

The fusion fallacy essay sample



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Jurists have long drawn a distinction between equity and common law, a divergence that can primarily be attributed to equity's historical evolution. This does not mean that equity fails to be 'law' as traditionally defined but rather, as Maitland saw it, equity was a 'gloss' on the common law, called in aid where the latter fell short by virtue of its universality. ¹ If equity's status as 'law' is not in dispute, the argument that it and the common law are now so similar that retaining a distinction between them is not useful has led to calls - both judicially and extra-judicially - for jurisdictional fusion.

This latter form of fusion is contrasted with the administrative fusion effected by the Judicature Act 1873. ² By contrast, equity specialists like Patricia Loughlan argue that both jurisdictions are still developing substantive law; mix them at all and one engages in 'fusion fallacy'. ³ Arguably, the common law is becoming more and more flexible even as equity solidifies and sets. When considering the relationship between equitable compensation and common law damages, evidence suggests that there are strong similarities now emerging between the two, and it is difficult to draw meaningful distinctions between them.

In most common law countries including the United States, Canada, New Zealand and even in traditionally orthodox dualist countries like Australia and the UK jurisdictional fusion is gradually evolving and seems inevitable. Therefore the response to whether equity and law are capable of substantive or doctrinal fusion will be answered in the affirmative in this essay as 'fusion' is not as far-fetched a concept as some jurists would like it to be, and the 'fusion fallacy' is in fact, a fallacy in itself.

According to the ' general limb' of the fusion fallacy as proposed by conservatives Meagher, Gummow and Lehane's Equity Doctrines and Remedies, ' foreign concepts' cannot be imported from one jurisdiction into the other. 5 More specifically, the first limb of the fusion fallacy which is central to the arguments put forth in this essay implies remedies from one jurisdiction cannot go in support of rights in the other jurisdiction where that was unattainable before the fusion of the administration of law and equity.

This is commonly referred to as the ' crossover of remedies. ' 7 Interestingly though, the crossover of remedies implies that if equity were to borrow a concept from the common law, for example by analogy to the award of exemplary damages at law, include exemplary damages as an element of equitable compensation or account of profits, this would not result in a fusion fallacy as it would be considered merely a sensible development of equity that could have occurred before the administrative fusion in 1873. However in contrast, if exemplary damages, a legal remedy, were applied to an equitable wrong that only arises in equity such as breach of a fiduciary duty, this would be considered a fusion fallacy as it would have been impossible prior to 1873.

The reason for this is because in the absence of statutory authority, in equity, the Chancery could not have applied legal remedies as equitable rights were not recognized at law, nor were legal remedies available in support of such rights. 0 Contrastingly, equitable remedies have always been available in support of legal rights where the legal remedy is inadequate. 11 However absurd this distinction may appear, Australian authority largely

supports the rejection of the crossover of remedies¹² though in recent times there seems to be a gradual movement towards fusion.

In a critical decision in *Harris v Digital Pulse Pty Ltd*, Spigelman CJ and Heydon JA by a majority in the Court of Appeal reversed the trial judge's decision, holding that exemplary damages could not be awarded for the breach of the type of fiduciary duty in the instant case as it was 'inappropriate' to import such objectives by analogy from the legal remedy of damages. ¹³ The main reason given for this judgment was that equitable relief did not pursue penal objectives. ⁴ In dissent, Mason J argued that equity strives for a remedial adequacy that is not and cannot be limited to compensation, hence a punitive element falls within the scope of certain cases such as the instant case.

This argument persuades one to argue that though equity and the law are not completely fused, perhaps the crossover of remedies in both directions may be useful in certain cases as equity and the law are becoming increasingly intermingled. Such an argument is in line with the view put forth by La Forest J in *Canson Enterprises v Boughton & Company*¹⁶, an important case in which the Supreme Court of Canada was divided.

La Forest J argued that 'equitable principles were not frozen in time' but rather a 'mingling of law and equity' in some cases 'allows for direct application of the experience and best features of both law and equity, whether the mode of redress originates in one system or the other.'¹⁷ In this case La Forest J took a realistic approach and emphasised that jurisdictional fusion was an ongoing and subtle process as some areas of law

and equity were more likely to result in successful doctrinal fusion than others.

He also proposed that the flexibility of the remedy and desire for justice should prevail over any concern for the historical origins of causes of action. 19 Such views highlight the backward nature of dualists who are convinced as Professor Ashburner was, that ' the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters'20 simply because common law and equity were historically ' inherently distinct' and unique creatures.

Critics of jurisdictional fusion however, may argue that the origins of common law and equity and the underlying principles on which they are founded, notably common law being based on precedent and judges supposedly ' declaring' the law, whereas equity being more discretionary in nature allowing judges to ' make' law based on the ' rules of equity and good conscience', are critical arguments in favour of the fusion fallacy and should ensure that the two systems are not fused together. 21 According to Sir George Jessel MR in *Re Hallett's Estate; Knatchball v Hallet*, 22 the rules of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. '

In rebuttal, fusionists claim that equitable doctrines and remedies have now long been based on more than mere judicial discretion. Rather, the appointment of legally trained Chancellors and now the concurrent administration of law and equity by judges of similar educational background and experience has meant that equitable remedies are more likely to be

based upon rules of law. Hence the maxim that ' equity is as long as the Chancellor's foot' is a myth in the modern administration of equity. 4 Fusionists also assert that the historical origins are no longer relevant so long as an appropriate remedy can be ascertained.

This is most certainly the view held in the decision of the New Zealand Court of Appeal in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*²⁵ in which it was established that the substantive fusion of law and equity in relation to breach of confidence had been achieved. Cooke P held that ' for all purposes material, equity and common law are mingled and merged' and, ' a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.

Lord Denning also supported the fusion of law and equity in *Central London Property Trust Ltd v High Trees House Ltd*²⁷ in which he considered that a defendant could be compelled to adhere to his/her representation of future intention within the context of a pre-existing legal relationship on the basis of ' a natural result of the fusion of law and equity' in the area of estoppel. 28 This view was later reiterated in the landmark Australian High Court decision of *Waltons Stores Ltd v Maher*²⁹, signifying the dominance of equitable principles, particularly the principle of unconscionability, in the law of estoppel.

Deane J noted that the ' advent of the Judicature System encouraged the development of a unified legal system' and law and equity has not only fused but to consider otherwise would be risking the future development of an orderly legal system. 30 In contrast to this view, in another recent

Australian case, *Pilmer v The Duke Group Limited*³¹, the High Court expressly recognised that a fiduciary duty will not arise simply because the adviser has had past dealings, and an expectation of future dealings, with the client.

This is significant because, as recognised by Kirby J, fiduciary obligations which are equitable obligations 'are more onerous (and the legal consequences more drastic) than those arising from common law duties of care or from contractual relationships.'³² This case highlights the current rigid stance in Australia, not allowing a legal obligation to arise from an equitable obligation as this would result in a 'fusion fallacy'.

On the contrary, fusion adherents such as Lord Diplock expressed the practical reality of the fusion of law and equity in *United Scientific Holdings Ltd v Burnley Borough Council*,³³ in which he referred to Professor Ashburner's metaphor when he stated, 'the waters of the confluent streams of law and equity have surely mingled now.'³⁴ Similarly, in the English case *Seager v Copydex Ltd* a crossover of remedies occurred as damages were available in response to a breach of an equitable obligation.⁵ Furthermore, the benefits of a fused system were expressed by Mason CJ in *Verwayen*³⁶ in which he argued in favour of a fused cause of action with a wide variety of remedies including damages to rectify the breach of a defendant.

In contrast, evidence from the United States, a substantively fused system, suggests that fusion has led to the demise of equity. That is, the hallmarks of equity jurisprudence - based primarily on 'good conscience' and judicial discretion are dying out as the two systems are becoming increasingly fused.

7 However, it is argued that this is not necessarily an intentional or aversive outcome but rather, as Roscoe Pound perceives, an inevitable element in the substantive fusion of equity and law which holds many benefits. 38

Moreover, the complete demise of equity as foreshadowed by some legal commentators has not occurred.

According to Professor Hohfeld in the Michigan Law Review, to teach and administer equity independently of the law is ' unscientific, both from the point of view of analysis and from that of educational expediency. 39

Furthermore, such liberal views such as those expressed in United Scientific Holdings, Aquaculture and Verwayen suggest that fusion of equity and common law is not only inevitable but also both practical and preferable.

Amalgamation of law and equity is in the interest of judges, the courts and the plaintiff seeking a remedy as it allows them access to a wider range of remedies from which the most appropriate one will be applied.

Critics of the aforementioned views have argued that a cross over of remedies and subsequent fusing of common law and equity was not the intent of the Judicature Act of 1873 and therefore should only be supported if legislation specifically provided for it. 40 This is an argument put forth by Heydon J in Harris. However, if one examines the Judicature Act in detail it is quite apparent that it, nor any other legislation, prohibits the fusing of law and equity. 1

As a result it is proposed that fusion is not beyond the judicial function and there is nothing inherent in the amalgamation of law and equity that suggests otherwise. Anti-fusionists also claim that fusion of law and equity is

likely to bring about uncertainty and confusion in the law as some aspects of the legal system would be substantively fused whilst in other aspects, equity and law would remain separate. 42 This is a valid point as there is no denying that fusion is a slow and gradual process.

However, Tilbury convincingly rebuts this argument by claiming that the 'principled' fusion that is developing will 'take place incrementally, against the background of the existing law' and thus is likely to cause 'no more uncertainty than any other principled development of the existing law.' 43 Furthermore, it is argued that such fusion may in fact enhance the flexibility of the legal system and minimize if not completely remove, current unnecessary distinctions between equity and the law that is more likely to result in uncertainty and unpredictable outcomes for aggrieved plaintiffs.

Critics of fusion also argue, as Heydon J did, that 'it is not irrational to maintain the existence of different remedies for different causes of action having different threshold requirements and different purposes.' 44 For example, he claimed, a client suing in deceit has an opportunity to obtain exemplary damages but also carries a higher burden of proof and more onerous tests for breach, causation and remoteness than if the action were merely for breach of fiduciary duty. 5 This is a challenging argument for fusionists as it seems only fair to hold plaintiff's to a higher threshold when the potential awarded damages are greater. However, as Mason J argued in Harris, it would be absurd if the same fact scenario rendered two different outcomes, one in which exemplary damages were awarded and one in which it was not, depending on whether the plaintiff was suing in equity for breach of fiduciary duty or in common law for deceit.

Legal Philosopher HLA Hart wrote that no legal system can be considered just unless it can ' treat like cases alike.... nd treat different cases differently. '47 This view has been reiterated by English Professor Burrows, who claimed that, ' where, on close examination, like cases are not being treated alike.... fusion of common law and equity is required in order to eradicate that inconsistency. '48 These arguments focus more on the necessity of achieving a fair, consistent and just outcome as was encouraged by La Forest J in *Canson*, than on pragmatic considerations as is promoted by Heydon J. If the purpose of a remedy is to redress a wrong and achieve a fair outcome consistently than Mason J's principally driven approach prevails as the stronger argument.

In conclusion, proponents of the fusion fallacy pose numerous challenges to fusing common law and equity, particularly in regards to the crossover of remedies, claiming that the trust-like basis of equity along with its discretionary nature and lower thresholds suggest that the scope for amalgamating law and equity is quite limited. 9 However, as case law across the Commonwealth reveals, there are many instances which give rise to the need for fusion of equity and law in order to provide adequate remedies for the plaintiff and achieve a just outcome. Thus, it is evident that concurrent administration and changing social realities pose a need for this amalgamation. Despite equity and law being historically distinct creatures once administered separately and independently, administrative fusion has inevitably led to close intermingling and intertwining of the two jurisdictions.

Though the position in Australia continues to be somewhat rigid following *Harris and Pilmer v The Duke Group Ltd*, case law from other Commonwealth

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countries including Canada, New Zealand, the United States and England are evidence that such 'intermingling of waters' is a practical necessity in order to reduce uncertainty and create a cohesive, rational, consistent and efficient unified system of law. Hence, practical reality indicates that 'fusion' is no longer a 'fallacy'.