

Fusion fallacy essay



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1. Introduction Two jurisdictions of law exist in Australia: equity and common law. ' Equity is ' the body of law developed by the Court of Chancery in England before 1873. Its justification was that it corrected, supplemented and amended the common law. It softened and modified many of the injustices at common law, and provided remedies where, at law, they were either inadequate or non-existent.'[1]

Common law is ' the unwritten law derived from the traditional law of England as developed by judicial precedence, interpretation, expansion and modification.'[2] The complete fusion of these jurisdictions has not yet occurred. The two " streams" of jurisdiction have merged in some areas as the law has developed, but are technically still separate. This essay will prove this claim using the equitable doctrines of estoppel and fiduciary obligations and will then discuss remedies.

2. History of Equity Prior to the enactment of the Judicature Act 1873, the administration of common law and equity was completely separated. The principles of equity developed in the Court of the Chancery where a ' petitioner could seek relief from the harsh or unjust operation of the law'.[3] The Chancery Court was a court of conscience charged with ' an extraordinary power to prevent the injustices and supply the deficiencies that were perceived in the operation of the Common Law'.[4]

The disadvantage of this system was that courts of law refused to recognise equitable rights or interests. The Judicature Act 1873 was enacted in order to merge the administration of law and equity. The effect of the Act was the abolition of the old courts and the creation of a new High Court of Justice that

combined the jurisdiction of the old courts.[5] The judicature system was implemented in WA by enacting in the Supreme Court Act 1880 (WA) provisions equivalent to the Act. These provisions are now located in sections 16(1), 24 and 25 of the Supreme Court Act 1935 (WA).

3. What is the Fusion Fallacy? The phrase “ fusion fallacy” refers to ‘ the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign.... Those who commit the fusion fallacy announce or assume the creation by the Judicature system of a new body of law containing elements of law and equity but in character quite different from its components.’[6]

In her article The ‘ Fusion Fallacy’ Revisited, Fiona Burns sets out the four view points found in case law as to whether the fusion of law and equity exists.[7] This essay will argue in favour of the third view which is called the empirical approach. This approach argues that: ‘ a century of fused jurisdiction has seen the two systems working more closely together; each changing and developing and improving from contact with the other; and each willing to accept new ideas and developments, regardless of their origin. They are coming closer together. But they are not fused.’[8]

4. Equitable Doctrines 4. 1 Estoppel Historically, the law of estoppel has several facets. These include: estoppel by deed, estoppel by judgement, common law estoppel, equitable estoppel by acquiescence and estoppel by representation.[9] Estoppel by representation was ‘ a rule of evidence that could be pleaded in certain circumstances as a defence to an action by a plaintiff who was seeking to enforce rights clearly at odds with

representations he or she had made.’[10] The House of Lords in *Jorden v Money*[11] identified the difficulty with relying on such a representation. The House of Lords held that “ a representation of future intention was only enforceable when it was accompanied by consideration’.[12]

The case of *Central London Property Trust Limited v High Trees House Limited*[13] re-examined the principles of equitable estoppel. The case was decided by Denning J who stated that: The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow a party making it to act inconsistently with it. In that sense, and in that sense only, such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity.[14]

In Australia, promissory estoppel was first argued in the High Court case of *Legione v Harteley*[15] which concerned a contract for the purchase of land. The High Court said that: The clear trend of recent authorities, the rationale of the general principle underlying estoppel in pais, established equitable principle and the legitimate search for justice and consistency under the law combine to persuade us to conclude that promissory estoppel should be accepted in Australia as applicable between parties in such a relationship. [16]

The case that has had a large impact on estoppel is that of *Waltons Stores v Maher*.[17] The Mahers owned commercial premises that they orally agreed to lease to Waltons. Part of the agreement was that the premises would be demolished and a shop built to Waltons specifications. On 7 November 1983 Waltons’ solicitor forwarded the Mahers’ solicitor a lease. Amendments had

been made to the agreement, and the Mahers' solicitor was told by Waltons' solicitor that he believed approval would be forthcoming. Mahers' solicitor wrote to Waltons' solicitor a few days later but received no reply.

The Mahers demolished the building and had half completed the new shop when Waltons indicated that they were not going ahead with the transaction.

[18] The court found that the ' facts as rehearsed by him were sufficient to found an estoppel precluding Waltons from denying the existence of a binding agreement for lease. In doing so his Honour accepted the finding of the trial judge and as a consequence the estoppel thus found was common law or estoppel by conduct.'[19]

The decision in *The Commonwealth of Australia v Verwayen*[20] developed the conceptual frameworks established in *Legione v Hateley*[21] and *Waltons Stores v Maher*. [22] This case focussed on whether the Commonwealth was able to amend its defence in order to contest liability after previously saying that it would not plead any defence or contest liability. It was found that the court was estopped from using the defence. The importance of this case is the statements made, in particular by Mason CJ and Deane J, in relation to the merger of the various categories of estoppel.[23]

Since *Verwayen*[24], there have been no cases decided that relate to the possibility of the merging of the different categories of estoppel. Based on the statements in *Verwayen*, [25] it can be proposed that common law and equitable estoppel has, or will, be merged in the future. It cannot be said whether fusion has definitely occurred until a case relating to the fusion of

the various categories of estoppel has been decided. However, until such a time, this paper would suggest that they have been fused.

4. 2 Fiduciary Obligations ‘ The fiduciary relationship emerged from the Courts of Chancery in earlier centuries. The primary aim of this equitable doctrine is to prevent those holding positions of power from abusing their authority’.[26] ‘ Because of the dependency and vulnerability that was involved in trust situations, equity imposed special duties on the trustee known as fiduciary duties’.[27] Since the time of its evolution, “ the law has developed case by case, largely by analogy, it being accepted that the categories of fiduciary relationships are not closed”.[28]

The issue pertaining to fusion in the area of fiduciary obligations is whether or not a fiduciary relationship exists. There are two kinds of fiduciary relationships: those which are automatically assumed to attract fiduciary obligations and those which must be proven. Assumed relationships include, among others, those between a trustee and a beneficiary[29] and a solicitor and client.[30] If the relationship is not an assumed one, then it must be proven. In *Hospital Products Ltd v United States Surgical Corp*,[31] Mason J outlined the specific characteristics of a fiduciary obligation as: a relationship of trust and confidence, an undertaking, the power to affect the principal’s interests, and vulnerability.[32]

The decision in *Hospital Products* concerned whether a fiduciary relationship existed between HPL and USSC. It was found that a relationship did not exist. Gibbs CJ remarked in his judgement that ‘ an actual relation of confidence ... is neither necessary for the nor conclusive of the existence of a fiduciary

relationship’.[33] He stated that ‘ the fact that the arrangement was of a purely commercial kind and that they had dealt at arms length and on equal footing has consistently been regarded by this court as important, if not decisive, in indicating that no fiduciary duty arose’.[34]

The High Court demonstrated the same approach in determining the existence of a fiduciary relationship in *Breen v Williams*.[35] The case was concerned with ‘ whether a patient could demand direct access to the information in the original material of the doctor’s file that concerned the patient.’[36] The result in *Breen* was that same of that in *Hospital Products*. Whilst some members of the High Court considered that particular aspects of the doctor/patient relationship could possibly be fiduciary in nature[37], ‘ all members of the court held that there was no fiduciary duty on the part of the doctor to give a patient access to records created by the doctor’.[38]

In reaching the decision in *Breen*, ‘ the High Court Justices rejected developments in Canada upholding expansion of the categories of fiduciary relationships.’[39] The Supreme Court of Canada has recently added the categories of doctor and patient,[40] parent and child,[41] and also the Crown and indigenous peoples.[42] The failure of Australian equity to develop means that the doctrine is not expanding over time. The situations and relationships which give rise to a duty of care in common law are much broader than those that give rise to a fiduciary duty in equity. If equity and the common law were fused, then it would be expected that the situations giving rise to a fiduciary obligation would be more inclusive. Thus, there is no apparent fusion with respect to fiduciary obligations.

4. 3 Unconscionable Conduct

4. 4 Yerkey Principle (Wife's Special Equity)

Remedies 5. 1 Exemplary Damages ' Traditionally, the capacity of equity to award damages for breaches of equitable obligations was virtually non-existent.'[43] In recent times, the opinion of the courts has shown signs of moving towards the fusion of remedies. The case of *Harris v Digital Pulse*[44] deals with the award of exemplary damages for a breach of fiduciary duty.

The defendants were employees of Digital and they had ' secretly been carrying out marketing and web design work for various of Digital's clients in order to make profit for themselves and for the company they had set up called " Juice".'[45] Palmer J in the Supreme Court of New South Wales[46] held that there had been a breach of fiduciary duty and that the claimant was entitled to equitable compensation or an account of profits. Palmer J additionally held that Harris and Eden should pay \$10 000 each in punitive damages to Digital for the breach.

Palmer J concluded that: Consistency in law requires that the availability of exemplary damages should be coextensive with its rationale...where a punishment is called for to deter the wrongdoer ... from similar conduct and where something more than compensation is felt necessary to ameliorate the plaintiff's sense of outrage, then it should make no difference to the availability of exemplary damages that the court to which the plaintiff comes is a court of equity rather than a court of common law.[47]

The case was appealed to the Court of Appeal of New South Wales on the punitive damages issue. The majority overturned the award of punitive damages. The reason for the decision was that no past decisions had awarded such damages in equity. They stated that, if such a change was to be made, then it should be implemented by the Legislature or the High Court.[48]

Although other jurisdictions have expanded the remedies available for the breach of an equitable duty to include common law damages,[49] Australia has yet to do so. This suggests that, although some courts support the fusion of damages, the higher courts do not. Thus, there is not yet fusion in this area.