; Hartkamp (n 20) 201.* It is interesting to note what the Elder Seneca had to say in *Controversiae 9 3 9*: “The law is not angry with the man applying the force; it merely comes to the aid of one who has suffered by it ... It makes no odds, I repeat, who caused him to be forced; for what is annulled is made unfair by the fortunes of the man who suffered, not the person of the agent” (Loeb translation).

\(^{48}\) Zimmermann (n 12) 655; Hartkamp (n 20) 245 274; Buckland (n 9) 593; Schulz (n 5) 602. For a detailed examination of the concept of *infamia* in Roman law, see Greenidge *Infamia in Roman Law* (1904).

\(^{49}\) See *D 4 3 1 4; 4 3 11 1.*
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developed, it being aimed principally at reversing the depredations of Sulla's cohorts:50

No doubt Octavius did not think of attaching infamia to condemnation because he was dealing with a class of defendant belonging to the lowest order of freedom, who had no civic honour to lose.

Sixthly, the action could be instituted by the heirs of the plaintiff, but could not be instituted against the heirs of the defendant, unless they had been enriched in some way.51 Finally, if a number of persons were responsible for the act of intimidation, they were jointly and severally liable under the action.52

These characteristics present "a puzzling mixture of mildness and rigidity", suggests Zimmermann.53 One could not agree more. On one hand, a defendant could suffer the most severe penalty of four times the value of the performance that had been received; on the other hand, by giving restitution, the defendant could quite literally get off scot-free, without further penalty or lowering of status. This may have been because policy dictated that such behaviour was unacceptable — a message to this effect needed to be articulated, and backed up with a heavy sanction. But a lesser sanction needed to be available to protect those bona fide third parties who might face an action based on metus. Those guilty of blatant intimidation were fortunate to have the opportunity to benefit from the resultant compromise.

3.5 The exceptio metus

An aggrieved party who had been induced into an agreement by metus did not have to seek an action as a plaintiff in Roman law. The aggrieved party could also wait until the other party attempted to enforce the agreement, and raise a defence that the contract had been coerced. This defence was known as the exceptio metus,54 and if successful, allowed the defendant to avoid performance of the obligation. Just like the actio quod metus causa, if the agreement induced by metus was stricti iuris in form, the defendant would have to seek an exceptio metus expressly from the praetor in iure, otherwise the defendant would have had

50 Kelly (n 17) 16.
51 D 4 2 19; Leage (n 36) 380; Thomas (n 6) 374.
52 See D 4 2 14 15.
53 Zimmermann (n 12) 655.
54 See Justinian Institutes 4 13 1; D 44 4 4 33; Gaius Institutes 4 11 7 and 4 12 1; C 8 36 9.
no defence under the *ius civile*. It is not known exactly when the *exceptio metus* was introduced into the law, but it was probably of late Republican origin, since it is referred to in the writings of Cicero. Like the *actio quod metus causa*, the *exceptio* was in *rem scripta*. In other words, the defence could be raised against any plaintiff, whether or not the plaintiff was the person who had made the threats, or some *bona fide* third party who was to benefit from the transaction.

3.6 An order of *restitutio in integrum*?

The nature and function of *restitutio in integrum* in Roman law remains a matter of some mystery, and therefore, debate. *Ressetutio in integrum* is traditionally viewed as an order that entitled the aggrieved party, on good cause shown, to be restored to the original position he or she would have been in had the contract never been entered into. The agreement was declared void, and any performance which had been made had to be returned by both parties. The *restitutio in integrum* was, according to this view, an extraordinary remedy in that it was granted by the praetor by that official exercising his *imperium*, rather than by him exercising his ordinary judicial *iusdictio*. This was necessary because the order involved the nullification of rights under the *ius civile*, rather than the simple enforcement of rights and duties. A *restitutio in integrum* could only be claimed where the transaction was one *stricti iuris* — the power to grant a similar type of order was inherent in *iudiciae bonae fidei*.

The relationship between the order of *restitutio in integrum* and the *actio quod metus causa* has been a matter of extensive scholarly debate. In the light of the orthodox view of the *restitutio in integrum* described above, it has commonly been thought that an order of *restitutio in integrum* was the second distinct type of remedy available to a victim of *metus* where the contract was one *stricti iuris*. Those who support this view rely in particular on a statement by Ulpian that "if anyone, compelled by force, does something, he may obtain *restitutio* through this..."
edict", as well as the way in which book four of the Digest is compiled. There are separate sections for topics such as metus and dolus following a general title on restitutio in integrum. According to this approach, the actio quod metus causa was a purely penal delictual action, and the restitutio in integrum was the restitutionary action — the two served different purposes.

If one were to accept the view that the restitutio in integrum may have existed in early Roman law, this view presents some difficulties. It seems unlikely that the self-standing restitutio in integrum would have remained in existence by the time of Justinian’s codification. This is so for two reasons. First, as time passed, contracts bonae fidei became far more popular and prevalent, and in turn contracts stricti iuris naturally became less popular. As a result, the practical scope for the implementation of an order of restitutio in integrum would have receded, since the order could only be implemented in cases where the contract was stricti iuris. Secondly, as I have already mentioned, according to the traditional view the order could only be granted by the praetor exercising his imperium. As time passed, and the edict became concretised, the praetors became less and less involved in the day-to-day administration of justice, leaving this task to the iudex. The iudex only had powers of iurisdictio and not imperium, and so would not have been entitled to grant an order of restitutio in integrum. By as early as the third century AD the formulary procedure was no longer in use, and the proceedings in iure before the praetor no longer occurred. Since the restitutio in integrum as a self-standing order would have been intimately connected with the praetor, its continued existence must be questionable. This view is supported by the Dutch Pandectist Goudsmit, who states:

En ten gevolge van der veranderde procesorde en die gewijzigde taak des rechters, moest de verschil tussen de gewone rechtsmiddelen en de i.r.r. meer en meer verdwynen, en had zij inderdaad voor het Justinianeische recht geen reden van bestaan meer.

In recent times certain eminent jurists have challenged the orthodox view, and have argued convincingly that the order of restitutio in integrum, viewed as a self-

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61 D 4 2 3 pr (Watson’s edition). See too D 4 1 1.
63 Van Zyl (n 8) 384 states that the formulary procedure had ceased to be used by the time of Diocletian (284-305AD), and was officially abolished and replaced by the cognitio procedure in the 4th century. Disputes were decided at one formal hearing, usually by a trained jurist.
64 Goudsmit Pandecten-Systeem (1866) §109.
standing remedy, may not have existed at all, or at the very least was not relevant in cases of metus. This view was first proposed by Kupisch, and has been adopted by Kaser, Zimmermann, Du Plessis and O’Brien. According to this view, the actio quod metus causa and order of restitutio in integrum were not two distinct remedies at all. Rather, in cases where a contract stricti iuris was coerced by metus there was only one relevant action — the actio quod metus causa. Although the actio quod metus causa did contain a penalising element, it has already been shown that in practice this penalty was seldom imposed, and was not the main rationale of the action. Rather, restitution was its main priority, which is why the iudex would always order restitution first, and only impose a penalty as a last resort if the defendant did not comply with that order. In this sense, the actio quod metus causa was the legal mechanism implemented to obtain (in a terminological sense) restitutio in integrum. This being the case, it would be unnecessary and inappropriate for a plaintiff to seek an extraordinary order of restitutio in integrum in cases where metus was relevant. These views are convincing, and it is my view that restitutio in integrum did not exist as a remedy in such cases.

4 Metus and contracts bonae fidei

4.1 An action on account of metus

In situations where a contract bonae fidei had been entered into because of metus, an aggrieved party who had performed in terms of that contract was entitled to seek an action against the aggressor. This had been the position since the Romans began to recognise the class of contracts bonae fidei. In such cases there was no need for the praetorian reform that was necessary with regard to contracts stricti iuris. In fact, it is likely that the availability of an action for metus where the contract was one of good faith may have provided the legal inspiration for the introduction of the actio quod metus causa in the late Republican period, to alleviate the problem faced by those coerced into a stricti iuris contract in the pre-classical period.

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65 Kupisch In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht (1974) 123ff. The original source was unavailable to me.
66 (n 62) 101. At 110 Kaser describes Kupisch’s conceptual breakthrough as revolutionary.
67 (n 12) 656-657.
69 (n 38) 13-17.
The nature of an action on account of metus where a contract bonae fidei was concerned was different to that where the contract was stricti iuris. In such cases the actio quod metus causa was not the appropriate action, since that was a special action that had to be sought from the praetor where the contract was stricti iuris, and where the question of metus would otherwise have been irrelevant. Since such contracts were predicated upon the existence of good faith, rather than formality, matters like fraud, duress and mistake could automatically be taken into account when adjudicating the case, and a remedy granted to an aggrieved party. There was no need for the issue expressly to be raised or inserted in the formula, since the generic formula allowed such issues to be adjudicated upon as a matter of course. Metus (like dolus) was undoubtedly a violation of the good faith that was supposed to exist between contracting parties, and provided grounds for an action. Where a plaintiff sought restitution by way of action, the plaintiff would usually institute the generic action relevant to the particular bonae fidei contract he or she had concluded. For example, where a contract of purchase and sale had been concluded due to metus, the plaintiff would institute an actio empti.

4.2 A defence of metus

In situations where the person coerced into a contract bonae fidei by metus was sued for performance, the bona fide nature of the contract meant that metus could automatically be raised as a defence. It was not necessary for the defendant to seek a specific exceptio from the praetor that would have to be inserted in the formula. The iudex had the inherent power to refuse to entertain the plaintiff’s case on the ground of metus, since this sort of behaviour violated the precepts of good faith.
5 The likely elements of a cause of action

Up to this point I have focused my enquiry mainly on the nature and classification of the contract affected by *metus*, and the consequences this had for the nature of the procedural action and the ultimate remedy available to the aggrieved party. I have done so because the Romans were far more concerned with the classification of actions, and the remedies that were attached umbilically to those actions, than we are in South Africa today. Today, the legal system is geared more towards trying to understand and articulate the substantive principles that determine the rights and duties of individuals than to the rigid classification of actions. Therefore, perhaps the most important question that needs to be asked of the Roman sources is: what substantive elements would have to be proved in order for a person to claim that he or she was entitled to an action on account of *metus*? It is necessary to turn to the passages on *metus* contained in the *Corpus Iuris Civilis* for guidance on this point. As stated earlier, this question is not easy to answer, since the relevant texts are not neatly systematised, and the Romans never explicitly articulated a list of elements which, if established by evidence, would amount to *metus* and would constitute grounds for instituting an action or raising a defence. Furthermore, the construction of the *formula Octaviana* tells us little or nothing about the substantive requirements that would have to be proved before an action based upon *metus* would succeed. But it does appear that there were certain important general elements which would have had to be satisfied before a transaction could successfully be reversed on grounds of *metus* — even if these have to be extracted from the sources by a process of careful interpretation, rather than merely quoted from a succinct list. These elements would in all likelihood have been common to any action based on *metus*, whether it was an *actio quod metus causa* instituted on the basis of a contract *stricti iuris*, or an action in good faith where the contract was one *bonae fidei*.

5.1 Fear caused by a threat of harm

It is evident from the words of Cicero that the *formula Octaviana* originally gave a remedy *quae per vim aut metum abstulerant*. Literally, this would refer to what had been taken away by physical application of force (*vis*) or fear (*metus*). Yet the reference to *vis* came to be dropped in time:75

75 D 4 2 1 (Watson’s edition).
At one time the words of the edict were: "what has been done through force or under duress". For mention was made of force because of the compulsion brought to oppress the will, whereas duress expressed the alarm of a mind brought about through present or future danger. But the mention of force was later omitted.

The main reason for this was probably that the remedies for metus were designed only for cases of what the Romans called vis compulsiva — where someone had inspired fear in the mind of his victim by means of threats, and not for cases of physical violence (vis absoluta).76 Cases concerning the application of physical force (vis absoluta) fell to be decided in terms of the actio vi bonorum raptorum.77 But the original term vim metumque does provide some important clues about a key element of an action based on metus. Both Schulz78 and Van Huyssteen79 suggest that the words vim metumque should not be understood to have had exclusive and independent meanings, but should rather be construed as a hendiadys, expressing the idea of "fear caused by a threat".80 Merely acting due to a personally perceived fear of possible consequences was not enough. The fear had to have been induced by a threat which had been made by the other party: a causal connection between the threat and the resultant fear was critical.81

5.1.1 Metus reverentialis

Metus reverentialis may be defined as fear arising from the respect or awe persons may feel for someone who occupies a position of authority over them.82 It is evident from the bulk of authority that metus reverentialis was not a good ground for avoiding a contract in Roman law.83 This makes sense when one

76 Hartkamp (n 20) 6-11.266.
77 Schulz (n 5) 601; Hartkamp (n 20) 11.
78 (n 5) 600ff.
79 (n 36) 10-11.
80 A hendiadys is defined to be the grammatical technique of expressing one idea by using two words connected with "and". The debate concerning the congruence or otherwise of the terms vis and metus is reviewed in Du Plessis (n 68) 7-9.
81 See D 4 2 9 or (Watson’s edition): "if Pomponius says that fear is to be understood as having been inspired, that is, where dread has been inspired by someone." In D 4 2 9 1 (Watson’s edition), it is stated: "If, the more readily to protect or free you from the force of the enemy or robbers or a mob, I have accepted something from you or placed you under an obligation, I ought not to be liable under this edict, unless I myself subjected you to this force. But if I have nothing to do with the force, I ought not to be liable since I am rather held to have accepted a reward for my services." See too D 4 2 21 pr; D 4 2 23 pr; C 2 19(20) 6.
82 Eg, a son’s fear for a father or a wife’s fear for a husband. For an exhaustive analysis of the concept of metus reverentialis, see Scholtens “Undue Influence” 1960 Acta Juridica 276, and Van Huyssteen (n 36) 11-12.
83 In C 2 19(20) 6 it is stated that one could not escape the terms of a contract merely by demonstrating that the other party had senatorial rank. In D 2 9 6 3 and C 6 34 3 a husband who induces his wife to leave her property to him in her will (provided he does
remembers the general rule that mere fear without the presence of a threat of some kind did not constitute actionable metus. The few isolated texts which could provide evidence that metus reverentialis was a good ground for avoiding an agreement have been shown to be vague and inconclusive, and do not derogate from the general Roman legal position.\textsuperscript{84}

5.2 The threat must be contra bonos mores

There has been some debate about what the Romans considered to be the true theoretical basis for an action based on metus. Was it because of the unlawful or illegitimate nature of the threat which had inspired the conclusion of the agreement? Or, was it because the act of duress suppressed the essential contractual element of consensus, rendering the purported agreement involuntary? Evidence of the uncertainty as to which of these two competing theories formed the true juridical basis of the law may be found in a single passage in the Digest, which is attributed to Ulpian, and which refers to both possibilities:

\begin{quote}
Nothing is so opposed to consent, which is the basis of cases of good faith, as force and fear; and to approve anything of this kind is contrary to good morals.\textsuperscript{85}
\end{quote}

There are a few passages in the Corpus Iuris Civilis which suggest that contracts concluded because of metus were void for lack of consent.\textsuperscript{86} However, the majority of the Roman authorities saw the illegitimate nature of the threat which induced the agreement as the key ingredient in a case of metus, and did not see

\textsuperscript{84} In C 2 19(20) 11 the Emperor Constantine decreed that a sale induced by the "influence" of a minor public official would be subject to restitution. The word "influence" (impressio) is vague, and could conceivably have involved some form of threat. It has been suggested that this passage is indicative of a relaxation of the requirement of a causal connection between threat and fear in post-classical Roman law (Hartkamp (n 20) 72; Van Huyssteen (n 36) 12), but the learned authors suggest that this would only have applied to contracts between officials and citizens, and not generally. Furthermore, the classical requirement of a causal connection between the threat and the fear was revived by Justinian, which would effectively have overturned this relaxation. D 44 5 1 5 and 6 do suggest that it may be possible where a freed slave enters into an agreement with his patron "through excessive reverence" the agreement may be unacceptable, but the passage does say "the position is doubtful", and is thus slightly contradictory. Other texts occasionally cited in this regard, like D 23 22, D 29 2 6 7 and D 18 1 46 do not provide authority for the proposition that metus reverentialis was actionable metus at all.

\textsuperscript{85} D 50 17 116 (Watson's edition).

\textsuperscript{86} Over and above D 50 17 116 see C 4 44 1, where an edict of the Emperor Alexander states that a sale in good faith of a house would be void if the seller had been compelled by fear to agree to the transaction; and D 4 2 23 1, where Paul states that where a dowry is promised under duress, the promise is void ab initio.
the act of duress as vitiating the consent of the aggrieved party. The jurist Paul penned the famous phrase "Si metu coactus... tamen coactus volui", or "If I entered [into an agreement] under duress, nevertheless when compelled, I had the intention to enter".\textsuperscript{87} Support for this thinking may be found in the \textit{Institutes}:\textsuperscript{88}

Suppose, for instance, that, being coerced by duress ... you promise, in response to Titius's demand what you had no need to promise, obviously you are bound at civil law, and the action which claims that you "ought to give" is operative: but it is inequitable that judgment should be given against you, and so you are given the defence of duress, or a defence is devised for you to resist the action.

In other words, although the jurists recognised that the victims of duress formed their will to contract under coercion, this consent was legally valid, since these persons had exercised a choice — to agree to the terms of the contract, rather than suffer harm. However, it was because the unscrupulous and predatory act of intimidation had unjustly induced the contract that the praetor would grant an action. The cardinal principle appears to have been that the threat should have been \textit{contra bonos mores}:

\begin{quote}
But we understand force to be severe and such as is used contrary to sound morals, but not that which a magistrate properly brings to bear, of course, if that is done lawfully and in accordance with the legal powers of his position. Yet should a magistrate of the Roman people commit a wrongful act, Pompeius states that the edict is applicable.
\end{quote}

As a result, a contract induced by \textit{metus} was considered to be \textit{prima facie} valid (since the aggrieved party had consented to the contract), but voidable because the agreement had been unlawfully induced.\textsuperscript{90} The above passage provides evidence that the Romans would ascertain the illegitimacy or otherwise of a threat by utilising a fairly broad test, which examined not only the nature of the threat itself, but also the goal which the threat was designed to achieve.\textsuperscript{91} First, a threat that was unlawful in nature, (eg, a threat to murder a person if he did not sign a

\begin{footnotes}
\item[87] D 4 2 21 5 (Watson’s edition). See too D 23 2 22.
\item[88] Justinian \textit{Institutes} 4 13 1 (Thomas’s translation).
\item[89] D 4 2 3 1 (Watson’s edition). See too (i) D 4 2 7 1 and (ii) D 4 2 8 pr. In the latter passage there is a reference to an act of duress having to be "morally wrong" (\textit{malo more}) before an action or defence will lie against the perpetrator.
\item[91] For an analysis of this issue, see Olivier (n 27) 189-190.
\end{footnotes}
contract of indebtedness) was considered to be contra bonos mores. But additionally, a prima facie valid threat that was designed to achieve a manifestly unjust purpose was also considered to be contra bonos mores. Three examples of this broader form of unlawfulness may be found in the texts. First, a magistrate who threatens to use his legal powers of enslavement to extort a payment of a sum of money from a victim would act unlawfully, since his powers were being used illegitimately for financial gain. Secondly, where a person apprehended another committing adultery, it would be unlawful to threaten to have that person prosecuted to induce (or blackmail) the adulterer into agreeing to pay an amount of money in return for silence. And thirdly, if someone made a threat which induced his debtor to pay a greater sum of money than the debtor in fact owed, this would be unlawful conduct.

5.3 Serious evil

The third main element of a claim for metus in Roman times was that the threat should be one of serious evil (maioris malitatis). Gaius provided a more detailed explanation of this requirement:

Moreover, we say that the duress relevant to this edict is not that experienced by a weak-minded man but that which reasonably has an effect upon a man of the most resolute character.

The question of serious evil was therefore inextricably linked with the question of character. Perhaps as a result of the influence of Stoic philosophy, the Romans extolled the virtues of the homo constantissimus, or "the [person] of the most steadfast character". The Romans took a very restrictive view of the sorts of threat which would amount to legally actionable metus. A Roman was expected to take responsibility for his actions, and it was considered poor form for a Roman to attempt to avoid the consequences of what he had done, unless there was a very high

92 These examples are drawn from D 4 2 3 1 as read with D 4 2 4.
93 D 4 2 7 1 and D 4 2 8 pr.
94 "If anyone has been forcibly compelled, through the intervention of the governor's attendants without an inquiry by a judge, to pay one claiming by assignment from his adversary what he did not owe the latter, the judge orders restitution of what had been wrongfully extorted to be made by the one who caused him loss. But if he has paid what is owed on a mere demand, where no judicial inquiry has been held, although the demand should not have been made out of turn but in accordance with the law, nevertheless, it is contrary to legal principle to revoke what has enabled payment of the amounts owed by him" (my emphasis) D 4 2 23 3 (Watson's edition).
95 Labeo says that duress is to be understood not as any alarm whatever but as fear of a serious evil D 4 2 5 (Watson's edition). See too D 50 17 184.
96 D 4 2 6 (Watson's edition). See too D 4 2 7 pr.
good reason for doing so.\textsuperscript{97} The test was thus objective in nature. First of all, the threat had to be an imminent one, and not merely a contingent threat.\textsuperscript{98} Secondly, the types of threat which would ground an action for metus in Roman times were extremely limited. The threat could only be directed against the victim himself or his children,\textsuperscript{99} and had to constitute a threat of physical harm: either of death, enslavement, imprisonment (particularly private imprisonment by an individual), an attack upon the person’s chastity, or the accusation of a capital charge.\textsuperscript{100}

5 4 Other types of threat

There are three other types of threat which are of interest, namely threats directed against property, threats of criminal prosecution, and threats of litigation or civil action. The attitude of the Romans to such threats warrants some discussion.

5 4 1 Threats to property

The Roman sources provide no explicit guidance at all about whether a threat directed against a person’s property could amount to metus. It would appear that such threats were not considered actionable, and the threat had to be one of physical harm to the person. There is one passage in the Digest which could be interpreted to mean that such a threat could provide grounds for an action. Paul states:\textsuperscript{101}

If someone who is ready to destroy documents relating to my status unless I give [something to him] receives money [from me], there is no doubt that he has exercised compulsion through the most extreme fear, at least if an action to have me declared a slave has already been brought against me and I cannot be declared free if those documents are lost.

The passage is inconclusive since it is not clear whether the fear concerned the possibility of the documents themselves being destroyed (which would have been a threat directed against a corporeal thing), or whether it was the threat of losing

\begin{footnotes}
\footnote{97}{For comment on this issue, see Zimmermann (n 12) 653.}
\footnote{98}{\textit{D} 4 2 9 pr.}
\footnote{99}{\textit{D} 4 2 2 3.}
\footnote{100}{Death: \textit{D} 4 2 3 1; enslavement: \textit{D} 4 2 8 1; imprisonment: \textit{D} 4 2 7 1, \textit{D} 4 2 2 2, \textit{D} 4 2 2 3 1 and \textit{D} 4 2 2 3 2; stuprum: \textit{D} 4 2 8 2; a capital charge: \textit{D} 4 2 8 3. See Leage (n 36) 380; Thomas (n 6) 227; Zimmermann (n 12) 653-654.}
\footnote{101}{\textit{D} 4 2 8 1 (Watson’s edition).}
\end{footnotes}
status and freedom which was considered to be contra bonos mores. It is possible, though, that this strict position regarding threats to property was in fact ameliorated in post-classical law by means of an extended application of the condictiones. This matter will be discussed below.

5.4.2 Threats of criminal prosecution

It is not at all clear whether threats of criminal prosecution did constitute metus in Roman law. The relevant passages are rather inconclusive, and refer only obliquely to this particular sort of threat. A rescript of the Emperors Diocletian and Maximian reads.102

You ask that an alienation or a promise which has been made through fear of prosecution which has been begun against you, or which may be brought hereafter, shall be rescinded, and this is an improper request.

This passage seems to indicate that a threat of criminal prosecution did not constitute an actionable threat. However, it is not entirely clear whether this passage in fact refers to a threat of criminal prosecution in its strict sense at all. The word translated as "of prosecution" by Scott is the genitive form of the noun accusatio, which can mean a complaint or an accusation which falls outside the realms of criminal law, and which is made in civil proceedings.103 Little can really be gleaned from the rescript, due to its vagueness. On the other hand, Ulpian states.104

Likewise, if a person caught in the act of theft or adultery or in some other disgraceful conduct made a present of something or incurred an obligation, Pomponius, in his twenty-eighth book rightly writes that he can invoke this edict, for he feared either death or prison. Although it is not always lawful to kill an adulterer or thief, unless he defends himself with a weapon, he could still be killed unlawfully, and therefore fear was justified. Again, it is held that relief under this edict should be given to someone who has transferred property so that he might not be given up by the person who has caught him, since, if he had been given up, he could have suffered the penalties which we have stated.

102 C 2 19(20) 10 (Scott’s translation).
103 Lewis & Short A Latin Dictionary sv accusatio.
104 D 4 2 7 1 (Watson’s edition).
Paul continues as follows:105

Those [who have made the discovery] indeed are liable under the *lex Julia* because they have accepted something on account of proved adultery. Yet the praetor ought also to intervene and compel them to make *restitutio*. For what has been done is morally wrong, and the praetor does not consider whether the person who made the gift is an adulterer but only what the recipient has obtained by inspiring the former with the fear of death.

Read superficially, these passages might suggest that a threat of criminal prosecution was *contra bonos mores* in Roman law. But these passages are not explicit, and do raise some questions. First, the passages do not define what a threat of "death" entails, and how this might differ from a threat which could result in the person being "given up" and ending up in prison. Do threats of death refer to a direct threat by the aggressor (which would constitute a physical threat, not a threat of prosecution), or do the jurists refer to the spectre of being reported to the authorities, prosecuted, and sentenced to death for committing the crimes? For it was possible, in terms of the *lex Julia de adulteriis*, for one found guilty of adultery by the courts to face a penalty of death.106 Secondly, the nature of the crimes which are referred to are serious, and involved serious consequences for perpetrators (either death or imprisonment). There is no clarity as to what the position might have been with regard to less serious crimes. Thirdly, the words "made a present of something or incurred an obligation" (*aliquid ... se obligavit*) do not explain clearly the purpose of the impeachable transaction. Did it have to concern an entirely unjustified payment of money or property blackmailed from the other person (the reference to adultery would support this), or was an agreement to pay back merely what was owed by a threat of criminal prosecution (eg in the case of theft) also a voidable transaction? On this point the texts cited above are inconclusive,107 and do not make it clear whether the general test of unlawfulness will apply in this particular context. The word "*aliquid*" (something) is particularly

105  D 4 2 8 pr (Watson’s edition).
106  See D 485 21, 22 and 25.
107  Certainly some form of actual loss was necessary for a penal delictual action. See the section on the actio quod metus causa below, and D 4 2 14 14. This issue has caused some debate in contemporary South African law. See 4 3 4 1 1 below, and (in connection with the Roman law texts) Wessels *The Law of Contract in South Africa* §1188; Bloch "Duress — threats of civil and criminal prosecution" 1974 *Responsa Meridiana* 43; D’Oliveira "Caught redhanded: metus and compounding" 1974 *SALJ* 284.
ambiguous, and gives no indication as to whether there is a necessary link between the obligation and the crime.

5 4 3 Threats of civil action or litigation

Although there is almost no authority on the point, it appears unlikely that a threat of civil action was considered contra bonos mores by the Romans. Interestingly, most authorities cite the rescript of Diocletian and Maximian (referred to above) as authority for this point, which lends some credence to the suggestion that Scott’s translation of the passage as referring to threats of criminal proceedings is inaccurate, and that the passage in fact ought to be interpreted as a reference to threats to sue.

6 Metus and the condictiones

Up to this point this paper has focused on the way in which agreements concluded as a result of metus were treated in Roman law, both from a point of view of the actions and remedies available, as well as the substantive requirements that had to be proved. The next question that needs to be considered is whether there were any other forms of action available for cases of coercion in the Roman law of obligations. More specifically, what was the legal position where payments were made or property transferred improperly under compulsion outside the traditional territory of the metus doctrine?

6 1 Unjustified enrichment in the Roman law of obligations

The Romans did not recognise a discreet "system" of enrichment law as a distinct branch of the law of obligations. However, the general principle that unjustified enrichment ought not to be countenanced was recognised at least as a matter of principle in Roman law, even if this sort of obligation was classified by the Romans as being quasi-contractual. The leading articulation of the principle against unjustified enrichment in Roman law is the statement of the jurist

108 See on this point D’Oliveira (n 107) 287.
109 C 2 19(20) 10. This view is endorsed by Zimmermann (n 12) 654 and Van Huyssteen (n 36) 13 n 95. Another text which could serve as authority for the view is D 4 2 23 3.
110 For the fact that the Romans merely recognised an enrichment principle in a vague sense, see Pucłowski v Johnston’s Executors 1946 WLD 1 3-4; Le Roux v Van Biljon and another 1956 2 SA 17 (T) 20 in fin. LAWSA Vol 9 §75; De Vos Verwykingsaanspreeklikheid in die Suid-Afrikaanse Reg (1987) 5; Eiselen & Pienaar Unjustified Enrichment: A Casebook (1999) 3.
Pomponius, who said in the Digest "[f]or it is by nature fair that nobody should
enrich themselves at the expense of another",\textsuperscript{111} and "[b]y the law of nature it is
fair that no one become richer by the loss ... of another".\textsuperscript{112} On the basis of this
principle of equity, it was possible for an aggrieved party in Roman times to seek
relief in cases where that party had been unjustifiably impoverished in some way.
But since the Romans did not go as far as viewing unjustified enrichment as a
distinct source of obligations, cases of unjustified enrichment were treated in a
rather ad hoc fashion. The Romans did not develop one all-embracing enrichment
action. Rather, in circumstances where unjustified enrichment occurred, it was
ultimately possible to seek relief in terms of certain specific enrichment actions,
each with their own particular characteristics, and each designed to deal with a
particular practical problem. The most famous of these were the condictiones,\textsuperscript{113}
although there were other forms of enrichment action, like the action of the
negotiorum gestor, for example.

### 6.2 The position with regard to cases of metus

Under classical Roman law, the traditional actions for metus discussed above
were, of course, framed widely enough that although they are commonly
discussed in the context of agreements and promises, they could be implemented
to allow an aggrieved party to recover payments and transfers of property outside
the bounds of contract law. The relatively fluid nature of the law of the Roman
approach to metus would explain this — but what would have been important is
whether a case for restitution based on metus had been made out. Of course, the
traditional approach to claims based on metus was very strict, and limited to
recovery in cases involving a threat of serious evil to the person. So, the question
that needs to be asked is whether the Roman condictio had any relevance to
transfers of money or property made as a result of metus outside traditional
(mainly contractual) bounds, or to situations where the strict requirements for
metus were not met. In classical law, the formula for the condictio was framed in
the abstract, allowed for the recovery of any datio that was undue, and applied to
a wide variety of transactions. As such, one could make out a prima facie case for
saying that a person who had transferred money or property under threat would

\begin{itemize}
\item \textsuperscript{111} \textit{D} 12 6 14 (Watson's edition).
\item \textsuperscript{112} \textit{D} 50 17 206 (Watson's edition). There are a number of other passages where
the principle against unjustified enrichment is referred to in Roman law. See \textit{D} 5 3 38; \textit{D} 5 7 1.3; \textit{D} 5 12 1; \textit{D} 25 2 26.
\item \textsuperscript{113} For a full discussion of the nature and development of the condictiones generally, see
Kaser (n 10) 200-205; Zimmermann (n 12) 834ff; De Vos (n 110) 7-10; Thomas (n 6) 77; Du Plessis (n 68) 17ff.
\end{itemize}
have been entitled to seek a condictio by way of action for recovery, over and above the traditional stricti iuris actions for metus discussed earlier. But, as Du Plessis points out, on closer analysis of the nature and scope of the action for a condictio in classical law it is unlikely that this would have been possible. The aggrieved party would have to have shown that the transfer was undue in the eyes of the law, which was problematic. In the formative period of Roman law, the Romans did recognise that a coerced agreement or conferment was voluntarily made, and therefore the performance was technically due, despite the threat. Only in the late Republic, once the praetors recognised that metus was inappropriate, could an aggrieved party speak of the transaction being undue. Secondly, a classical condictio was usually sought where the transfer had occurred to satisfy a debt or legal obligation that the party did not know was not due. Since a payment or transfer under threat was made with the knowledge (scientia) that it was not due, and there was as a result usually no intention to satisfy some legal obligation that the party thought was owed, it seems unlikely that an action for a condictio could have been available to a victim of metus. The traditional remedies for metus would have had to suffice.

In post-classical law, the position was different, since the condictiones had evolved into a variety of enrichment remedies. Since it was recognised by this stage that a payment or transfer under threat was undue (indebitum), it would seem that the condictio indebiti would have been a competent mechanism to institute to seek recovery of the money or property. But the condictio indebiti would not in fact have been available, since the compilers of the Digest required that before a condictio indebiti could be successful, the undue payment had to have been made by mistake (in error). An intentional payment or transfer under coercion could not be said to have been made erroneously.

In the light of the fact that metus was considered an unlawful act in Roman law, the condictio that was relevant to cases of coercion was the condictio ob turpem vel iniustam causam. The relevant title of the Digest identifies a number of situations where a payment or transfer made under compulsion could be recovered in terms of this condictio. As far as metus in particular is concerned, the most explicit passage is D 12 5 7, which reads: "It is agreed that money exacted under a stipulation itself extorted by force is recoverable." This passage suggests

114 Du Plessis (n 68) 21.
115 See D 12 6 1.
116 D 12 5. See too Dawson "Economic duress and the fair exchange in French and German law" 1937 Tulane LR 348.
that, at least as far as the stipulatio was concerned, the condictio ob turpem vel iniustam causam as well as the traditional stricti iuris actions for metus could have been instituted.

But there are other relevant passages too. First, Paul intimates that where one makes a payment to ensure one’s property is returned, such a payment was turpis, and could be recovered for being undue in terms of the condictio ob turpem vel iniustam causam. In similar vein, an undue payment made in order to obtain money or property legitimately owed to a person in terms of a will or stipulatio was also recoverable in this way. This suggests that it would have allowed transactions induced by compulsion to be reversed without the strict requirements for metus (a threat of serious evil to the person) having to be proved. Both examples refer to more subtle forms of threat, and concern proprietary or patrimonial interests. This indicates something of an extension of the traditional bounds of the doctrine of metus. Finally, this condictio could be instituted to recover something given in order to prevent the commission of some form of crime. From these passages it can be inferred that the condictio ob turpem vel iniustam causam did provide an aggrieved party with a remedy for recovery that not only paralleled the more traditional actions for metus in post-classical Roman law (notably the contractual restitutionary action that had evolved by that time), but may also have extended the bounds of actionable compulsion to a small degree.

117 D 12 5 2 1.
118 D 12 5 9 1 (Watson’s edition) reads: “[[I]f I give you money to get from you something owed by you under a will or stipulation, only the condictio will lie to recover the payment.”
119 See D 12 5 2 1.