

## A CLASSIFICATION OF FUSION AFTER *HARRIS V DIGITAL PULSE*

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### I INTRODUCTION

The fusion of law and equity might be variously characterised as fact, fallacy,<sup>1</sup> or furphy.<sup>2</sup> Whilst some Commonwealth countries have embraced the unification of the two jurisdictions,<sup>3</sup> Australian jurisprudence has been more hostile to the concept. There can be no doubt that the influential thinking of Meagher, Gummow and Lehane, expressed in the various editions of *Equity: Doctrine and Remedies*,<sup>4</sup> has contributed significantly to the Australian reserve.

‘Fusion’ is a term that embraces many meanings.<sup>5</sup> In all its senses, it captures the notion that the boundaries between the jurisdictions of common law and equity are becoming less rigid. However, this theme gives rise to countless variations. At one extreme, the call is made to remove all unnecessary distinctions between the common law and equity. A more cautious view advocates the quiet integration of the doctrines. This article posits a broad classification of the suggested approaches.

The case in favour of fusion has been advocated as long as there have been two jurisdictions to fuse.<sup>6</sup> Blackstone questioned the differences between the

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1 See, eg, Roderick Meagher, John Dyson Heydon, Mark Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) [2-105].

2 Michael Tilbury ‘Fallacy or Furphy? Fusion in a Judicature World’ (2003) 26 *University of New South Wales Law Journal* 357.

3 For example, courts in both Canada and New Zealand award exemplary damages for breach of fiduciary duty: *Norberg v Wynrib* [1992] 2 SCR 226; *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299.

4 Most recently Meagher, Heydon, and Leeming, above n 1.

5 The most recent collection of essays for and against fusion can be found in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005).

6 See generally Joshua Getzler, ‘Patterns of Fusion’ in Peter Birks (ed), *The Classification of Obligations* (1997) 157. See also Joshua Getzler, ‘Am I my Beneficiary’s Keeper? Fusion and Loss-Based Fiduciary Remedies’ in Degeling and Edelman, above n 5, 239, 241–8.

common law and equity.<sup>7</sup> When the two jurisdictions were separately administered, fusion was at times embodied by co-operation between the Lord Chancellor and the common law judges.<sup>8</sup> At other times, attempts at fusion more closely resembled the hostile takeover.<sup>9</sup> Following the introduction of the judicature system, calls for fusion came almost immediately.<sup>10</sup> Ever since, debate about the extent to which the two jurisdictions may validly work together has continued.<sup>11</sup>

This article seeks to contribute to this tradition, and attempts to untangle some of the concepts bound up in various notions of ‘fusion’. While ultimately in favour of principled fusion, the article focuses on the various paths by which fusion could be implemented, and the directions they might take the law. Today there are still those who call for a hostile takeover, while others advocate slow merger. This article distinguishes between the two approaches, labelling them ‘direct fusion’ and ‘indirect fusion’ respectively, and considers their differing ramifications.

A recent decision of the New South Wales Court of Appeal will serve as a foil for this discussion. In *Harris v Digital Pulse Pty Ltd*,<sup>12</sup> a judge at first instance in the Supreme Court of New South Wales allowed an award of exemplary damages (a common law remedy) for breach of (an equitable) fiduciary duty.<sup>13</sup> The Court of Appeal, comprising Spigelman CJ, Mason P and Heydon JA, allowed an appeal against the exemplary award, but did not do so on the basis that it is never

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7 Getzler, ‘Patterns of Fusion’, above n 6, 163 fn 26.

8 For example, Lord Chancellor Bacon’s efforts to normalise relations between the jurisdictions after the dispute between Lord Coke CJ and Lord Ellesmere LC came to a head in 1616. This included an agreement to consult with the common law judges on hard cases: see generally Getzler, ‘Patterns of Fusion’, above n 6, 184; John Baker, ‘The Common Lawyers and the Chancery: 1616’ in John Baker, *The Legal Profession and the Common Law – Historical Essays* (1986) 205, 224–9. It appears that some of the common law judges returned the courtesy by having regard to equitable doctrines: see *Master v Miller* (1791) 4 TR 320, 341; 100 ER 1042, 1053–4; *Legh v Legh* (1799) 1 Bos & Pul 447, 447; 126 ER 1002, 1002; *Bosanquet v Wray* (1815) 6 Taunt 597, 607; 128 ER 1166, 1171. However, Glanville Williams considered such cases to be ‘exceptional’: Glanville L Williams, *Learning the Law* (3<sup>rd</sup> ed, 1950) 16 fn 2.

9 *Earl of Oxford’s Case* (1615) 1 Ch Rep 1; 21 ER 485, where Lord Ellesmere LC sought to restrain a judgement at law after it was complete, leading to the intervention of the King. Getzler, ‘Patterns of Fusion’, above n 6, provides a number of further examples. *Anon* (1464) YB 22 Edw IV; Pasch 9, where the Court of Common Pleas considered enforcing a use. *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676 (KB) where the bankruptcy court attempted to create a trust-like doctrine. The use of the business expression ‘hostile takeover’ is particularly apt in this context – courts once competed for jurisdiction because the judges kept the court fees: see Sir William Holdsworth, *A History of English Law* (6<sup>th</sup> ed, 1938) 246–62, 424–37.

10 See, eg, *Walsh v Lonsdale* (1882) 21 Ch D 9, 14–15.

11 See, eg, Degeling and Edelman, above n 5; Tilbury, above n 2; Meagher, Heydon and Leeming, above n 1; James Edelman, ‘A “Fusion Fallacy” Fallacy’ (2003) 119 LQR 375; Judith Maute, ‘Alice’s Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000–1900 AD)’ (2003) 71 *Fordham Law Review* 1357; Justice William Gummow, ‘Equity: too Successful?’ (2003) 77 *Australian Law Journal* 30; Jill Martin, ‘Fusion, Fallacy and Confusion; a Comparative Study’ (1994) *The Conveyancer and Property Lawyer* 13; Fiona Burns, ‘The “Fusion Fallacy” Revisited’ (1993) 5 *Bond Law Review* 152; Paul Perell, *The Fusion of Law and Equity* (1990); Peter Sparkes, ‘*Walsh v Lonsdale* ((1882) 21 Ch D 9): The Non-Fusion Fallacy’ (1988) 8 *Oxford Journal of Legal Studies* 350.

12 (2002) 40 ACSR 487; rev’d (2003) 56 NSWLR 298 (‘*Harris*’).

13 *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487 (Palmer J).

permissible to award a common law remedy for an equitable wrong. That door was left open. In three judgements of great learning and analysis, the members of the Court of Appeal squarely addressed issues of fusion.

The question of whether exemplary damages ought to be available for equitable wrongs provides a useful vehicle for exposing the direct and indirect approaches to fusion. As well as being current, this vehicle neatly demonstrates the manner in which the interplay of equitable and common law doctrines will vary depending upon the characterisation of fusion.

This is not, however, a case note of *Harris*. They may be found elsewhere.<sup>14</sup> Rather, this article makes use of the ideas underlying *Harris* to more closely examine the different manners in which common law and equity can interact. More specifically, this article examines fusion ‘close up’ by concentrating on a single proposition: that exemplary damages should never be available in equity.

Propositions of this character remind one that legal reasoning cannot always follow the path of formal logic. The mathematician knows that there are two simple paths to either proving or disproving a proposition of the form ‘there should be no instances of X in Y’. If a single counter-example is found – one X that should be in Y – the proposition is disproved, and the proof is complete. On the other hand, if the mathematician proves that there should be no instances of X at all, irrespective of Y, the proposition is also proved.

The lawyer must be more circumspect. A counter-example – a single instance where exemplary damages should be awarded in equity – cannot be found without the construction of a framework that admits the award of exemplary remedies in equity. Before such a framework can be constructed, the nature of exemplary damages must be understood, as well as the effects of the judicature system that separates common law and equity. That is the approach taken by this article. The other approach available to the mathematician, to argue that exemplary damages should not be available anywhere, is not taken. Rather, the place of exemplary damages in civil law is assumed.

Part II of this article surveys the nature and purposes of exemplary awards within civil law, and the circumstances in which they are available. Part III considers the judicature system, and examines the implications of this system on the problem. In the judicature system, law and equity are split. On one view, they should remain split. If this view is correct, it is likely that no counter-example can be found. Accordingly, a close examination is given to the circumstances under which law and equity might be fused. Two methods of effecting fusion – direct and indirect – are considered in Part IV. This part also considers whether there is anything in the nature of equity that would not allow the award of exemplary damages, and the manner in which the two approaches to fusion might interact with this principle. This part concludes by sketching out the path forward to fusion foreshadowed by *Harris*. Part V concludes the article.

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14 See, eg, Justice Peter Young, ‘Perhaps Equity is Beyond Childbearing – Case Note; *Harris v Digital Pulse Pty Ltd*’ (2003) 77 *Australian Law Journal* 224; Martina Kann, ‘Exemplary Damages Overruled – Case Note; *Harris v Digital Pulse*’ (2003) 6 *Inhouse Counsel* 65.

## II THE NATURE AND PURPOSE OF EXEMPLARY DAMAGES<sup>15</sup>

Before considering the appropriateness of exemplary damages in equity, it is desirable to outline both their purpose and the circumstances in which they are awarded. Whilst debate continues over the appropriateness of exemplary damages *per se*, it is outside the focus of this paper to consider such arguments; save to the extent they are relevant here.<sup>16</sup> Exemplary damages form part of the law's current fabric. This section examines the circumstances in which the remedy is available, and the justifications put forward in those circumstances.

Exemplary damages<sup>17</sup> are awarded in civil proceedings to punish the defendant, not to compensate the plaintiff. The purpose of exemplary damages is to 'teach the defendant that "tort does not pay" by demonstrating what consequences the law inflicts'.<sup>18</sup> The role of punishment in civil law is not without 'anomalies and difficulties'.<sup>19</sup> These flow, in part, from the early days when 'the roots of tort and crime in the law of England' were 'greatly intermingled'.<sup>20</sup> Today, the roles of punishment, deterrence, and even retribution are still understood as the legitimate objects of exemplary damages in civil law.<sup>21</sup>

It is important to stress that there is no compensatory element to an award of exemplary damages. To the extent that any outrageous conduct of the defendant has increased the harm suffered by the plaintiff, the law's response is the award of aggravated damages.<sup>22</sup>

Given that the purposes of exemplary damages are orthogonal to civil law's primary response to wrongs<sup>23</sup> – compensation – it is not surprising that they are rarely justified. First, the defendant must be demonstrated to have committed 'a

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15 See generally Michael Tilbury *Civil Remedies: Volume One Civil Remedies* (1990); Michael Tilbury, Michael Noone and Bruce Kercher *Remedies: Commentary and Materials* (2<sup>nd</sup> ed, 1993); Michael Tilbury, Michael Noone and Bruce Kercher *Remedies: Commentary and Materials* (4th ed, 2004); The Law Commission, *Aggravated, Exemplary and Restitutionary Damages* Report No 247 (1997).

16 For a lucid summary of arguments against exemplary damages altogether, set in terms similar to this article, see Charles Rickett, 'Punitive Damages: the Pulse of Equity' (2003) 77 *Australian Law Journal* 496. See also Andrew Burrows, 'Remedial Coherence and Punitive Damages in Equity' in Degeling and Edelman above n 5, 381, 393 fn 55.

17 Exemplary damages are also known as punitive damages – no distinction is drawn here.

18 *Cassell & Co Ltd v Broome* [1972] AC 1027, 1073 (Lord Hailsham of St Marlebone LC).

19 *Gray v Motor Accident Commission* (1998) 196 CLR 1 ('Gray'), [9] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

20 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 ('Uren'), 149–50.

21 *Lamb v Cotogno* (1987) 164 CLR 1, [9] (*per curiam*) affirming *Wilkes v Wood* (1763) Lofft 1, 19; 98 ER 489, 498–9. For further discussion of each of the interests, see Jeremy Birch, 'Exemplary Damages for Breach of Fiduciary Duty' (2005) 33 *Australian Business Law Review* 429, 430–33. In particular, Birch argues that the interests of deterrence and punishment are capable of *independently* justifying an award of exemplary damages: at 433. This article will assume the more conservative position that an exemplary award will generally serve all of these interests.

22 *Uren* (1966) 117 CLR 118, 149.

23 In the analysis that follows, this article will adopt Professor Birks' taxonomy of rights, wrongs and remedies: see, eg, Peter Birks, *An Introduction to the Law of Restitution* (1985), 39–44; Peter Birks, 'Equity in the Modern Law: an Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1; Peter Birks, 'Rights, Wrongs and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1.

conscious wrongdoing, in contumelious disregard for the plaintiff's rights.<sup>24</sup> This is a high standard.<sup>25</sup> Secondly, the plaintiff must be the victim of the defendant's punishable behaviour. This is explained by Lord Devlin in *Rookes v Barnard* to be necessary, as otherwise '[t]he anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct ... obtained a windfall in consequence.'<sup>26</sup> Finally, exemplary damages can only be awarded if, and only if, they will succeed in the aim of punishment. The words 'if, and only if' are important. They imply both the proposition and its converse. On the one hand exemplary damages may not be awarded against a defendant who has already been sufficiently punished (in the criminal system, for example),<sup>27</sup> or is dead.<sup>28</sup> Conversely, they may only be awarded if the sum sought as compensation is insufficient to achieve the aims of punishment.

Exemplary damages are available as a response to some, but perhaps not all, common law wrongs.<sup>29</sup> In particular, it seems that exemplary damages are not available as a response to breach of contract.<sup>30</sup>

### III JUDICATURE

Why should exemplary damages be clearly available at common law, but not in equity? It is not that equitable wrongs are less affronting or harmful. Nor are common law duties more sacred. Rather, the distinction is born of the ancient separation of common law and equity. In this section, the separate origins of equity and common law are considered in brief. Although the effect of the *Judicature Act 1873* (UK) was to bring the two jurisdictions into the one courtroom, their doctrines remained distinct. The significance of the common law nature of exemplary damages is examined in this light. It will be shown that, to one school of thought, the fact that exemplary damages were a common law remedy is determinative of the question. This view will be analysed with an eye for areas of weakness.

#### A The Judicature System

Before 1873, equity and the common law were separately administered. The principles of equity developed, separately from the Common Law Courts, in the Court of the Chancery, where the petitioner could seek relief from the harsh or

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24 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448, 471.

25 See, eg, *Backwell v AAA* [1997] 1 VR 182 (Victorian Court of Appeal) and the discussion in Tilbury, Noone and Kercher (2004), above n 15, [7.40].

26 [1964] AC 1129, 1227 (House of Lords).

27 *Gray* (1998) 196 CLR 1, [40]–[43].

28 *Vesey v Public Trustee* [1960] SASR 71, 71.

29 For a discussion of wrongs that do and do not attract exemplary damages, see Tilbury, *Civil Remedies*, above n 15, [5007].

30 *Gray* (1998) 196 CLR 1, [13] (Gleeson CJ, McHugh, Gummow and Hayne JJ). Note, however, that exemplary damage awards have been made for breach of contract in Canada: *Whiten v Pilot Insurance Co* (2002) 209 DLR (4<sup>th</sup>) 257.

unjust operation of the law.<sup>31</sup> The Chancery Court was, at first, 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’.<sup>32</sup> Over time, the concepts, doctrines, principles and remedies of equity evolved – never into a complete system of law, but rather ‘an appendix’ to,<sup>33</sup> or ‘a gloss’ on, the law. Throughout its development, the administration of equity remained the domain of the Chancery alone. The Common Law Courts did not recognise equitable rights, and the Courts of Equity did not award common law remedies. Exemplary damages are a common law remedy, and hence were unavailable to a petitioner in the Chancery.

Two events have occurred since those times that arguably affect the availability of exemplary damages. The most significant was the merging of the administration of law and equity as a result of the *Judicature Act 1873*. The effect of the Act was to abolish the old courts and create a new High Court of Justice vested with all the jurisdiction of the old courts. Also of importance, in 1858 the *Lord Cairns Act* gave the Courts of the Chancery a power to grant damages in addition to, or in substitution for, the remedies of specific performance and injunction.<sup>34</sup> This is important as it gave a power to award a compensatory remedy in equity. Later, in the 20th century, it was acknowledged that equity had *always* had the power to award a compensatory remedy.<sup>35</sup> The significance of these two events is discussed below.

## B Consequences of the Judicature System

Although the *Judicature Act* unified the administration of law and equity into one court system, it did nothing to fuse the content of the two doctrines. The principles of equity and the principles of law remained separate: ‘the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters.’<sup>36</sup> Yet the question must be asked: after more than a century of fused administration – of courts that both recognise equitable rights and award common law remedies – surely the waters have mingled a little?<sup>37</sup> At first blush, it would seem somewhat odd that a court of unified jurisdiction would so strictly maintain an historical distinction.

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31 For more details, see, eg, Frank Tudsbury, ‘Equity and the Common Law’ (1913) 29 LQR 154.

32 Sir Frank Kitto, preface to Meagher, Heydon and Leeming, above n 1, v.

33 Frederic Maitland, *Selected Historical Essays of F W Maitland: Chosen and Introduced by H M Cam* (1957) 134.

34 *The Chancery Amendment Act 1858* 21 & 22 Vic c 27. Similar legislation has been enacted in NSW: *Supreme Court Act 1970* s 68 (‘*Lord Cairns Act Legislation*’).

35 *Nocton v Lord Ashburton* [1914] AC 932.

36 Walter Ashburner, *Principles of Equity* (1902) 23.

37 Of course, the question has been asked: *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 957 (Lord Diplock). Moreover, in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927 Lord Denning MR stated, rather optimistically one might suggest, that the ‘two streams of common law and equity have flowed together and combined so as to be indistinguishable from one another’ (at 974). See also *Bally v Wells* (1769) Wilmot 341, 344; 97 ER 130, 131; *Attorney-General for England and Wales v The Queen* [2002] 2 NZLR 91, 103.

The *Judicature Act* was intended to rid the law of unnecessary procedural problems born of split administration. Why should it not also be used to solve the unnecessary substantive problems also born thereof? This question presupposes two important issues. First, that there are substantive problems arising from the separation of law and equity, and secondly that these problems would be solved by fusion – whatever that means. The remainder of this section examines whether the arguments against the fusion of common law and equity are so strong as to still deny the availability of a common law remedy for an equitable wrong.

### C The ‘Fusion Fallacy’

The strongest opposition to fusion of any nature is expressed by Meagher, Heydon and Leeming.<sup>38</sup> The learned authors condemn the ‘fusion fallacy’, which they define as the assertion that it is allowable for equity and common law to fuse in some respects as a consequence of the *Judicature Act*.<sup>39</sup> Understood strictly, the learned authors’ point is plainly correct – the *Judicature Act* did not effect any fusion but merely altered administrative arrangements. The two bodies of law now administered by a single High Court were unchanged. Let us term this the ‘obvious fusion fallacy’.

It is submitted, though, that the ‘fusion fallacy’ concept encompasses rather more than the obvious fusion fallacy. The learned authors continue:

The fusion fallacy involves the administration of a remedy, for example common law damages for breach of fiduciary duty, not previously available at law or in equity, or in the modification of principles in one branch of the jurisdiction by concepts that are imported from the other and thus are foreign, for example by holding that the existence of a duty in tort may be tested by asking whether the parties concerned are in fiduciary relationships.<sup>40</sup>

This demonstrates that the ‘fusion fallacy’ also encompasses a second, broader proposition that is not so obvious: that it is bad law to combine equity and common law in a manner that would have been impossible in the pre-judicature period, or even to apply principles from one jurisdictional branch to the other. Clearly, this second proposition does not follow from the obvious fusion fallacy. So much has been said before.<sup>41</sup>

Two passages point to a justification for the wider proposition. In response to arguments in favour of a systematic program to fuse law and equity, the learned authors assert that ‘[t]he principles by which courts are authorised to make these changes are unstated, and, perhaps, incapable of being stated.’<sup>42</sup> Courts lack the power to fuse law and equity, and to exercise such a power would be to take up a ‘radical law reform brief.’<sup>43</sup> Similarly, in *Harris*, Heydon JA asserted that the award of exemplary damages for breach of fiduciary duty would be ‘a radical

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38 Meagher, Heydon and Leeming, above n 1.

39 Ibid [2-105].

40 Ibid.

41 See, eg, Tilbury, *Civil Remedies*, above n 15, [1019]. Professor Burrows has described the obvious fusion fallacy as ‘the view that no one adheres to’: Andrew Burrows, ‘Remedial Coherence and Punitive Damages’ in Degeling and Edelman, above n 5, 381, 397.

42 Meagher, Heydon and Leeming, above n 1, [2-320].

43 Ibid.

change, having no justification in traditional thinking, properly understood.<sup>44</sup> His Honour then continued: '[t]he conclusion could only be arrived at if there was some particular provision in the legislation effecting the administration of the two systems in a single court compelling it.'<sup>45</sup> Once again, the justification for the broader proposition that it is bad law to apply principles from one jurisdictional branch to the other is that the court has no power to do so. Clearly, his Honour cannot mean that such a change is not, under any circumstances, within the scope of judicial power. Plainly it is.<sup>46</sup> It is submitted that the point that Heydon JA seeks to make is to emphasise the strength with which his Honour holds the principle that equity and law are separate and should not meet. While the capacity undoubtedly exists within the sphere of judicial power to give effect to fusion, to do so would be so offensive to deeply rooted doctrine that the only practical implementation of such a program would be by exercise of legislative power or, perhaps, the High Court.<sup>47</sup> To do so would be 'a radical step'.<sup>48</sup>

#### D Areas of Weakness in the Fusion Fallacy Argument

At its root, therefore, the argument against fusion is historical. In particular, it is not an argument that shows that fusion would have undesirable practical consequences. It is submitted that the fusion fallacy viewpoint *cannot* demonstrate this. This is not a failure of means – examples are available of individual instances of fusion that may be criticised.<sup>49</sup> Rather, the fusion fallacy argument, by taking so strict a position, condemns both large and small-scale fusion as equally heretical. Whilst, then, adherents to the fusion fallacy may demonstrate on a case-by-case basis that the results of fusion are practically undesirable, the breadth of their program prevents the construction of a conceptual framework that demonstrates, in the abstract, that undesirable consequences must necessarily follow from fusion. In particular, if areas in equity exist where the operation of law and equity is incoherent, and where limited fusion might bring coherence, the anti-fusion camp relies only on history as justification against fusion.<sup>50</sup>

It is not suggested that arguments rooted in history lack force. In the discipline of law, the opposite is true. A fundamental rule of law requires that like cases be

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44 *Harris* (2003) 56 NSWLR 298, 413.

45 *Ibid* 402–3.

46 For a discussion of this point in the context of New South Wales, see Keith Mason, 'Fusion: Fallacy, Future or Finished?' in Degeling and Edelman, above n 5, 41. See generally Tilbury, *Civil Remedies*, above n 15, 368–9.

47 *Harris* (2003) 56 NSWLR 298, 419.

48 *Harris* (2003) 56 NSWLR 298, 415.

49 See, eg, Meagher, Heydon and Leeming, above n 1, [2-130]–[2-160] for a veritable catalogue, updated each edition.

50 It is important to note that the view of history said to justify the anti-fusion view is not universally held: see, eg, Sir Anthony Mason 'The Place of Equity and Equitable Remedies in the Contemporary Law World' (1994) 110 *The Law Quarterly Review* 238; Keith Mason, 'Fusion: Fallacy, Future or Finished?' in Degeling and Edelman, above n 5, 41, especially 49–57; Joshua Getzler, 'Patterns of Fusion', above n 6, 176–90. The point here is to identify that, in places, the only justification for the anti-fusion camp is history, however revisionist others may claim it to be.



treated alike. As Spigelman CJ noted in *Harris*, the fact that equity has never developed a remedy of a character similar to punitive damages ‘indicates that the development of the law in a case of this kind is inappropriate’.<sup>51</sup> It is necessary to ‘acknowledge and respect the collective wisdom of our predecessors’,<sup>52</sup> but at the same time remember that history ‘cannot dictate answers to present legal problems’.<sup>53</sup>

If it can be shown that in some areas fusion would actually advance the goal of treating like cases alike, then the opposing weight of history loses its force. President Mason in *Harris* noted that ‘[d]istinctions with nothing but history to support them have, at times, been deliberately ironed out or conveniently overlooked as doctrines passed from generation to generation.’<sup>54</sup> Similarly, in *Attorney-General v Blake*,<sup>55</sup> Lord Nicholls stated that

as a matter of principle, it is difficult to see why equity required the wrongdoer to account for all his profits ... whereas the common law’s response was to require the wrongdoer to pay a reasonable fee ... This difference in remedial response seems to have arisen simply as an accident of history.<sup>56</sup>

Professor Tilbury argues that to treat like cases alike means that ‘in principle and in policy, it is desirable that the jurisdictional origins of rules of law become less and less important as those rules are adapted to changing social realities by courts exercising fused jurisdictions’.<sup>57</sup> As a consequence of this, he argues that ‘where piecemeal fusion does take, or has taken, place, it ought not to be rejected out of hand on the basis of backward looking argument’.<sup>58</sup>

There will always be opposition to change, even principled change. Advocates of stasis, in law and elsewhere, warn of floodgates and chaos. Chief Justice Raymond warned that the abolition of the old forms of action would ‘introduce the utmost confusion’.<sup>59</sup> Similarly, opponents of fusion warn of ‘a proliferation of discordant and idiosyncratic opinions, and ultimately an anarchic “system” operating according to the forms, but not the realities, of law.’<sup>60</sup> One is wise to pay heed to the warnings of history. But one must also look to the future.

## E Conclusions from Judicature

The historical divide between common law and equity remains influential. Juridical concepts are labelled as either equitable or common law, and these labels are meaningful. On one view, the labels are sufficient to preclude altogether the availability of exemplary damages in equity. This ‘anti-fusion’ argument is strong, relying as it does on important legal principles: historical

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51 (2003) 56 NSWLR 298, 307.

52 *Ibid.*

53 Sir Anthony Mason, ‘Fusion’ in Degeling and Edelman, above n 5, 11, 12.

54 (2003) 56 NSWLR 298, 327.

55 [2001] 1 AC 268.

56 *Ibid.* 280.

57 Tilbury, *Civil Remedies*, above n 15, [1019].

58 *Ibid.*

59 *Reynolds v Clarke* (1725) 1 Strange 634, 635; 93 ER 747, 748.

60 (2003) 56 NSWLR 298, 419 (Heydon JA).

continuity and doctrinal coherence. Certainly, wholesale fusion – whatever that means – is as undesirable as it is uncertain.

On the other hand, the law must not be stagnant, but rather constantly evolving. The anti-fusion view does not justify eternal stasis. The historical roots of the argument against fusion are at their weakest when they perpetuate incoherence, or undermine the very purpose of our legal tradition: to treat like cases alike.

#### IV BEYOND HISTORY

From the consideration of the effects of the judicature system it can be concluded that, if exemplary damages are to be available in equity, at least one of two justifications must be demonstrable: either the availability of the remedy overcomes present incoherence, or its availability is somehow consistent with the judicature system. Equity's capacity to punish must either come from within, or be borrowed from the common law. The significance of which path is chosen is examined in this section, and both paths are analysed.

So far, two competing principles have been identified: historical continuity and the need to treat like cases alike. This suggests that the inquiry should now be directed to identifying instances where the award of exemplary damages would both overcome historical incoherence and serve to treat like cases alike. However, such a binary analysis would ignore an important third principle: the assertion that equity does not punish.

In this section three questions are considered. First, should equity simply borrow exemplary damages from common law? This question needs to be made more explicit. Are there circumstances where, in order to treat like cases alike, it is necessary to award exemplary damages in equity *because* they are awarded in like cases at common law? This will be termed 'direct fusion', as it involves the direct appropriation of a common law remedy. Secondly it is asked: should punitive equitable remedies be developed? If equity should find within itself the power to punish, and this was to follow the common law form of a punitive monetary award,<sup>61</sup> when should such a remedy be available? The arguments that suggest that equity can punish, and should do so in order to treat like cases alike, will be termed 'indirect fusion'. 'Indirect', because the remedy comes from within equity, but is applied in a way that follows the common law. Both questions need to be considered in conjunction with a third: are equity and penalty strangers? That is, is there something about equity that is inconsistent with penalty?

The distinction between direct and indirect fusion emerges from the literature. On the one hand, direct fusionists call for the takeover: 'compensatory damages and equitable compensation should be regarded as identical';<sup>62</sup> 'equity and law

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61 It is beyond the scope of this article to consider why equity should necessarily follow this form, or why exemplary damages should only be attached to compensation. See discussion below n 116.

62 Andrew Burrows, 'We do this at Common Law but that in Equity' (2002) 22 *Oxford Journal of Legal Studies* 1, 12.

are one’;<sup>63</sup> ‘[a] full range of remedies should be available as appropriate, no matter whether they originated in law, equity or statute’.<sup>64</sup> Others seek a more moderate approach, arguing for a quiet integration of the two jurisdictions through a sort of ‘fusion by analogy’:<sup>65</sup> ‘our task nowadays is to see the two strands of authority, at law and in equity, moulded into a coherent whole’.<sup>66</sup> As will be shown, each approach has different consequences. It will be contended that there are areas in which direct fusion is appropriate, but indirect fusion impossible. On the other hand, there will be circumstances where the reverse is true. The distinction between direct and indirect fusion is also relevant to the overall debate about whether fusion is desirable at all. A good argument against direct fusion will not always have force against indirect fusion, and vice-versa. The obvious fusion fallacy, for example, is no argument against indirect fusion.

There will never be a bright line between the two. The hostile takeover will never admit to being so. Indeed, Professor Burrows, whose work I have quoted as an example of direct fusion, claims to be an adherent of ‘fusion by analogy’, an idea I have labelled indirect.<sup>67</sup> One must respectfully disagree with Burrows’ characterisation. By calling for the scrapping of distinctions, Professor Burrows seeks more than analogy. He seeks transformation. One sees his point: direct fusion can and should operate only in areas where analogy is possible. It will be demonstrated, though, that direct and indirect fusion give rise to different consequences. While it would be futile to deny that there is an area where the concepts of direct and indirect fusion mingle, the distinctions between the various positions that Professor Burrows adopts, and their differing effects, bespeak the relevance of the distinction here drawn.

### A ‘Equity and Penalty are Strangers’

Before moving to the direct and indirect methods of accommodating exemplary damages in equity, it is necessary to follow a short tangent to investigate the various concepts bound up in the precept that ‘equity and penalty are strangers’. As will be seen, the various senses of this maxim have different consequences for direct and indirect fusion.

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63 *Bridge v Campbell Discount Co Ltd* [1962] AC 600, 632 (Lord Denning).

64 *Aquaculture Corp v New Zealand Mussel Co Ltd* [1990] 3 NZLR 299, 301 (Cooke P).

65 Edelman, ‘A “Fusion Fallacy” Fallacy’, above n 11 377.

66 *Lord Napier v Hunter* [1993] AC 713, 743 (Lord Goff). See also Deane J in *Waltons Stores v Maher* (1988) 164 CLR 387, 447:

To ignore the substantive effects of the interaction of doctrines of law and equity within the fused system [of administration] in which unity, rather than conflict, of principle is now to be assumed, is, however, unduly to preserve the importance of past separation and continuing distinctness as a barrier against the orderly development of a simplified and unified legal system which fusion was intended to advance.

See also Mason P in *Harris* (2003) 56 NSWLR 298, 327: ‘Since fusion of administration, judges have tended to use similar forms of judicial method whether administering law, equity or both’, and more generally at 325–9.

67 Andrew Burrows, ‘Remedial Coherence and Punitive Damages in Equity’ in Degeling and Edelman above n 5, 381, 383. See also at 396: ‘Taking fusion seriously requires nothing more than the eradication of inconsistencies between law and equity’.

## 1 A Double Maxim?

In *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*,<sup>68</sup> Somers J asserted that ‘the exclusion of exemplary damages in this case [for breach of fiduciary duty] can be justified ... on the ground that equity and penalty are strangers’.<sup>69</sup> This view has received support in the Federal Court, albeit as obiter dicta.<sup>70</sup> Depending on what this maxim means, it may be an obstacle in the path of both direct and indirect fusion.

The maxim has a negative and a positive meaning. It is one thing to say punishment has never been a purpose behind equitable remedies. It is quite another to say that punishment is inconsistent with the principles of equity. The first statement is the negative meaning of the maxim, the latter positive. The positive meaning says that penalty cannot coherently be imported into equity. The negative meaning states that equity has never punished.

The distinction is important. If the positive maxim is true, and equity is fundamentally inconsistent with penalty, then it would be wrong to borrow a punishing remedy from the common law, and it would be impossible to find a punishing remedy within equity. However, if only the negative maxim is true, the fact it is not possible to find a punishing remedy within equity does not speak to the issue of whether equity may import a punishing remedy from the common law. The positive maxim prohibits both direct and indirect fusion. The negative maxim, by contrast, places no impediment in the path of direct fusion. However, if it is true, the failure of equity to develop a punitive remedy makes the case for indirect fusion far less arguable.

It is notable that, in *Harris*, no cases were advanced in favour of an overarching positive principle that equity abhors penalty. Although a large number of cases that advance the negative maxim receive attention,<sup>71</sup> the only cases identified that assert a positive abhorrence are correctly (it is submitted) characterised by Mason P as ‘a response to contractually agreed penalties and forfeitures that are unconscionable’.<sup>72</sup> That is not this case. Rather than evincing a positive estrangement from penalty, these cases are examples of ‘equity [choosing] to fall in line with the common law in relation to contractual penalties’.<sup>73</sup> It is submitted that, while authority exists for the negative maxim, there is no basis on which to suggest that the maxim ‘equity and penalty are strangers’ should be understood positively.

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68 [1990] 3 NZLR 299.

69 Ibid 302 (in dissent).

70 *Bailey v Namol Pty Ltd* (1994) 53 FCR 102, 113 (Burchett, Gummow and O’Loughlin JJ).

71 See especially ibid 363–5 (Heydon JA). Justice of Appeal Heydon remarks at the end of this analysis that ‘[e]quity’s abhorrence of exacting greater monetary awards than compensation and profits is matched by its abhorrence of penalties’: at 384. It is submitted that while the language used here by his Honour seems to speak in favour of the positive maxim, the many cases his Honour considers over the previous 24 pages do not support the positive maxim, but rather support the negative maxim.

72 Ibid 330.

73 Ibid.

## 2 Public Purposes Seen by Equitable Remedies

To determine the accuracy of the maxim that equity and penalty are strangers requires investigation of the purposes that underlie established equitable remedies, with an eye towards identifying those interests that appear to involve public considerations. The various purposes motivating equitable remedies are considered by all members of the Court in *Harris*, especially by Mason P<sup>74</sup> and Heydon JA.<sup>75</sup> Whilst it is not desirable to rehearse the entirety of that analysis,<sup>76</sup> their Honours raise two issues that require investigation here. First, the remedy of account of profits has a deterrent function. Secondly, the rate of calculation of interest charged to a defaulting fiduciary may be higher in circumstances where the fiduciary's action has been dishonest. This appears, at least on its face, to punish.

It will be recalled from Part II that exemplary damages serve the public purposes of punishment, deterrence and retribution. The recognition within equity of remedial purposes similar to those underpinning exemplary damages strengthens the case for fusion, both direct and indirect.

### (a) Account of Profits

When a fiduciary profits from a breach of duty, they may be liable to account for the profit.<sup>77</sup> The liability is strict. In particular, the honesty of the defendant is not a factor in the determination.<sup>78</sup> The justifications for the rule are twofold. On the one hand, account of profit prevents the unjust enrichment of the defendant.<sup>79</sup> On the other hand, 'the rule has a deterrent and prophylactic function'.<sup>80</sup> Indeed, the strictness with which fiduciary duties are enforced was once explained as being necessary for 'the safety of mankind'.<sup>81</sup>

Deterrence is a public purpose, and is one of the purposes that underpin exemplary damages. However, as Heydon JA makes clear in *Harris*,<sup>82</sup> courts have been careful to state that punishment is not a purpose of the remedy: '[t]he remedy removes profits, but it does not go further'.<sup>83</sup> Given that the remedy treats an honest fiduciary as strictly as it treats a dishonest fiduciary, this argument has weight. The manner in which the defendant infringes the plaintiff's rights does

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74 Ibid 329–33.

75 Ibid 360–84.

76 For a discussion of some of the other matters considered, and further arguments, see Birch, above n 21, 435–42.

77 *Docker v Somes* (1834) 2 My & K 656–64 (Lord Brougham LC).

78 *Warman International Ltd v Dwyer* (1995) CLR 544.

79 *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101, 111 (Mason CJ, Deane, Dawson, and Toohey JJ).

80 *Harris* (2003) 56 NSWLR 298, 369 (Heydon JA).

81 *Parker v McKenna* (1874) LR 10 Ch App 96, 124 (James LJ). Nearly a century later, it was suggested that '[i]n the nuclear age [this statement] may seem something of an exaggeration, but, nonetheless, it is eloquent of the strictness with which ... courts of the highest authority have always applied this rule': *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, 452 (Roskill J).

82 (2003) 56 NSWLR 298, 369–71.

83 Ibid 371.

not affect the severity of the remedy. Nevertheless, the remedy has a clear public purpose: to deter.<sup>84</sup>

(b) *Interest Charged to Dishonest Fiduciaries*

An award of interest against a defaulting fiduciary will vary depending upon the conduct of the defendant. If the fiduciary's behaviour is reprehensible, more interest is awarded. '[I]n cases involving a trustee's misappropriation of trust funds for his own benefit, higher rates (up to 5%) [are] allowed',<sup>85</sup> rather than the usual rate of three per cent. On its face, such a rule would appear to apply principles of both deterrence (via the availability of the remedy of account of profits), and retribution (by treating reprehensible conduct more harshly than honesty). These purposes begin to resemble the principles underpinning an exemplary award at common law.

In *Harris*, Heydon JA held that there is no punitive element to this rule.<sup>86</sup> Rather than being a 'penalty for misconduct',<sup>87</sup> his Honour's analysis of the relevant law found that '[t]he award of the higher rate of interest in cases of gross misapplication of trust funds ... rests not on ideas of punishment or penalty, but on two other bases'.<sup>88</sup> The first of these bases is that, rather than imposing any sort of penalty, the rule estops the defendant 'from denying that he received interest at such a rate which he ought to have received'.<sup>89</sup> The other basis is that 'the award ensures that the fiduciary retains no profit'.<sup>90</sup>

With the greatest respect to the learned Judge of Appeal, the suggestion that the first of the two bases does not rest on punishment or penalty is unpersuasive. To reclassify the rule as one of estoppel begs the question: why is the defendant estopped? In the cases that his Honour considers, various reasons are given.

In *Attorney General v Alford*,<sup>91</sup> the reason is that the defendant should be estopped from saying he did not receive interest 'which it is fairly presumed that he did'.<sup>92</sup> This begs the same question. From where does the presumption arise?

In *Burdick v Garrick*,<sup>93</sup> Giffard LJ considered it 'quite right' that the defendant 'ought never to be heard to say that he has made less than 5 per cent'.<sup>94</sup> This is not the language of rebuttable presumption. Lord Chancellor Hatherly's language was not so emphatic,<sup>95</sup> yet both their Lordships were willing to presume 5 per

84 Note that there is also some authority for a retributive purpose that punishes a dishonest fiduciary who has profited from a mixed fund: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 110 (Mason J, Dean J agreeing).

85 Meagher, Heydon and Leeming, above n 1, [23-020]. For example, in *Hagan v Waterhouse* (1992) 34 NSWLR 308, a 'mercantile' rate was applied in the case of 'gross misapplication of trust funds'. See also *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWLR 211.

86 (2003) 56 NSWLR 298, 365-9.

87 *Jones v Foxall* (1852) 15 Beav 388, 393 (Sir John Romilly MR).

88 (2003) 56 NSWLR 298, 367.

89 *Bailey v Namol* (1994) 53 FCR 102, 112 (Burchett, Gummow and O'Loughlin JJ).

90 *Harris* (2003) 56 NSWLR 298, 367.

91 (1855) 4 De G M & G 843; 43 ER 737.

92 *Ibid* 851 (Lord Cranworth LC).

93 (1870) LR 5 Ch App 233.

94 *Ibid* 243-4.

95 *Ibid* 241-2.

cent interest, but require evidence that any greater amount be charged. Ultimately, their Lordships allowed and accepted evidence that the defendant had not earned compound interest above 5 per cent, concluding that ‘there being neither proof nor presumption that compound interest was made, ... compound interest should not be charged’.<sup>96</sup> A similar question arises: why was the defendant allowed to demonstrate that compound interest was not made, and yet estopped from demonstrating that less than five per cent interest was earned (remembering that the rate of five per cent is higher than normally applied because of the dishonest conduct)?

In *Wallersteiner v Moir (No 2)*, Lord Denning found that ‘in equity, interest is never awarded by way of punishment’, and the basis for the award of higher interest is that ‘it should be assumed that [the beneficiary] ... would have made the most beneficial use of it’.<sup>97</sup> If this be true, on what principle does the beneficiary not receive the benefit of this presumption where the fiduciary’s breach is honest? More fundamentally, Lord Denning’s argument is clearly loss-based – the higher interest is charged because of what the *beneficiary*, denied his or her money, *would* have made. It follows that, with respect, this reasoning is not easily applicable to the remedy of account of profits.

It is submitted that to say that the rule is based in estoppel – as all the passages above do – misses the point. The key question is: if a dishonest fiduciary can demonstrate beyond any doubt that the interest earned was below five per cent, what principle operates to prevent them from saying so? We are told many times that, whatever the principle is, it is neither punitive nor penal.<sup>98</sup> We are also told that the remedy of account of profits seeks *only* to restore the profit made by the fiduciary and no more.<sup>99</sup> These assertions are, it is submitted, irreconcilable.

Chief Justice Spigelman agreed with Heydon JA that neither the remedy of account of profits, nor the interest payable by the misbehaving fiduciary, is punitive. His Honour added a number of observations. In particular, his Honour noted that

There is no principled basis upon which a rate of remuneration or a particular interest rate could be adopted and applied. ... In such contexts it is perfectly understandable that the conduct of the fiduciary is a relevant consideration in determining where, within the relevant range, justice between the parties indicates the choice should be made. This process offers no analogy with the award of a separate and discrete remedy, over and above any damage to the beneficiary or profit to the fiduciary.<sup>100</sup>

Two points are made in reply. First, while one agrees that it is impossible to fix an appropriate rate of interest, it does not follow that whatever rate is ultimately chosen should give rise to anything more than a rebuttable presumption. In circumstances where the presumption can be rebutted, surely evidence of the fiduciary’s *actual* gain is far more relevant than their misbehaviour. Secondly,

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<sup>96</sup> Ibid 234 (Giffard LJ).

<sup>97</sup> [1975] QB 373, 388.

<sup>98</sup> Meagher, Heydon and Leeming, above n 1, [23-020]; *Harris* (2003) 56 NSWLR 298, 367 (Heydon JA); *Wallersteiner v Moir (No 2)* [1975] QB 373, 388 (Lord Denning MR); *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187, [104] (Meagher, Sheller and Beazley JJA).

<sup>99</sup> See above n 78–85 and accompanying text.

<sup>100</sup> (2003) 56 NSWLR 298, 310–11.

the amounts awarded *are* discrete – good fiduciaries pay 3 per cent; bad fiduciaries pay more. In substance, if not in form, this constitutes an additional remedy that a maltreated beneficiary can seek. For the reason that the additional interest is irrebuttably imposed, circumstances can arise where the beneficiary obtains a windfall. Such an outcome is inconsistent with balancing only the equities of the two parties – the scales are tipped by retribution and deterrence.<sup>101</sup>

It is submitted that Mason P was correct to consider that this rule is an instance of what Professor Tilbury has described as ‘a vestigial punitive element lurking in’ the remedies against dishonest fiduciaries.<sup>102</sup> The President agreed with Heydon JA that ‘equity does not set out to punish as an end in itself’, but considered that

[t]o invoke the notion of estoppel against [a dishonest fiduciary] ... may mask the punitive choice, but cannot disguise it completely. When it strips a miscreant fiduciary of profits, a fortiori when it chooses a harsher alternative remedy, equity readily trumpets its punitive/deterrent intent.<sup>103</sup>

### 3 *Old Acquaintances?*

This section has demonstrated that the maxim ‘equity and penalty are strangers’ has both a positive and a negative meaning. No authority has been advanced in favour of the positive maxim. This suggests that direct fusion is permissible. However, the negative maxim is at least arguable. Certainly, the most devout lip-service has been paid to the proposition that equity does not punish. It follows that indirect fusion must be more cautiously approached. Nevertheless, it is clear that equity does not only seek to do what is fair between the parties, but sees also public purposes. It is noteworthy that two public purposes that equity appears to see in a remedial context are deterrence and retribution – purposes that motivate exemplary damages.

## B Direct Fusion

So far, no arguments in favour of fusion have been carefully examined. What has been demonstrated is that, in some circumstances, the case against fusion is weak. History and doctrinal consistency are important, and any fusion agenda must respect both. The examination of the anti-fusion argument has narrowed the areas of acceptable fusion to those areas alone where fusion would assist like cases being treated alike. Here it will be demonstrated that the availability of exemplary damages at common law can justify their award for some equitable wrongs, because such a change would serve to treat like cases more alike, whilst not creating legal turbulence that would jar with either history or doctrine. The first step of this process is to look at areas of similarity between law and equity.

Professor Burrows analyses the interplay between law and equity,<sup>104</sup> and finds that the modes of interaction fall into three broad categories.<sup>105</sup> First, there are

101 Cf *ibid* 311.

102 Tilbury, *Civil Remedies*, above n 15, [4026].

103 *Harris* (2003) 56 NSWLR 298, 331.

104 Burrows, above n 62.



areas ‘where common law and equity co-exist coherently, and where the historical labels of common law and equity remain the best, or at least, useful terminology’.<sup>106</sup> The division of legal and equitable title in trust law is given as an example. Indeed, the overwhelming utility of trusts was given as a reason that fusion was not attempted when the Judicature Acts 1873–75 were being drafted.<sup>107</sup>

Secondly, Burrows considers areas of co-existence where nothing is gained by historical labels.<sup>108</sup>

Finally, Burrows argues that there exist areas where equity and common law do not co-exist coherently, and that fusion is required here. Relevant to this discussion, the learned author nominates monetary remedies for civil wrongs as one such area of incoherence.<sup>109</sup>

Following Professor Birks’ characterisation of a wrong as a breach of duty,<sup>110</sup> Burrows notes that wrongs exist in law and equity, and that both jurisdictions allow compensation – that is, a loss-based remedy – as a remedial response.<sup>111</sup> Burrows considers, on the basis of this conceptual identity alone, that ‘there is no rational reason for having another category of wrongs, labelled equitable wrongs. All equitable wrongs should be treated as examples of breach of contracts or torts.’<sup>112</sup> This viewpoint is in direct opposition to the ‘fusion fallacy’ argument discussed above. It suffers from the same overbreadth. Whilst the anti-fusion program pays history too much heed, this view ignores it altogether. Neither is satisfactory. To recast equitable wrongs as examples of common law wrongs would create turbulence. Equity and law do not serve identical purposes, and wrongs in each jurisdiction share these differences. Indeed, the very reason that wrongs exist in equity is because they could not be accommodated within the framework of the common law.

Practically speaking, equity has developed defences and remedies that common law does not presently see, and has different rules of causation and remoteness.<sup>113</sup> The wholesale treatment of equitable wrongs as species of common law wrongs would lead to uncertainty as to the applicability of those

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105 Ibid 5.

106 Ibid.

107 See Getzler, ‘Patterns of Fusion’, above n 6, 158 fn 2.

108 Burrows, above n 61, 5–6.

109 Ibid 7.

110 Citing Peter Birks, ‘Misnomer’ in William Cornish et al (eds), *Restitution: Past, Present, Future: Essays in Honour of Gareth Jones* 1, 8–9.

111 Burrows, above n 62, 8–9.

112 Ibid. See also Lord Denning, *What Next in the Law* (1982) 226.

113 Although Burrows argues, *ibid* 14, that ‘there is a tendency to exaggerate the distinctions between common law and equitable defences’, pointing to the large amount of discretion involved in practice in the determination of common law causation and remoteness.

defences and remedies. Like cases would not be treated alike.<sup>114</sup> Chief Justice Spigelman explains this point lucidly:

Equitable remedies, including equitable compensation have elements that may seem to be more punitive or deterrent than common law remedies available in similar situations. This may occur, for example, by reason of the application of different rules of liability, principles of causation or tests for remoteness. The integrity of equity as a body of law is not well served by adopting a common law remedy developed over time in a different remedial context on a different conceptual foundation.<sup>115</sup>

Yet Burrows' analysis identifies an important similarity. At common law, exemplary damages are only awarded in addition to compensatory damages – a loss based remedy.<sup>116</sup> If there exist areas of equity where direct fusion is a persuasive argument for the award of exemplary damages, these areas will be circumstances where equity awards a loss-based remedy in response to a wrong. That is, circumstances where equitable compensation and equitable damages are awarded for wrongs.

### 1 *An Example of Direct Fusion – Treating Like Wrongs Alike*

This subsection considers a counter-example where, it is suggested, like cases are not treated alike and direct fusion is justified. Burrows identifies the manner in which compensation for past and future torts is awarded,<sup>117</sup> and suggests that it is an instance of like cases receiving unlike treatment. The analysis below shows that the source of incoherence in this instance flows from the fact that a single species of wrong can be split between law and equity, and that where this happens, different remedies are available in each jurisdiction.

A plaintiff may seek an injunction against a defendant committing 'future torts' – that is, a tort that has not yet occurred, but that is threatened. By the operation of *Lord Cairns Act* legislation, equitable damages may be awarded either in addition or substitution to the grant of such an injunction. This allows, in exceptional cases, a plaintiff to receive damages for future torts.

This is not quite the counter-example sought in answer to the problem originally stated. The basis for the award is not the breach of an equitable duty, but rather derives from statute. However, the remedial principles applied are

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114 A similarly wide analysis occurs in the New Zealand case of *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 where the majority (Cooke P, Richardson, Bisson and Hardie Boys JJ) held at 301, with very little consideration of principles, that a 'full range of remedies' including exemplary damages ought to be available for breach of fiduciary duty. It is submitted that such a development would lead to the same uncertainty. In *Harris* (2003) 56 NSWLR 298, Heydon JA presents, it is submitted, strong reasons for why this case should not be followed at 393.

115 *Harris* (2003) 56 NSWLR 298, 306. See also Getzler, 'Patterns of Fusion', above n 6, 160 fn 14 for further criticism.

116 Why this is so is an important question, but goes beyond the scope of this article. There are certainly important questions relating to the nature of the exemplary damages remedy, and why its award is 'parasitic' on damages alone and not, say, gain based awards. Certainly, there is no immediately obvious reason why a remedy that is *explicitly non-compensatory* should only be awarded with a compensatory remedy. This might be an avenue for suggesting that, given equity's preference for deterrence through gain-based awards, exemplary remedial awards are appropriate in addition to account of profits, which is what occurred in *Harris* at first instance.

117 Burrows, above n 62, 13–14.

drawn from equity, and, more importantly, are triggered by the availability of equity's flagship remedy: the injunction. A true counter-example might occur in the case of a solicitor who steals a clients life savings, as considered by Palmer J and Mason P.<sup>118</sup> The 'almost-counter-example' has been chosen for two reasons: first, it exposes the distinction between direct and indirect fusion more clearly;<sup>119</sup> secondly, it remains an example of direct fusion, if not in the precise area initially chosen.

For the example, consider two causes of action. In action A, the plaintiff seeks compensation for a past tort of trespass. In action B, for a future trespass. I suggest that the two actions are similar in the following two respects:

- they are both actions for the same wrong (trespass); and
- if liability is established, the principles for assessing compensation in both cases will be the same.<sup>120</sup>

The two actions differ in three relevant respects:

- in action A, the wrong is labelled as a common law wrong, whereas the wrong in action B is labelled equitable;
- different tests apply to determine liability; and
- exemplary damages are only available in action A.

Central to the following argument is the assertion that the same wrong underlies both causes of action. This requires justification. In each case, the court is responding to a breach of the same duty not to trespass. One breach is in the past, the other in the future. The fact that the wrong in action B occurs in the future should only affect the determination of liability. Liability for a future tort is – and should be – much harder to establish. It is submitted that the different paths taken to determine liability are unimportant to the analysis as they ultimately unite. In both actions, establishment of liability means that a court has found that the same wrong has been established. While the processes for establishing liability differ, the result in both cases is that the plaintiff is entitled to a remedy for trespass.

However, exemplary damages are only available as a remedy in action A. At first blush this may seem reasonable. After all, it seems unfair to punish wrongs that have not *actually occurred*. But such an analysis ignores the importance of distinguishing between determination of liability for the wrong, and the availability of remedies for the wrong. Once liability is established, the law is responding to an *actual* wrong. The higher standard of proof required to justify any juridical response to a future wrong is relevant to the former, but not the

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118 And the possibility of actions in deceit and breach of fiduciary duty. See (2002) 40 ACSR 487, 522 (Palmer J); (2003) 56 NSWLR 298, 335 (Mason P).

119 See below n 130–133, and accompanying text.

120 Equitable compensation is determined by the same principles as common law damages. *Wenham v Ella* (1972) 127 CLR 454, 460 (Barwick CJ); *Johnson v Agnew* [1980] AC 367, 400 (Lord Wilberforce). Both cited in Tilbury, *Civil Remedies*, above n 15, [3266]. See also *Attorney-General v Blake* [2001] 1 AC 268, 281 (Lord Nicholls).

latter. Remember also, exemplary damages are only awarded *if and only if* the compensatory remedy is insufficient.

In truth, the reason that exemplary damages are not available in action B is not because it is unfair to punish future wrongs, but purely because the wrong is labelled as equitable.

This example, it is submitted, is an instance of the same wrong receiving different treatment in law and equity. It is suggested that in circumstances such as this, where a wrong is split between equity and common law, fusion makes sense. But the touchstone remains the need to treat like cases alike.

A program of this character does not advocate fusion for its own sake. Rather, it advocates fusion where the law as it presently stands offers incoherence. Chief Justice Spigelman makes the point that '[t]he fact that exemplary damages are awarded in tort is ... not a basis for asking "Why not?" in equity'.<sup>121</sup> With this statement one must respectfully agree. Rather, direct fusion should be limited to the case where the objective observer spots incoherence in the law's present operation and validly asks 'Why?'.

One element is missing from this analysis: it thus far fails to consider the relevance of the fact that the same principles are applied to assess compensation in both cases. Plainly, if these principles differed substantially between actions A and B, it would be hard to argue that the availability of exemplary damages in A justified their award in B. It would not be clear that to do so would cause like cases to be treated alike. This point can lead in two directions. On the one hand, one could take a narrow view and say, following the reasoning above, that direct fusion is only justified where the same wrong is seen by equity and common law *and* a compensatory award is available in both *and* the principles for assessing compensation are the same. This narrow view would suffice for our example, and satisfy the mathematician.

There may, however, be a broader principle. Perhaps the principles for assessing equitable damages follow the law *because* they are responses to wrongs that exist in common law. Perhaps we have uncovered a species of indirect fusion.<sup>122</sup>

## C Indirect Fusion

### 1 *The Rationale for Indirect Fusion*

The question of whether a punitive remedy comes from within equity or is borrowed from the common law may seem to be a distinction without difference. Indeed, the analysis so far suggests that where the adoption of a single rule brings coherence, common law and equitable labels ought to be discarded and a uniform selection of remedies made available. After all, an analysis that abandons labels

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121 (2003) 56 NSWLR 298, 306. See also at 303.

122 Even Meagher, Heydon and Leeming acknowledge that there is a 'paradox' in the manner that the calculation of equitable damages follows the law, above n 1, [23-150]. Getzler notes the move to 'inject common law devices controlling the extent of liability into the remedy of compensation for breach of fiduciary and other equitable duties': Joshua Getzler, 'Am I my Beneficiary's Keeper?' above n 6, 239.

to make remedies available should place little importance upon labelling those remedies.

However, there are motives for considering indirect fusion. On one interpretation of the judicial method it is important that an equitable wrong is given a remedial response with the same label. The orthodox statement on the judicial method authorises:

a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder.<sup>123</sup>

It is submitted that the above analysis concerning direct fusion fits within this method, and finds its justification in the ‘more fundamental principle’<sup>124</sup> of treating like cases alike. However, an alternate view – not necessarily identical to the anti-fusion view – exists that requires developments of equitable principle to be ‘legitimate’.<sup>125</sup> On this view, for equity to pluck a remedy from the alternate dimension of the common law would lack legitimacy; the remedy must come from within equity. Clearly, this issue is easily solved by some minor conceptual gymnastics. Rather than adopting a common law remedy into equity when coherence demands it, the same goal of coherence could be achieved by the creation, within equity, of an exemplary monetary award that mirrors the common law remedy. The bend sinister is lifted. Indirect fusion is achieved.

However, if punitive remedies are found to exist in equity, the question arises: why should they be limited to situations that resemble common law? Far from solving a conceptual obstacle to direct fusion, has this indirect fusion idea opened a Pandora’s box? The solution is to return to first principles, and look for those purposes that underlie an award for exemplary damages. A workable framework for indirect fusion must respect the maxim that ‘equity follows the law’.<sup>126</sup> In this instance, this requires that ‘the availability of exemplary damages should be coextensive with the rationale of the remedy’.<sup>127</sup>

It has been demonstrated that, in certain circumstances, equity sees public purposes, including deterrence and retribution. The necessary conclusion is that equitable remedies do more than simply balance competing interests between parties.<sup>128</sup> It has been shown that, sometimes, equity requires that a plaintiff get more than is deserved either to deter others from committing a wrong, or to express the law’s disapproval of the manner in which the defendant committed a wrong. A model for indirect fusion is therefore to make exemplary awards available in circumstances where equity sees deterrence and retribution as remedial purposes.

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123 Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (1965) 158, quoted by Spigelman CJ in *Harris* (2003) 56 NSWLR 298, 304.

124 *Ibid.*

125 *Cowcher v Cowcher* [1972] 1 WLR 425, 430.

126 For a discussion of this maxim, see Meagher, Heydon and Leeming, above n 1, [3-035]–[3-045]; Robert Megarry and Paul Parker, *Snell’s Principles of Equity* (25<sup>th</sup> ed, 1960), 26–7.

127 *Harris* (2003) 56 NSWLR 298, 335 (Mason P). See also *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, [65] (Lord Nicholls).

128 *Contra Harris* (2003) 56 NSWLR 298, 311 (Spigelman CJ).

## 2 The Limits of Indirect Fusion

It is beyond the scope of this article to survey equitable remedies and identify areas where indirect fusion might operate. Yet some guidelines may be sketched out. First, the need to treat like cases alike remains, and needs explanation in this context. Secondly, the framework needs to be robust against significantly altering the law, rather than bringing coherence. Finally, to give the framework some grounding, the method applied in *Harris*<sup>129</sup> by Spigelman CJ and Mason P is analysed.

This paper's analysis began with the proposition that fusion is justified where it brings coherence. Like cases should be treated alike. It is important that indirect fusion does not extend beyond those limits. In *Harris*,<sup>130</sup> Mason P noted that where a fiduciary had breached their duty with the

additional elements of conscious wrongdoing necessary to trigger an award of exemplary damages, a disinterested observer would be bemused to learn that the law would say that exemplary damages should be withheld, whereas they would have been awarded if the *identical* facts were established had the case been pleaded in tort.<sup>131</sup>

This is a very different approach to treating like cases alike. Unlike the example given above of treating like wrongs alike, the likeness identified here is that the two wrongs – breach of fiduciary duty, and tort – spring from the one set of facts. President Mason's emphasis of 'identical' makes this clear. A single set of facts can constitute several wrongs, just as a single wrong can lead to a number of different remedial responses.<sup>132</sup> A series of rules have emerged to govern the interplay between the remedies available for a single wrong and, where necessary, force a plaintiff to elect between inconsistent remedies.<sup>133</sup> The same differences must be accommodated amongst wrongs that spring from one set of facts. Treating like cases alike does not, with the greatest respect, require remedial consistency amongst the wrongs that emerge from one set of facts, nor is such a rule desirable.<sup>134</sup> It is submitted that the real source of bemusement in the above example is as follows: breach of fiduciary duty is a wrong that attracts both deterrent and retributive responses; however, *solely because* the wrong is labelled as equitable, the most appropriate deterrent and retributive response is unavailable.

Although Heydon JA agrees in *Harris* that deterrence is a remedial purpose seen by equity, his Honour considers that equity effects deterrence by strictness alone: '[t]he prevention or protection from the relevant disease is assisted by the strictness of the standard imposed and the absence of defences justifying departures from it'.<sup>135</sup> This passage suggests that equity deters by strictness, in

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129 (2003) 56 NSWLR 298.

130 *Ibid.*

131 *Ibid* 335–6.

132 Birks, 'Rights, Wrongs and Remedies' above n 23, remarks that remedies hang off a wrong like a 'jellyfish trails its tentacles in the sea': at 7 ff.

133 See Tilbury, *Civil Remedies*, above n 15, [2001]–[2027].

134 See also *Harris* (2003) 56 NSWLR 298, [396] (Heydon JA).

135 (2003) 56 NSWLR 298, 409.

contrast to the common law that uses exemplary awards to deter. Equity is strict; common law is steep. It is submitted that this distinction is illusory.

The reason that equitable remedies are stricter is that equity has historically favoured gain-based remedies, whilst the common law has favoured compensation, which is a loss-based remedy. The two modes of award are very different in character. In particular, a gain-based remedy is easily capped. A fiduciary can only make a finite profit in the period between the commission of a wrong and the award of a remedy. The calculation has a beginning (the date of wrong), and an end (the date of award). Loss-based remedies are not easily capped as they compensate past and (potentially unlimited) future damage. More importantly, loss-based remedies compensate intangibles – loss of enjoyment, lost capacity to earn. Stricter rules of causation and remoteness are here required as a loss-based remedial scheme must be kept more closely in hand.

Equity has been able to make more use of strictness because it has historically awarded remedies that are more suited to stricter liabilities. Rather than deterring only via strictness, it is submitted that equity's mode of deterrence (and retribution) in a loss-based context, namely equitable compensation and *Lord Cairns Act* damages, is not yet properly developed. It is to be remembered that compensatory remedies are relatively new in the equitable jurisdiction.

It is important not to lose sight of the fact that exemplary damages are only awarded *if and only if* the compensatory award is unsatisfactory. Exemplary damages are, it is submitted, the natural expression of deterrence in a loss-based setting.<sup>136</sup> Turbulence is not an issue. Strictness and gain-based remedies will continue to play their deterrent role and

[t]o the extent that such remedies already achieve the aims of a punitive damages award in full or part, ... this will be a legitimate reason for refusing to make an award under the [if and only if] test, or making a lower award that would otherwise be necessary.<sup>137</sup>

#### D The Path Forward After *Harris*

The approach to fusion contemplated by Spigelman CJ and Mason P in *Harris*<sup>138</sup> is consistent with the above analysis. Although their Honours came to different conclusions, both reached their decisions by the same process: finding a common law wrong that resembled the equitable wrong at hand, and reasoning by analogy whether exemplary damages should be available.<sup>139</sup>

The Chief Justice found that the better analogy was with contract and, as exemplary damages are unavailable in contract,<sup>140</sup> found that their award was

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136 See also John Glover, *Commercial Equity: Fiduciary Relationships* (1995) 271. For an economic analysis of the deterrent role played by exemplary damages, see Anthony Duggan, 'Exemplary Damages in Equity' (2006) 26(2) *Oxford Journal of Legal Studies* 303.

137 The Law Commission, 'Aggravated, Exemplary and Restitutionary Damages' Report Number 247 (1997) 112.

138 (2003) 56 NSWLR 298.

139 *Ibid.*, 307–10 (Spigelman CJ); 335–9 (Mason P).

140 *Gray* (1998) 196 CLR 1.

inappropriate in the circumstances.<sup>141</sup> However, his Honour also queried whether reasoning at this level was appropriate.<sup>142</sup> Weight must also be placed upon his Honour's reliance upon the fact that, in the long history of fiduciary relationships, a punitive remedy has never been awarded. As considered above, there is great strength to this argument.<sup>143</sup> Nevertheless, his Honour indicated that where changes to the economy and society might be served by changes in the law, the weight of the historical argument is diminished. One such area suggested by his Honour involved 'the emergence ... of intangible property as a much more substantial proportion of the community's wealth'.<sup>144</sup> The door is not closed:

'it is unnecessary and undesirable to decide this case on the basis that a punitive monetary award can never be awarded in equity. Remedial flexibility is a characteristic of equity jurisprudence.'<sup>145</sup>

On the other hand, Mason P favoured the analogy with tort. The strengths of the two analogies are not relevant here. The course that *Harris* has charted for the future is a model for indirect fusion that makes exemplary monetary awards available in equity where similar interests are protected at common law, and where analogous common law wrongs makes an exemplary award available.

## V CONCLUSION

The judicature system is an insufficient barrier to the availability of exemplary damages in equity. At the same time, it is the only barrier. It has been demonstrated that the availability of exemplary damages at common law but not in equity can be a source of legal incoherence. This article has focussed upon the various approaches that can be taken within the law to remedy that incoherence. There is no end in sight to the 'Fusion Wars'.<sup>146</sup> The issues engaged are of great complexity, and their ultimate resolution will have important consequences for our system of law.<sup>147</sup> Accordingly, the opposing columns are lead by some of today's most eminent jurists.

It is submitted that a consciousness of the distinctions between direct and indirect fusion will bring further coherence to the debate. Argument and counter-argument will match more closely. Those who advocate direct fusion must make a clear case against incoherence. Indirect fusion must occur within strict bounds. Those opposing fusion *holus bolus* cannot fight indirect fusion armed only with the obvious fusion fallacy argument.

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141 (2003) 56 NSWLR 298, 312.

142 Ibid 308–9. For a detailed discussion of reasoning by analogy, see John Farrar, 'Reasoning by Analogy in the Law' (1997) 9 *Bond Law Review* 149.

143 It is pertinent to note that, in *Harris*, exemplary damages were sought and awarded at first instance in addition to account of profits, a gain-based remedy. At common law, they are only awarded with loss-based remedy. The remedy sought in *Harris* did not sit within the core area of incoherence considered in Part III.

144 (2003) 56 NSWLR 298, 306.

145 Ibid 303–4.

146 A term adopted by Sir Anthony Mason, above n 53, 11.

147 Cf Justice Peter Young, 'Current Issues' (2005) 79 *Australian Law Journal* 71, 73: 'this philosophic question ... of almost nil significance to the judges and practising profession'.



*Harris* has shed light on the directions forward for fusion. Decisions in which such issues arise so directly will be rare. The issue of the availability of punitive damages for breach of fiduciary duties arising from contract is a narrow question. Nevertheless, the learned analyses contained therein will dictate, for now, the contours of the paths to fusion – both direct and indirect.