

Should the
concurrent but
separate obligations
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Law



1. " How far the remedies or causes of action should be kept discrete is debatable, but it would seem excessively legalistic to insist on concurrent duties. What is important is the substance of the duty falling on the particular defendant in the particular circumstances, to ascertain which it may be necessary to consider various possible sources ??? tort, contract, equity, statute...For breach of these duties, now that common law and equity are mingled, the Court has available the full range of remedies...What is most appropriate to the particular facts may be granted":

Cooke P (as his Lordship then was) in *Mouat v Clark Boyce* [1992] 2 NZLR 559 at 565-566. Do you agree that maintaining the concurrent but separate obligations and remedies of common law and equity is " excessively legalistic" or do you believe that there is a sound basis for such a distinction? Support your view with case law wherever possible. I INTRODUCTION This paper argues that as equity developed from a court of conscience with ' trust' as its guiding principle, there is no historical foundation for its fusion or ' mingling' with the common law.

Instead of being excessively legalistic to insist upon concurrent duties, it argues that that nature of equitable obligation and remedies are restorative and serve a distinctly different purpose from the common law and should remain separate. Pursuant to this, the case law demonstrates the different means by which the court will determine an equitable remedy to one of common law, and that compensation is awarded to put the aggrieved party in a position that she would have been in had the equitable obligation not been breached.

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It focuses specifically upon judgments where exemplary damages have been awarded for breaches of equitable duty, and looks at the reasoning of the courts when allowing such damages. By considering the obiter of certain judgments from New Zealand and Canada, it concludes that they are marked by confusion and uncertainty and exacerbated by a lack of reasoning beyond claiming the merits of fusion. Fusion, it is argued, appears to be an unsubstantiated and almost circular process through which a judgment can be validated with no real explanation of how it be dependably applied.

Finally, it turns to a seminal Australian case in which the courts asserted their own position on the award of exemplary damages in equity. II THE HISTORICAL FOUNDATION OF EQUITY Equity, 'the saving supplement and complement of the common law' was originally administered by the Court of Chancery, 'a court of conscience'. Getzler writes that 'trust' was part of the greater project of the Chancellors to remedy the inability of the common law procedures but most importantly to 'get at the fine detail of fact explaining parties' minds and actions'.

Its unifying principle is described as one of conscience, perhaps best demonstrated by the maxim that 'equity acts in personam'. This maxim is said to date back to the Earl of Oxford's Case where Lord Ellesmere said that equity could restrain a plaintiff enforcing a judgment in the court of common law 'not for any error or Defect in the judgment, but for the hard Conscience of the party'. Despite procedural amalgamation with the common law courts through the Judicature Acts, in Australia, it has not been viewed as fused in any substantive way with the common law.

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The early case *Salt v Cooper* clearly rejected such a notion when Jessel, M. R. wrote, that the assimilation of the transactions in equitable and common law business under the Judicature Act of 1873 was not a fusion as some suggested but 'the vesting in one tribunal the administration of Law and Equity in every cause, action or dispute which should come before the tribunal. That was the meaning of the Act'. III EQUITY AND REMEDY

Equity is concerned, not only to compensate the plaintiff, but also to enforce the trust which is at its heart. Equitable remedies are thus responsive and amenable to this unifying principle. Equitable compensation of a pecuniary nature is designed to be restorative, in as much as it puts the plaintiff back into a position they were before the breach. It has a separate purpose to common law damages. Lord Ellesmere encapsulates the above in the following quote taken again from the Earl of Oxford's Case:

The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of what nature soever they be, and to soften and mollify the extremity of the law. Writing in 1995, Lord J Millett described the traditional objects of equity as: to relieve against mistakes and fraud, accident and surprise; to protect the weak from exploitation and trust and confidence from betrayal, to prevent the unconscionable assertion of legal rights and to give relief against every kind of unconscionable conduct.

However, in contrary to Australian judges, he also says that 'so far as remoteness of damages, mitigation and even contributory negligence are

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part of the law of causation there may well be cases in which they should be relevant to the assessment of equitable compensation. ' In conclusion, he says that equity should not be hesitant to borrow from the common law and that pride prevents contemporary judgments from profiting from common law concepts.

Australian authority, acknowledges that a decision like *Seager v Copydex Ltd* openly constructs a belief that damages are able to be awarded for a breach of a purely equitable obligation under the Lord Cairn's Act and its successor provisions. However, it is suggested that, in this case, Lord Denning acted upon a legally unfounded assumption that damages could be awarded in equity under any of its jurisdictions. They do not see that there is any legal reason to support the inclusion of common law considerations to assess equitable compensation within its exclusive jurisdiction.

The difference between equitable jurisdictions seems to be an important distinction in the debate surrounding pecuniary remedies for compensation of harm done in equity. IV EQUITY AND DAMAGES There appears to be agreement that Lord Cairns Act gives the court power to award damages in lieu of or in addition to specific performance or injunction for wrongful acts. However, it appears as controversial whether the Act confers power to award such damages in equity's exclusive or concurrent jurisdiction.

Australian judges appear the more staunch believers that the Act only authorizes this power in its concurrent jurisdiction, and argue that the legislative words ' wrongful acts' were intended to mean only those wrong at

law and not wrong in equity. The distinction is more than purely academic, as recent decisions from New Zealand, Canada and the United Kingdom, quite clearly disagree with the Australian point of view, and have mingled the remedies and causes of action to produce the award of common law damages for exclusively equitable jurisdictions.

These decisions show that the courts believe that common law damages are perfectly capable of righting an equitable wrong, and have awarded exemplary damages against a defendant in particular circumstances. V EQUITY AND COMPENSATION Exemplary damages appear contrary to the role of equitable compensation, as it is considered to be an assessment of the punishment required by the defendant's wrong and focuses on the blameworthiness of what he or she did. The purpose of equitable compensation, however, is to place the aggrieved party in the position he or she would have been in had the equitable obligation not been breached.

This doctrine was established in *Nocton v Lord Ashburton* where, failing a cause of action under either fraud or negligence, the House of Lords awarded the plaintiff pecuniary compensation for the breach of fiduciary obligation committed by his solicitor. The reasoning of the House of Lords in this case is interesting, as it reveals the process by which equity will seek to redress a wrong which has failed in common law. In *Nocton*, the common law action of fraud was not proven as the required mens rea of deceit had not been proven.

However, the concurrent existence of the fiduciary duty allowed for the wrong to be righted, Lord Dunedin commenting that 'this was a case in which common justice demanded a remedy which was not forthcoming in the common law ??? as the common law begins with the remedy and ends with the right'. So, conversely, the equitable duty pre-exists any wrong, and any remedy awarded stems from a breach of that relationship of trust. I believe that this case illustrates the whilst some causal connection between the breach of loss must be established in order not to do injustice to the defendant, that connection faces a less rigorous examination at equity. A breach of a fiduciary duty can still exist where a common law tort is not proven against the defendant. Moreover, a defendant may have misconceived the extent of his obligation, but the strict liability of equitable relationships mean that the plaintiff will receive restitution for the defendant's breach of obligation. Thus, in *Nocton*, Viscount Haldane LC, clearly identified the basis on which the court decided to award equitable compensation when he said that the defendant had acted fraudulently, 'not a moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court of conscience'.

In conclusion, *Nocton* reveals that equity's unique obligation of honesty exists independently of contract or other special obligation, and provides a means for a court to administer 'justice' where it may not have been served under the common law. Thus, with such high standards required of the fiduciary, to mingle the common law and equitable remedies and causes of

action may impose unduly harsh remedies against the more general and public duties imposed by tort or contract. VI CONTEMPORARY CONFUSION

The Mouat judgment attempts to mingle the causes of action and remedies available in equity and the common law with confusing results. This appeal focussed (amongst other issues) upon whether damages for breach of contract can be reduced on the grounds of contributory negligence. In his assessment, Cooke P, based his decision upon the plaintiff's fiduciary relationship with the defendant. Accordingly, he concluded that the plaintiff, Mrs Mouat, contributed somewhat to her loss, and damages should therefore be apportioned as 50/50 (reduced from the trial judge's ruling of 2/3).

However, in determining this figure Cooke considered the high standards expected of fiduciaries and the unequal bargaining position between the two. Thus, he used the breach of fiduciary relationship to determine damages under tort. Cooke justifies basing his decision on the further grounds of a fiduciary relationship by saying, ' the content of the duty of care in such a case is identical whether derived from theoretical sources of tort, contract or equity, or as I think from all of them in a situation where they overlap, so in my opinion its source or sources do not affect the power to apportion'. I disagree, on the basis that the source of the duty is not identical. The solicitor's breach in contract stems from that contract, without the contract, there is clearly no breach, or cause of action. Thus, damages are awarded upon that basis and for that wrong. The fiduciary relationship between a solicitor and client exists and can be breached without a contract, so the

action and the remedy are separate, and as mentioned at the beginning of this paper, begin from a position of trust.

I find the argument unsatisfying that contributory negligence attached to a breach of a contractual duty can be lessened by regards to the existence of a fiduciary relationship. To me the two causes do not overlap, as Cooke suggests, they may complement each other inasmuch as there may be a duty required in both, but the precedent set by remedying one by reference to another weakens the principle of each. Cooke's decision in *Mouat* highlights the disagreement occurring in common law courts about the fusion of equity and the common law.

He fails to give adequate reason as to what he means by this fusion, how it happened and what follows from it, which is exactly the general criticism leveraged at 'fusionists' by Meagher, Gummow & Lehane, and directly at Cooke, P by Michalik in his critique on the *Aquaculture* decision. In *Aquaculture* the courts allowed that monetary compensation (damages) be awarded for breach of a duty of confidence or other duty deriving historically from equity. The minority ruling in *Aquaculture*, Somers J, reminds us that 'equity and penalty are strangers', however the majority circumvent this historical reasoning in favour of remedial flexibility.

Yet, such flexibility aside, there appears a lack of understanding, or even respect for the exclusive jurisdiction of equity in their argument that exemplary damages must be awarded when compensatory damages do not 'adequately punish the defendant for outrageous conduct'. Although the New

Zealand Court of Appeal overturned the award of exemplary damages, they did not do so on a point of principle, but upon the decision that the \$1.5 million awarded in compensatory damages was sufficiently punitive against the defendant. As the exemplary award was considered to be an assessment of 'blameworthiness' of the defendant, and was retracted upon the basis that he was sufficiently penalised, there was no discussion given to the appropriateness of it as a remedy. Criticism is directed against the lack of the court's reasoning in *Aquaculture* for why they allowed exemplary damages to be considered for a breach of purely equitable origin. The strongest reason the court gives is that fusion between equity and the common law is now accepted, yet it is somewhat insubstantially discussed given the scant four-page judgment from the Court of Appeal.

Commentator Michalik points out a significant flaw in the argument of Cooke, P. Whilst it is clear from this case, as well as *Mouat* and his earlier judgement in *Day v Mead* that he sees law and equity as completely fused, his reference to the wider discretion of the courts of equity in determining damages as justification for including exemplary damages, seems to indicate that the two concepts still maintain separate identities or, 'if the remedy is a product of fusion, the fusion is itself an incomplete one'.

As such, Michalik believes that the fusion argument is a 'red herring' and that Cooke P, has used the concept of fusion to affect the availability of remedy rather than the substance of it. This, he concludes, is problematic as the basis in law of a particular remedy can affect its availability as it defines the particular task the remedy must perform. The overall effect is to leave

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the courts with a ' free-for-all'. I agree with Michalik inasmuch as the lack of strong judicial leadership as to why and how equity the common law are to be mingled creates much uncertainty in the law.

Canadian courts have been similarly unable to explain the future operational aspects of using common law principles to assess compensation for equitable duties, despite appearing to agree that this compensation could be measured by analogy with common law concepts of remoteness and mitigation. In *Canson Enterprises Ltd v Boughton & Co.* La Forest J, with the approval of three other of the Supreme Court judges cited *Day v Mead* to support the notion.

Around the same period in *Norberg v Wynrib* the majority of the Supreme Court of Canada allowed an appeal by a woman addicted to painkillers who claimed breach of a fiduciary duty by her elderly doctor to whom she exchanged sexual favours in return for a continuing supply of drugs. In response to the appeal, three out of five Supreme Court judges awarded compensatory and aggravated damages of \$20, 000 plus an additional \$10, 000 in punitive damages. Within the two minority judgments, one called for no punitive damages, whereas the other wanted to increase the figure to \$25, 000.

Despite comments in the first of the minority judgments by McLachlin J, that, ' the foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort...sometimes the doctrines may overlap in their application, but that does not destroy their

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conceptual and functional uniqueness' , there appears to be no further debate as to the appropriateness of additional exemplary damages, or the position of the Court in prescribing this remedy to a breach of equitable obligation.

Around this period, the Australian case of *Digital Pulse Pty Ltd v Harris* was pending appeal against the decision by Palmer J that breaches of fiduciary trust are to be attended by exemplary damages. In the appeal decision, the majority of the Supreme Court of New South Wales reasserted Australia's position that, contrary to courts in other common law jurisdictions, to make all types of remedies available in all claims as the court thinks just, regardless of the legal basis of the claim, would be a radical departure from established practice and that there was no persuasive historical precedent to justify this so.

Heydon, JA, held that the appropriateness of exemplary damages in this case needed not be considered due to the above, thus it was quite efficiently dismissed. In contrast to Cooke, P in *Mouat*, the majority held that, in equity, the beneficiary is not bound to protect oneself against the fiduciary. The equitable concepts of trust and confidence placed in the fiduciary means that there is no basis for importing common law concepts such as mitigation, remoteness, contributory negligence and exemplary damages.

It seems remarkable that there should be around 155 pages devoted to discussion of Australia's position on the ' fusion' of the obligations and remedies of equity and law and the ability of the court's to award exemplary

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damages under equity, whereas, in the cases that do permit such moves, there is little space devoted to the outcome of doing so. The recurring argument seems to be that the law must be responsive and reflexive, this is typified in the Mouat quote and by Getzler's statement that ' any dynamic system must [also] have a sense for which historical matter is essential to be preserved, and which may profitably be discarded' .

But ironically, if the courts were allowed to choose any remedy for a wrong surely some scale of blameworthiness would emerge, and a table or relative wrongs and remedies would need to be established. This, in effect, would be a replica of the equitable wrongs of abuse of trust and positions of power we have now. Human behaviour in and without conjunction to commercial relations will continue to operate along the same means. We will always need the exclusive jurisdiction of equity to recognize that which the common law doesn't, especially as the beginning of this paper raised, in obligations of conscience.

VII CONCLUSION The hardest thing when writing this paper was to establish the various grounds for argument once the parameters had been identified. This, in turn, somewhat became the focus of my paper, with a concurrent focus upon the use of exemplary damages awarded under equity as a characteristic of the ' fusion fallacy' and the differences between common law jurisdictions. Overall, I feel that whilst those in favour of merging or fusion forcefully argue that the law must evolve with the times, there seems no clear argument of what the fusion would involve or why it is needed.

Instead, as demonstrated in the cases considered, one body of law may influence the other, but they still remain conceptually distinct. Equity clearly requires a higher standard of fiduciaries than of parties merely liable in contract and tort, and the merging of obligations and damages will lose that fundamental difference. The largest question left begging of fusion is, are the remedies available as of right or at the discretion of the court? Analogies between common law and equitable causes of action inevitably arise when one tries to respond to one by reference to the other. However, this technique overlooks the unique foundation and goals of equity which has trust at its core and was always intended to run concurrently and as a gloss to the common law, the latter which appears fundamentally concerned with self-interest. By merging the two in what appears to be an ad hoc manner, we may lose the objectively ascertainable rules and principles. The law will suffer as a result. Word Count: 3100. Bibliography Books and Journal Articles Getzler L, ' Patterns of Fusion' in Peter Birks (ed), *The Classification of Obligations* (1997) 5-36. Gummow, Hon Justice W M C, ' Equity: too successful? ' (2003) 77 *Australian Law Journal* 30.

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