

Judicial Colloquium

Equitable Compensation

Chief Justice RS French AC
Hong Kong, 23 September 2015

Introduction — some questions for discussion

This paper sets out in a largely descriptive way approaches to the taxonomy and application of equitable compensation in Hong Kong, Australia, Canada, New Zealand and the United Kingdom. The paper considers the analogical development of equitable compensation by reference to other bodies of law and the direct grafting into equitable compensation of aspects of common law remedies. The particular questions raised by the paper include:

1. To what remedy should the term 'equitable compensation' be applied and by reference to what characteristics?
2. Are some monetary remedies for some equitable wrongs properly characterised as enforcement of an equitable debt rather than recovery of a loss within the meaning of the term 'equitable compensation'?
3. Assuming equitable compensation to be a compensatory remedy, what kinds of causal connections determine:
 - (a) its availability?
 - (b) its measure?and how do they depend upon the nature of the underlying equitable wrong?
4. To what extent should common law and statutory rules inform by analogy or otherwise the availability and measure of equitable compensation?
5. How the conduct of the plaintiff is relevant to the measure of equitable compensation?
6. Can common law measures of loss be applied directly to equitable compensation?
7. Can punitive damages as an element of equitable compensation, be reconciled with the compensatory nature of the remedy?

Taxonomy and passion

A celebrated cartoon appearing in the *New Yorker Magazine* in May 1980 depicted two men in suits sitting at a bar — one saying to the other 'I consider myself a passionate man but, of course, a lawyer first'. If there is one thing however, that ignites passion in the lawyerly breast it is taxonomy. It is as well therefore to begin by mentioning the distinction between 'equitable compensation' and 'equitable damages'. Reference will also be made to recent suggestions that the term 'equitable compensation' has been used to incorporate under one label distinct concepts of recovery of loss and recovery of an equitable debt.¹

The term 'equitable damages' historically designated the statutory remedy which, pursuant to s 2 of Lord Cairn's Act² could be awarded by the Court of Chancery 'in addition to or in substitution for' injunctive relief or specific performance of a contract, covenant or agreement. Despite its statutory origin and the absence of the adjective 'equitable' in the statute, the term was adopted before the *Judicature Acts* and continued thereafter.³ Equitable compensation, on the other hand, was used to describe monetary relief awarded as an equitable rather than statutory remedy for loss suffered by breach of an equitable obligation.⁴

The limits of Lord Cairn's Act were mentioned in a breach of confidence case, *Cadbury Schweppes v FBI Foods*⁵ in the Supreme Court of Canada. Binnie J, delivering the judgment of the Court, held that the compensatory remedies for breach of confidence were not tied to the Canadian equivalent of the Act. If they were, they would be dependent upon the availability of injunctive relief. He found that breach of confidence attracted the general equitable jurisdiction to award compensation and did not depend upon the presence or absence of a fiduciary duty.⁶

¹ Justice James Edelman, 'An English Misturning with Equitable Compensation' (Speech delivered at UNSW Australia Colloquium on Equitable Compensation and Disgorgement of Profits, Sydney, 7–8 August 2015).

² *Chancery Amendment Act 1858* (UK); 21 & 22 Vict c 27.

³ Peter M McDermott, *Equitable Damages* (Butterworths, 1994).

⁴ J D Heydon, M J Leeming, P G Turner, *Meagher, Gummow and Lehane's: Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2015) [23-015].

⁵ [1991] 1 SCR 142.

⁶ *Ibid* 178–79 citing *Lac Minerals Ltd v International Corona Resources Ltd* [1991] 1 SCR 142.

There has been overlapping usage of the terms 'equitable damages' and 'equitable compensation'.⁷ A recent example appeared in *Libertarian Investments Pty Ltd v Hall*⁸ in the Hong Kong Court of Final Appeal. The plaintiff, alleging breach of fiduciary duty, had claimed an account and, in the alternative, an order for 'equitable damages or restitution ... to restore the plaintiff to the position it would have been in had the defendant honoured his trust obligations.'⁹ The Court of Final Appeal and the lower courts adopted the designation 'equitable compensation' to describe the relief sought. One of the Members of that Court was Lord Millett who had denounced the misuse of the term 'equitable damages' in an article in the *Law Quarterly Review* in 1998.¹⁰ He had said that it was time it was 'stamped out', observing:

It is misleading to speak of ... equitable compensation for breach of fiduciary duty as if it were common law damages masquerading under a fancy name'.¹¹

Lord Millett's observation in the *Law Quarterly Review* was quoted in the most recent edition of Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies*. It was characterised as 'dogmatic' but accepted as 'pragmatic' with the comment that:

while monetary awards — including monetary awards that compensate for loss — are in no way alien to equity, and have even been called 'damages' by judges while suffering no confusion of thought, the equitable jurisdiction to award compensation and damages depends on distinct principles that bear out the distinctive principles and concerns of equity'.¹²

That comment also reflected the sentiment of Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns*¹³, quoted by the High Court in *Maguire v Makaronis*¹⁴, that:

Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate¹⁵.

⁷ McDermott, above n 3, 1.

⁸ *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681.

⁹ *Ibid* 699 [40].

¹⁰ P J Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214.

¹¹ *Ibid* 225.

¹² J D Heydon, M J Leeming, P G Turner, above n 4, [23-010] (footnotes omitted).

¹³ [1996] 1 AC 421, 435.

¹⁴ (1997) 188 CLR 449, 469 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

¹⁵ A footnote to that quotation in *Maguire* characterised the award of equitable compensation as an exercise of the inherent jurisdiction of the Court of Chancery and the power conferred by Lord Cairn's Act as one involving 'legal not equitable rights' (1997) 188 CLR 449, 469 fn 79.

The power to award such relief was described by Gummow J in a judgment in the Federal Court in 1990 as an 'inherent jurisdiction to grant relief by way of monetary compensation for breach of an equitable obligation, whether of trust or confidence.'¹⁶ The term 'inherent jurisdiction' is understood in Australia as a reference to 'inherent power' distinct from the concept of jurisdiction which is understood generally as 'authority to adjudicate', albeit defined by reference to subject matter and/or geography.

While the Chancery Court had no power to award damages at law 'it probably had a strictly limited power to award damages but not on the same scale, or on the same principles, as a court of law'.¹⁷ There were decisions in Chancery prior to Lord Cairn's Act which seemed to assume the existence of the power. Associate Professor Peter McDermott of the University of Queensland described a number of such cases in his monograph on Equitable Damages published in 1994. McDermott observed that 'damages' as used in the Court of Chancery before Lord Cairn's Act, had various meanings. They included indemnity, interest and costs. There was a power to direct an issue of '*quantum damnificatus*' to be tried at law by a jury or assessed by a master. In *City of London v Nash*¹⁸ in which the grant of specific performance of a building lease was held to be inappropriate, Lord Hardwicke LC said¹⁹:

The relief must be by way of inquiry of damages before a jury; as I am more inclined to this, than to decree a specific performance.

Another taxonomical question of more substance has emerged out of the recent decision of the Supreme Court of the United Kingdom in *AIB Group (UK) Plc Ltd v Mark Redler & Co Solicitors*.²⁰ Edelman J of the Federal Court of Australia, in a paper delivered in August, has suggested that the term 'equitable compensation' is being applied inappropriately to remedies by way of disgorgement of profits and enforcement of equitable debts historically based upon common account.²¹ The point made is that neither disgorgement nor enforcement

¹⁶ *Smith, Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73, 83.

¹⁷ J D Heydon, M J Leeming, P G Turner, above n 4, [1-290].

¹⁸ (1747) 3 Atk 512; 26 ER 1095.

¹⁹ (1747) 3 Atk 512, 517, 26 ER 1095, 1098 cited in McDermott, above n 3, 11–12.

²⁰ [2014] UKSC 58; (2014) 3 WLR 1367.

²¹ Edelman, above n 1.

of an equitable debt fits comfortably within the notion of 'compensation'. The treatment of all equitable monetary awards as 'compensation' or 'damages' is said to ignore a basic distinction between a claim based on a breach of a right and a claim for the enforcement of a right.²²

Taxonomical debates are rarely rewarding unless their resolution clarifies and disentangles distinct principles. Historical and in-principle distinctions are properly drawn as a baseline for the understanding of essentially different remedies. With that understanding the possibility of analogical cross-fertilisation in the service of legal coherence is enhanced. As a broad proposition equitable compensation serves a restitutionary purpose and is subject to discretionary considerations. Common law damages flow from the proof of breach of a contractual or tortious obligation. They are subject to a variety of statutory modifications serving particular purposes. The incidence and measure of statutory damages depend upon the terms of the statute properly construed.

Equity and the rest

That being said, equity is no more an island entire of itself than is John Donne's 'man'. It is, to borrow from his Meditation, 'a piece of the continent, a part of the main'²³ and particularly so in Australia. Maitland said of equity that 'every part of it presupposed the existence of the common law.'²⁴ It would, however, be wrong to describe equity as 'parasitic' upon the common law as there are equitable doctrines and remedies which exist in their own right. There are equitable proprietary interests which do not correspond to common law rights.²⁵ A fiduciary relationship may arise out of but does not require a non-fiduciary duty underlying it.²⁶

²² Edelman, above n 1.

²³ John Donne, *Devotions upon Emergent Occasions* (1624) Ch XVII, Meditation.

²⁴ FW Maitland, *Equity* (Cambridge University Press, 1936) 18–19.

²⁵ Robert Pearce, John Stevens and Warren Barr, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 2010) 54.

²⁶ See the example given by Edelman J of a trustee possessed of a trust fund without power to invest or disburse who is subject to fiduciary duty not to be in a position of conflict: Justice James Edelman, 'The Importance of the Fiduciary Undertaking, Conference on Fiduciary Law', (Speech delivered at University of New South Wales, Sydney, 22 March 2013). See also Alastair Hudson, *Equity and Trusts* (Taylor & Francis Ltd, 2014) 40.

Equity and the common law in Australia, characterised together as the 'common law of Australia'²⁷ take their place in a legal landscape dominated by Commonwealth and State statutes. There are few, if any, legal questions which are able to be resolved without reference to a statutory context. There are few equitable disputes which do not involve common law claims. It is not unusual in commercial litigation in the Federal and State courts in Australia to find various combinations of claims, including statutory causes of action for misleading or deceptive conduct or unconscionable conduct, common law claims in contract and tort and claims for breach of fiduciary duty.

The relationships between equity, the common law and statute are dynamic. The common law has been influenced by equity. Gummow J said in *Roxborough v Rothmans of Pall Mall Australia Ltd*²⁸ that 'notions derived from equity have been worked into and in that sense have become part of the fabric of the common law'. Equity, as Mason P said in *Harris v Digital Pulse Pty Ltd*,²⁹ has returned the compliment — a return expressed in the maxim 'equity follows the law'. The 'following' may be exemplified by the confinement of the principles governing the appointment of receivers in aid of equitable execution and the issue of the old writ '*ne exeat regno*'³⁰ to cases analogous to the common law remedies in relation to equivalent legal interests.³¹

Those interactions between equity and the common law are at odds with Ashburner's unscientific metaphor describing them as two streams of jurisprudence which run side-by-side in the same channel and 'do not mingle their waters'. Such a fluvial phenomenon would require battalions of Maxwell's demons to maintain — where are they to be found? That is not to say that the streams are entirely miscible as Lord Diplock suggested in 1978 in *United Scientific Holdings Ltd v Burnley Borough Council*.³² Perhaps a slurry would be a better metaphor: two sets of principles flowing together in the same channel.

²⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563; *Lipohar v The Queen* (1999) 200 CLR 485, 500 [24] (Gleeson CJ), 505–6 [44]–[52] (Gaudron, Gummow and Hayne JJ).

²⁸ (2001) 208 CLR 516, 554–55 [100].

²⁹ (2003) 56 NSWLR 298, 326 [143].

³⁰ Now abolished in most Australian States.

³¹ See generally *Glover v Walters* (1950) 80 CLR 172, 175 (Dixon J); R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies*, (LexisNexis, 3rd ed, 1992) 308.

³² [1978] AC 904, 924–25 in the course of which he denounced the metaphore as both 'mischievous' and 'misleading'.

Lord Diplock characterised the effects of the *Supreme Court of Judicature Act 1873* (UK) as 'fusing' the two systems of substantive and adjectival law formerly administered by Courts of Law and Courts of Chancery. His judgment informed the approach to equitable compensation taken in 1991 by four members of the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co.*³³ It was not however an approach accepted by McLachlin J and other members of the Court. Nor was it reflected in the approach to the availability of punitive damages for breach of fiduciary obligation as expounded in the judgment of McLachlin J, with whom L'Heureux-Dubé agreed, in *Norberg v Wynrib*.³⁴ In Australia, interaction is inevitable but fusion, in the sense used by Lord Diplock, has not been accepted as its corollary. The rejection, at intermediate appellate level in Australia, of a punitive component of equitable compensation reflects a concern about inappropriate mingling.

Recently, and again relevantly to the particular case of equitable compensation, Lord Reed JSC said in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*:

As the case law on equitable compensation develops ... the reasoning supporting the assessment of compensation can be seen more clearly to reflect an analysis of the characteristics of the particular obligation breached. This increase in transparency permits greater scope for developing rules which are coherent with those adopted in the common law. To the extent that the same underlying principles apply, the rules should be consistent. To the extent that the underlying principles are different, the rules should be understandably different.³⁵

The question of analogical development requires consideration not only of equity's relationship with common law but also with statute law.

Statutes have influenced the development of equitable doctrines in Australia.³⁶ One example is the analogical application of statutes of limitations to equitable claims.³⁷ And in

³³ [1991] 3 SCR 534, 581–82.

³⁴ [1992] 2 SCR 226.

³⁵ (2014) 3 WLR 1367, 1401–02 [138].

³⁶ See the recent discussion by Mark Leeming in 'Common Law, Equity and Statutes: Limitations and Analogies' (Paper presented at Private Law Seminar, University of Technology, Sydney, 14 November 2014).

³⁷ *Motor Terms Co Pty Ltd v Liberty Insurance Ltd (In liq)* (1967) 116 CLR 177; *Solla v Scott* (1982) 2 NSWLR 832.

*Delehunt v Carmody*³⁸ the High Court relied upon an analogical application of the *Conveyancing Act 1919* (NSW) to hold that a man and woman who contributed equally to the purchase price of a residential property registered in the man's name alone, held beneficial interests as tenants in common. Gibbs CJ, with whom the other members of the Court agreed, said:

If equity follows the law, it will follow the rules of law in their current state. Where, as a result of following the law, a beneficial joint tenancy would formerly have been created, now a beneficial tenancy in common will (in New South Wales) come into existence.³⁹

A different kind of interaction occurs where statutes use terminology derived from equity or the common law. In *Aid/Watch Inc v Commissioner of Taxation*,⁴⁰ the Court said that where a statute adopts as a criterion for its operation a body of the general law, in that case the equitable principles respecting charitable trusts, then absent a contrary indication the statute picks up the case law as it stand from time to time.⁴¹ It follows that in the application of such a statutory provision the general law may itself be developed. Another example is the statutory prohibition against conduct in trade or commerce that is 'unconscionable within the meaning of the unwritten law from time to time of the States and Territories of Australia'. The prohibitions contained consecutively in ss 51AA of the *Trade Practices Act 1974* (Cth) and its successor, s 20 of the *Australian Competition Law 2010* (Cth), have been held to incorporate equitable doctrines of unconscionable conduct including one party taking unconscientious advantage of the disabling condition or circumstances of another.⁴² The term 'unwritten law', used in that provision was described in the High Court in 2003 as a reference to 'the principles of law and equity expounded from time to time in decisions respecting the common law of Australia.'⁴³ Interestingly, the successive statutory prohibitions each attracted a general statutory remedy by way of damages for loss or damage 'suffered ... by'⁴⁴ contravening conduct and 'caused by'⁴⁵ contravening conduct respectively.

³⁸ (1986) 161 CLR 464.

³⁹ Ibid 473.

⁴⁰ (2010) 241 CLR 539.

⁴¹ Ibid 549 [23].

⁴² *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 71 [38], 74 [46] (Gummow and Hayne JJ).

⁴³ Ibid.

⁴⁴ *Trade Practices Act 1974* (Cth), s 82.

⁴⁵ *Australian Consumer Law 2010*, s 236.

At the time of the enactment of the unconscionable conduct provision⁴⁶ there was already a considerable body of case law in place about the nature of the statutory damages remedy, which applied to contraventions of existing provisions of the *Trade Practices Act*. A single overarching purpose served by the remedy is difficult to construct as it encompasses wide varieties of contravening conduct, including misleading or deceptive conduct (which embraces conduct which could also be characterised as negligent or deceitful), harassing and unconscionable conduct, and anti-competitive conduct. The statutory damages remedy is not discretionary. It is available as of right.⁴⁷ Its attachment to the equitable doctrines incorporated into the prohibition against unconscionable conduct might, perhaps, be thought of as a case of statutory fusion.

Analogically analogical developments

Analogical development of equity by reference to the common law or statute does not require the incorporation into equity of either common law doctrine or statutory rules. The distinction between analogical development and incorporation can be illustrated 'analogically' by the judicial exegesis in Australia of the statutory damages remedies for contraventions of the *Trade Practices Act* and its successor, the *Australian Consumer Law* which have already been mentioned.⁴⁸ The measure of damages was not set out in either provision nor were there any limiting criteria apart from the causal connection conveyed in the words 'suffered ... by' and 'caused by' respectively. Nevertheless, the High Court held many years ago that in most cases common law damages would be 'an appropriate guide'.⁴⁹ That guidance did not involve the general incorporation into the statutory remedy of normative principles informing common law causation. Causal analysis simpliciter supported limitations on recovery, for example, where the victim's own conduct or failure to mitigate could be treated as a break in the causal chain from contravention to loss. Those limitations were not grafts from the common law. They were expressed in terms of causal connection, with a policy-based cut-off.

⁴⁶ 21 January 1993.

⁴⁷ *Marks v GIO Australian Holdings Ltd* (1998) 196 CLR 494, 532 [109] (Gummow J).

⁴⁸ Section 82 of the *Trade Practices Act* allowed a person who suffered loss or damage 'by' conduct of another in contravention of a provision of the Act to recover the amount of the loss or damage. Replaced since 2010 by s 236 of the *Australian Consumer Law* which provides for recovery of loss or damage 'caused by the conduct of another in contravention ...'.

⁴⁹ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 526 (Mason CJ, Dawson, Gaudron and McHugh JJ).

The approach to the statutory remedy was explained in a judgment of the Full Court of the Federal Court in 1988 in *Munchies Management Pty Ltd v Belperio*,⁵⁰ which described it as telescoping what would be at common law concepts of causation, remoteness and measure of damages. The selection of a sufficient cause to establish the connection giving rise to liability was properly influenced by policy and not logic. The application of the remedy could reflect the underlying conduct giving rise to it. Relevantly to the present topic, the judgment, in which Gummow J participated, mentioned the case in which the contravention giving rise to the damages remedy was misleading or deceptive silence or non-disclosure.⁵¹ It was suggested that the analogy for the pecuniary remedy might be found in the treatment of the errant fiduciary who inflicts loss by failure to disclose to the plaintiff what he was bound to reveal.⁵² As will be seen, however, the errant fiduciary in Australia was not to be treated as a species of negligent tortfeasor.

While considerations of legal policy were relevant to the selection of causative factors determinative of liability for the purposes of the statutory remedy, that did not equate to 'the quite different proposition that in any given case the ultimate issue is whether the defendant *ought* to be held liable to pay damages for the harm suffered.' That proposition, stated by Gummow and Hayne JJ in 2005 in *Travel Compensation Fund v Tambree*,⁵³ involved the rejection of the approach of Lord Bridge in *Caparo Industries Plc v Dickson*⁵⁴ appending to questions of duty and foreseeability of damage a criterion of what was fair, just and reasonable. That rejection suggests a distinction between what might be called 'causality' and 'causation'. A similar distinction can be drawn between the ways in which equitable compensation is assessed by reference to the equitable wrong in question.

Notwithstanding the adaptability of the statutory remedy under the *Trade Practices Act* by reference to the underlying conduct giving rise to it, its essentially compensatory

⁵⁰ (1988) 58 FCR 274, 286 [36].

⁵¹ Silence as a species of misleading or deceptive conduct was discussed by Gummow J in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 in a judgment with which two other members of the Full Court agreed. More recently see *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 368–71 [15]–[23] (French CJ and Kiefel J).

⁵² (1988) 58 FCR 274, 287 [37] citing *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd* (1987) 16 FCR 410, 420–21 (Gummow J).

⁵³ (2005) 224 CLR 627, 643 [46].

⁵⁴ [1992] 2 AC 605, 617–18.

character precluded the award of exemplary damages as an element of it.⁵⁵ The corresponding question with respect to equitable compensation is whether its nature and purpose is consistent with a punitive element. That question has been answered differently in Australia, Canada and New Zealand.

Observations about analogues bring to mind the remark by Gummow J in *Marks v GIO Australian Holdings Ltd*,⁵⁶ rejecting the confinement of the statutory remedy under the *Trade Practices Act* by reference to common law measures:

Analogy like the rules of procedure is a servant not a master.⁵⁷

The extension or confinement of equitable compensation by analogy from the common law and statute law would, no doubt, attract the same caution.

Causality, causation and equitable compensation

The decision of the House of Lords in *Nocton v Lord Ashburton*⁵⁸ was seminal in the development of principles governing equitable compensation. It concerned a solicitor's liability to his client for breach of fiduciary duty arising out of the solicitor's non-disclosure of a benefit he would obtain as second mortgagee from his client's release of part of the first mortgage over the same premises. Viscount Haldane LC referred to the remedy of compensation for that which the plaintiff had lost 'by' the fiduciary acting in breach of duty⁵⁹. The word 'by' was not a statutory word but it imported the requirement for a causal connection between breach and loss. It did not in terms incorporate common law 'causation' and its attendant norms and purposes.

Causality was in issue in *Brickenden v London Loan and Savings Co of Canada*.⁶⁰ The solicitor for a finance company who benefited from the company's loan to a third party could not be heard to say that his prior disclosure of the benefit would not have altered the

⁵⁵ *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251; *Marks v GIO Australian Holdings Ltd* (1998) 196 CLR 494.

⁵⁶ (1998) 196 CLR 494.

⁵⁷ *Ibid* 529 [103].

⁵⁸ [1914] AC 932.

⁵⁹ [1914] AC 932, 956–57.

⁶⁰ (1934) 3 DLR 465, 469.

finance company's decision. The central passage of the judgment from Lord Thankerton in that case has been described as 'notoriously difficult'⁶¹ and has attracted different interpretations. The authors of the most recent edition of Meagher, Gummow and Lehane, with their characteristic faith in the Australian judiciary, observe that:

Clarity is likely to come only with resolution of the matter by the High Court.

An early and influential Australian judgment setting out the extent and limits of equitable compensation in a way that appeared to eschew the invocation of common law causation was that of Sir Lawrence Street in *Re Dawson*.⁶² It involved recovery in Australia of loss arising from improper disposition by a defaulting trustee of the New Zealand assets of a deceased estate. The question was whether recovery should be based on the exchange rate prevailing when the order was made or when the breach had occurred.⁶³ Street J rejected an argument that compensation should be ordered by reference to the date of breach analogously with the rule governing damages for breach of contract and for tortious acts which was founded upon common law principles governing remoteness of damage.⁶⁴ His Honour indicated a 'but for' approach:

Considerations of causation, foreseeability and remoteness do not readily enter into the matter ... the principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.⁶⁵

The obligation imposed on defaulting trustees and other fiduciaries was historically 'of a more absolute nature than the common law obligation to pay damages for tort or breach of contract'.⁶⁶

Re Dawson was quoted in 1984 by Wilson J in the Supreme Court of Canada in *Guerin v R*.⁶⁷ Indian lands had been surrendered to the Crown for lease to a golf club. The lease entered into was disadvantageous to the Indians and held to be in breach of a fiduciary

⁶¹ J D Heydon, M J Leeming, P G Turner, above n 4, [23-475].

⁶² (1966) 2 NSWLR 211.

⁶³ The New Zealand pound was worth far more at the time of the order than at the time of the breach.

⁶⁴ Ibid 213.

⁶⁵ Ibid 216.

⁶⁶ Ibid.

⁶⁷ [1984] 2 SCR 335.

duty deriving from the nature of Indian title and the statutory scheme established for the disposition of Indian land. On the Crown's breach of its duty it was liable to the Indians in the same way and to the same extent as if a private law trust had been in effect.⁶⁸ Wilson J accepted the trial judge's assessment of compensation based upon loss of opportunity for a residential development.⁶⁹ Dickson J held the primary judge had not erred in principle, noting as he did that the judge had rejected any claim for exemplary or punitive damages.

A different approach emerged in 1987 in New Zealand. The Court of Appeal in *Day v Mead*⁷⁰ upheld a decision of the trial judge reducing equitable compensation for loss incurred by breach of fiduciary duty by half to reflect the plaintiff's culpability in relation to that loss. Cooke P adopted Lord Diplock's approach, describing his speech in *United Scientific Holdings Ltd* as 'the most authoritative modern exposition of the effect that should be accorded to the Judicature Acts.' He said:

Compensation or damages in equity were traditionally said to aim at restoration or restitution, whereas common law tort damages are intended to compensate for harm done; but in many cases, the present being one, that is a difference without a distinction.⁷¹

Pointing to the discretionary character of equitable relief he could see no reason for not assessing compensation for breach of fiduciary obligation on the footing that the plaintiff should accept some share of the responsibility. He characterised law and equity as 'mingled' or 'interacting' and said:

It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims.⁷²

Cooke P also took the view that the evolution of the judge-made law in New Zealand could be influenced by contemporary statutes and other current trends.⁷³ He found the *Contributory*

⁶⁸ Ibid Dickson, Beetz, Chouinard and Lamer JJ agreeing — the obligation was held not to amount to a private trust.

⁶⁹ Ibid 363.

⁷⁰ (1987) 2 NZLR 443.

⁷¹ Ibid 451.

⁷² Ibid.

⁷³ Ibid 452. He derived support from *Doiron v Caisse Populaire D'Inkerman Ltee* (1985) 17 DLR (4th) 660, a judgment providing for apportionment of contractual damages in a claim against a solicitor. The relevant judgment was that of La Forest JA. Cooke P invoked the 'spirit' of the judgment pointing to its application to a breach of fiduciary duty arising out of contract.

Negligence Act (NZ) helpful as an analogy. Despite the reliance upon analogy, which was debatable because at common law contributory negligence was a bar to recovery, the approach taken by Cooke P could be seen as reflecting the importation of a normative causation rule limiting recovery.

Somers J held that equitable compensation was not fettered by requirements of foresight and remoteness controlling awards of damages at law. He accepted *Re Dawson*⁷⁴ as an illustration of that proposition. He eschewed the contributory negligence analogue. There had been want of care by the defendant approaching an acquiescence in the risk involved in the relevant investment. On that basis he held that a lesser sum than the full amount lost would fairly compensate.⁷⁵ Casey J, in similar vein, found that the idea of the control of unconscionable conduct underlying equity justified an award of no more than the loss fairly attributable to the defendant, or no more than the property or expectation of which the plaintiff had been deprived. Hillier J took a similar approach.⁷⁶ To the extent that those approaches brought in a limitation based upon the plaintiff's own conduct and the notion of what was 'loss fairly attributable to the defendant' these approaches also imported a normative rule of causation.

The decision of the Court of Appeal in *Day v Mead* was followed three years later in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*,⁷⁷ which concerned the monetary remedies available for breach of confidence. The trial judge held he had no power to award compensation which he would have assessed at \$1.5 million. However, he awarded \$100,000 exemplary damages. The Court of Appeal allowed the appeal and substituted the compensatory award for the exemplary damages. In so doing it held that there was no reason in principle why exemplary damages could not also be awarded for actionable breach of confidence. In the joint judgment of four of the Judges, led by Cooke P, their Honours said:

For all purposes now material, equity and common law are mingled or merged.⁷⁸

⁷⁴ (1966) 2 NSWLR 211.

⁷⁵ (1987) 2 NZLR 443, 462.

⁷⁶ (1966) 2 NSWLR 211, 469.

⁷⁷ (1990) 3 NZLR 299.

⁷⁸ *Ibid* 301.

As mentioned earlier, Lord Diplock's view of the effect of the *Judicature Act 1873* and the decision of the New Zealand Court of Appeal in *Day v Mead* influenced the approach taken by La Forest JA and three other Justices of the Supreme Court of Canada in 1991 in *Canson Enterprises*.⁷⁹ The primary judge had found the plaintiff's solicitor liable for a breach of fiduciary duty and awarded compensation on the same basis as for an action in deceit. La Forest JA agreed with the approach taken in *Day v Mead*. Accepting that there could be no indiscriminate melding of equity and the common law, he said in the last paragraph of his judgment:

Both the common law and equity sufficiently support the fiduciary position by compensating the victim of the breach of confidence. Damages equivalent to those for deceit would seem sufficient to meet both these ends.⁸⁰

McLachlin J, with whom Lamer CJ and L'Heureux-Dubé J joined, agreed with the result but not with the reasoning. McLachlin J referred to the unique foundation and goals of equity. The basis of the fiduciary obligation and the rationale for equitable compensation were distinct from the bases of the tort of negligence and contractual obligation and the rationales for common law damages. The common law took the parties to be independent and equal actors and sought a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved. In a fiduciary relationship, on the other hand, one party pledged itself to act in the best interests of the other. It had trust not self-interest at its core and when breach occurred the balance favoured the person wronged. Equity was there concerned not only to compensate the plaintiff but to enforce the trusts at the heart of the relationship. McLachlin J acknowledged that different types of fiduciary relationships might, according to the circumstances, attract different approaches to damages. However, they had to be related in some way to the underlying concept of trust.⁸¹ Her Honour looked to the restitutionary basis for breach of trust.⁸² Stevenson J, in a separate judgment, agreed substantially with La Forest J, but held the case was not one of profit making and that restitutionary concepts did not fit. He applied a 'remoteness' test to losses so unrelated and independent of the defendant's breach of duty that they should not, *in fairness*, be attributed to the defendant. The fusion of law and equity had

⁷⁹ [1991] 3 SCR 534.

⁸⁰ Ibid 589.

⁸¹ Ibid 546.

⁸² Ibid 547. Reference was made to *Ex parte Adamson* (1878) 8 Ch D 807, 819.

nothing to do with the case. At common law contributory negligence would have been a complete bar to the action. Moreover, contributory negligence legislation did not apply in a claim for breach of trust.⁸³

McLachlin J's statement of principle in *Canson* was reflected in her joint judgment with L'Heureux-Dubé J in *Norberg v Wynrib*⁸⁴ in 1992, when she drew attention to the conceptual distinction between the foundation and ambit of the fiduciary obligation and the foundation and ambit of contract and tort and said:

Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness.

That observation was quoted with approval in the High Court of Australia in *Pilmer v Duke Group Ltd (In liq)*.⁸⁵ As appears later in this paper, however, McLachlin J was prepared to award punitive damages as an element of equitable compensation in *Norberg*. The availability of that remedy was rejected by the Court of Appeal of New South Wales in *Harris v Digital Pulse Pty Ltd*⁸⁶, but has not been determined in the High Court.

In *Cadbury Schweppes v FBI Foods*,⁸⁷ mentioned earlier in this paper in connection with the limitations of the damages remedy under Lord Cairn's Act, Binnie J said that equity like the common law was capable of ongoing growth and development, citing La Forest J in *Canson* and Lord Diplock in *United Scientific Holdings*. That general observation however, seems to have been in support of the particular proposition that:

having regard to the evolution of equitable principles apparent in the case law, we should clearly affirm that, in this country, the authority to award financial compensation for breach of confidence is inherent in the exercise of general equitable jurisdiction and does not depend on the niceties of *Lord Cairns' Act* or its statutory successors.⁸⁸

⁸³ Ibid citing Gummow J, 'Compensation for breach of fiduciary duty' in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) and *Carl B Potter Ltd v Mercantile Bank of Canada* [1980] 2 SCR 343, 352.

⁸⁴ [1992] 2 SCR 226.

⁸⁵ (2001) 207 CLR 165, 196 [71] (McHugh, Gummow, Hayne and Callinan JJ) citing *Canson Enterprises*.

⁸⁶ (2003) 56 NSWLR 298.

⁸⁷ [1999] 1 SCR 142.

⁸⁸ Ibid 179.

The Court had ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies including appropriate financial compensation.

The Court considered that while the protection of confidences originated in equity it could also coincide with other causes of action in contract, tort and property. Binnie J said that:

In short, whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the appropriateness of a particular equitable remedy but does not limit the court's jurisdiction to grant it.⁸⁹

The choice of the appropriate remedy turned on matching the 'remedy to the underlying policy objective'. The approach ultimately adopted by the Court in that case was similar to that applicable to the tort of conversion. The plaintiff could recover its lost sales to the extent that it could prove that they directly flowed from the defendant's violation of the plaintiff's confidential information.

An important statement about the approach to causal connection between equitable wrong and loss was made by Lord Browne-Wilkinson in *Target Holdings Ltd v Redfern*.⁹⁰ In that case a solicitor trustee was to hold loan moneys on trust for the lender and to advance those moneys to the borrower when the duly executed charge over the land which was to be the security for repayment was received. The solicitor incorrectly disbursed the moneys being held. When assessing the requisite causal connection to loss, Lord Browne-Wilkinson applied a 'but for' test:

Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good the loss to the trust estate if, but for the breach, such loss would not have occurred ... thus the common law rules of remoteness and damage do not apply.⁹¹

The inapplicability of common law causation in the context of rescission of a transaction for breach of fiduciary duty was discussed by the High Court of Australia in

⁸⁹ Ibid 161.

⁹⁰ [1996] 1 AC 421.

⁹¹ Ibid 434.

Maguire v Makaronis.⁹² The case concerned solicitors whose clients executed a mortgage which unknown to them was in favour of the solicitors. No independent legal advice was recommended. On the solicitors' action for possession following default by their clients, the clients sought a declaration that the mortgage was void. The Court held that the mortgage was liable to be set aside as a result of the solicitors' breach of their fiduciary duty in entering into the mortgage without the informed consent of their clients to the solicitors' interest in the transaction. The remedy was available whether or not the client's would have entered into the mortgage if the solicitors had disclosed their identity. The plurality rejected submissions by the solicitors trying to invoke issues of 'causation' by analogy with those found in the recovery of damages in tort or contract.⁹³ The Court said:

The fiduciary duty forbade, in the circumstances of the case, entry by the appellants into the transaction of which the giving of the Mortgage was a central part ... Subject to the need for restitution, the Mortgage was liable to be set aside at the suit of the respondents.⁹⁴

Different considerations arose where a plaintiff sought an account of profits as a personal rather than proprietary remedy for compensation for that which the plaintiff had lost. In such instances there was a need to specify criteria for a sufficient connection between breach of duty and the profit derived, the loss sustained or the asset held.⁹⁵ The term 'causation' was used but it does not appear that it was used in the common law sense importing normative limitations.

Brickenden v London Loan and Savings Co of Canada,⁹⁶ was discussed in *Maguire*, but *Maguire* did not provide any occasion for testing its reasoning.⁹⁷ *Maguire* suggested that the nature of the requisite causality in relation to remedy depends upon the nature of the equitable wrong committed.

Analogical development of the remedy by reference to the common law is obviously facilitated for that class of breach of fiduciary duty which resembles a tort or breach of

⁹² (1997) 188 CLR 449.

⁹³ Ibid 467.

⁹⁴ Ibid.

⁹⁵ Ibid 468.

⁹⁶ [1934] 3 DLR 465.

⁹⁷ (1997) 188 CLR 449, 471.

contract. In 1998, in *Bristol West Building Society v Mothew*,⁹⁸ Millett LJ distinguished between the relief available for breach of the equitable duty of skill and care that custodial fiduciaries may labour under and the relief available for breach of the fiduciary duty of loyalty. He said of cases involving careless administration by a trustee that equitable compensation in such a case resembled common law damages and was awarded by way of compensation to the plaintiff for his loss. His Lordship went on to say:

There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.⁹⁹

That observation was approved by the Court of Appeal of New Zealand in 1999 in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*.¹⁰⁰ That was on the basis that strict liability for breaches of trust causing loss to the trust estate and for breaches of the fiduciary duties of loyalty and fidelity were not required where the complaint concerned failure to exercise appropriate care and diligence.

In 2003, the High Court in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*,¹⁰¹ after referring to *Bristol West Building Society* and the *Bank of New Zealand* case, expressed an obiter and cautionary view that:

there must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.¹⁰²

Their Honours cited McLachlin J in *Canson Enterprises*.¹⁰³

⁹⁸ [1998] Ch 1.

⁹⁹ Ibid 17.

¹⁰⁰ (1999) 1 NZLR 664, 681.

¹⁰¹ (2003) 212 CLR 484.

¹⁰² Ibid 500 [39].

¹⁰³ (1991) 3 SCR 534.

In 2010, the Hong Kong Court of Final Appeal in *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (No 2)*¹⁰⁴ considered an appeal relating, among other things, to a claim by company liquidators against a bank for knowing receipt of certain shares which it had received from the chief executive officer of the company acting without authority, and had subsequently sold. The liquidators claimed against the bank for equitable compensation on the basis that that remedy would yield a substantially higher sum than the common law measure of damages for conversion which would be based on the value of the shares at the date they were sold by the bank.

Lord Neuberger, who wrote the judgment of the Court, accepted that equitable compensation is assessed on a different basis from common law damages but suggested that the difference can be overstated. He referred to Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns*¹⁰⁵ and *Maguire v Makaronis* for the same proposition.¹⁰⁶ On the question of the measure of the compensation, Lord Neuberger recalled:

a basic principle applicable to equitable compensation' is that ... 'there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable viz the fact that the loss would not have occurred but for the breach'.¹⁰⁷

This he saw as a common approach in England, Australia and Canada. In the event he considered that although Akai might have a claim in knowing receipt that took the matter no further. Even if, on the principles he had discussed, Akai was entitled to equitable compensation in an amount greater than common law damages, he would have been sympathetic to the refashioning of the equitable remedy to equate the amount of such compensation with the common law damages.¹⁰⁸

A more recent discussion of equitable compensation in the Hong Kong Court of Final Appeal occurred in *Libertarian Investments Pty Ltd v Hall*.¹⁰⁹ Ribeiro PJ there reviewed authorities dealing with the question of causation and the remedy of equitable compensation.

¹⁰⁴ (2010) 13 HKCFAR 479.

¹⁰⁵ Ibid 527 [131] citing *Target Holdings Ltd v Redferns* [1996] 1 AC 421.

¹⁰⁶ Ibid citing *Maguire v Makaronis* (1997) 188 CLR 449, 469–70.

¹⁰⁷ Ibid 533 [151] citing *Target Holdings v Redferns* [1996] 1 AC 421, 434 (Lord Browne-Wilkinson).

¹⁰⁸ Ibid 534 [155].

¹⁰⁹ (2013) 16 HKCFAR 681.

He referred to categories of fiduciary relationship set out by Tipping J in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*:

1. Breaches leading directly to damage to, or loss of trust property.
2. Breaches involving an element of infidelity or disloyalty which engage the conscience of the fiduciary.
3. Breaches involving a lack of appropriate skill or care.¹¹⁰

In the first category, strict rules of causal connection applied, borrowed from those developed in relation to traditional trusts requiring the trustee to restore to the trust fund what he has caused it to lose as a result of his breach of trust.¹¹¹ The relevant causal connection is established on a 'but for' basis without the constraints of the common law causation rules on remoteness and foreseeability.¹¹² In the second category, the common law rules on foreseeability and remoteness are also inapplicable. Ribeiro PJ quoted McLachlin J in *Canson Enterprises*, tying the want of any requirement for foreseeability to the responsibility assumed by the fiduciary to act in the interests of another.¹¹³ Equitable compensation rested on the premise that the basic duty of the trustee or fiduciary who has misappropriated assets or otherwise caused loss or damage to the trust estate in breach of duty, is to restore the lost property to the trust together with an account of profits if applicable. Where restoration in specie is not possible, the court may order equitable compensation in place of restoration.¹¹⁴ Common law rules requiring the loss to be foreseeable and not too remote do not apply. The court is therefore entitled to assess compensation 'with the full benefit of hindsight'.¹¹⁵

Litton NPJ and Bokhary NPJ both concurred with Ribeiro PJ. Lord Millett NPJ deprecated arguments in the Court of Final Appeal and below that account and equitable compensation were alternative and inconsistent remedies between which a plaintiff must elect. He made the point that an account is not a remedy for wrong.¹¹⁶ The account is a first

¹¹⁰ Ibid 708 [75] citing [1999] 1 NZLR 664, 687.

¹¹¹ Ibid 709 [78].

¹¹² Ibid [79].

¹¹³ Ibid 710 [80].

¹¹⁴ Ibid 712 [87].

¹¹⁵ Ibid 713 [90].

¹¹⁶ Ibid 732 [167].

step in a process enabling the plaintiff to identify and quantify any deficit in the trust fund and seek the means by which it may be made good.¹¹⁷

In a very recent decision in *Novoship (UK) Ltd v Mikhaylyuk*¹¹⁸ the Court of Appeal of the United Kingdom drew a distinction between the measure of compensation applicable in the case of a fiduciary sued for breach of a fiduciary duty and a claim for an equitable wrong done against somebody who was not a fiduciary. The case concerned third party assistance. The Court acknowledged that common law rules of causation, remoteness and measure of damages did not apply in the first case but held they could apply in the second. The distinction made between a simple 'but for' test which was applicable to equitable compensation for breach of a fiduciary duty and common law causation which was based on the effective cause of the loss, affected the outcome. In *Novoship* the analogical application of the common law test had the result that profit derived by the perpetrator of the equitable wrong was not recoverable.

In another very recent decision of the Supreme Court of the United Kingdom, *AIB Group (UK) Plc v Mark Redler & Co Solicitors*,¹¹⁹ the common law causation approach was invoked in relation to monetary compensation payable to the beneficiary of a trust where trust property had been misapplied and the trust was no longer subsisting. Solicitors holding funds paid to them by a bank to be used as a mortgage advance held the money under the condition that it was only to be paid out when an existing mortgage held by another bank had been redeemed. They paid the money to the borrower without satisfaction of that redemption condition. The bank sought the shortfall in its recovery from the solicitors. It sought, inter alia, equitable compensation for breach of trust. Causation was in issue because the value of the mortgaged property had fallen due to extraneous factors. The Supreme Court held that the solicitors' liability should be limited to only that amount of the bank's overall loss that would not have been incurred if the solicitors had acted in accordance with their obligation. The difference was that between £275,000 and £2.5 million. The criterion of recovery was taken from the broad principle identified by Lord Browne-Wilkinson in *Target Holdings* when he said:

¹¹⁷ Ibid 732 [168].

¹¹⁸ [2014] EWCA Civ 908.

¹¹⁹ (2014) 3 WLR 1367.

Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.¹²⁰

In *AIB* it was argued that Lord Browne-Wilkinson had conflated restitutive and reparative compensation.¹²¹ As Lord Toulson characterised the criticism it was that Lord Browne-Wilkinson 'treated equitable compensation in too broad-brush a fashion, muddling claims for restitutive compensation with claims for reparative compensation.'¹²² He accepted what Tipping J had said in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* that 'the nature of the duty which has been breached can often be more important, when considering issues of causation and remoteness, than the classification or historical source of the obligation.'¹²³ The Bank's argument treated the unauthorised application of trust funds as creating an immediate debt between the trustee and the beneficiary, rather than as conduct meriting equitable compensation for any loss thereby caused. Lord Toulson acknowledged that in early cases the language of equitable debt had been used.¹²⁴ But that was long before the term 'equitable compensation' entered the vocabulary. Lord Toulson said that whatever label was used, the question of substance was what gave rise to or was the measure of the equitable debt or entitlement to monetary compensation, and what kind of 'but for' test was involved.¹²⁵ He did not think it right to impose or maintain a rule giving redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties.¹²⁶ He did not accept that *Target Holdings* was wrong. In cases such as *Target Holdings* the extent of equitable compensation should be the same as if damages for breach of contract were sought at common law.¹²⁷ The general purpose of monetary compensation, whether classified as restitutive or reparative, was 'to make good a loss'.¹²⁸ A beneficiary was entitled to be compensated for any loss he would not have suffered but for the breach.

Lord Reed JSC agreed substantially with Lord Toulson's reasons. He took *Target Holdings* to have endorsed what McLachlin J said in *Canson*. He himself adopted

¹²⁰ [1996] 1 AC 421.

¹²¹ (2014) 3 WLR 1367, 1382 [56] (Lord Toulson JSC).

¹²² *Ibid.*

¹²³ *Ibid* 1383 [59].

¹²⁴ *Ex parte Adamson; In re Collie* (1878) 8 Ch D 807.

¹²⁵ *Ibid* 1383 [61].

¹²⁶ *Ibid* 1384 [62].

¹²⁷ *Ibid* 1385–386 [71].

¹²⁸ *Ibid* 1386 [73].

McLachlin J's approach that the application by analogy of 'common law rules' was complicated by the fact that there was no single set of common law rules.¹²⁹ It would be necessary to consider the specific characteristics of the obligation in question and the respects in which it resembles or differs from obligations arising in other areas of the law in order for the law governing liability for the breach of those various obligations to be coherent.¹³⁰ His Lordship found a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of equitable compensation for breach of trust was that described by McLachlin J in *Canson* and endorsed by Lord Browne-Wilkinson in *Target Holdings*.

Lord Reed held that the model of equitable compensation where trust property had been misapplied was to require the trustee to restore the trust fund to the position it would have been in if the trustee had performed his obligation. If the trust had come to an end, the trustee could be ordered to compensate the beneficiary directly. Foreseeability was generally irrelevant but the loss had to be caused by the breach of trust in the sense that 'it must flow directly from it'. Losses resulting from unreasonable behaviour on the part of the plaintiff would be adjudged to flow from that behaviour, and not from the breach.¹³¹ Lord Neuberger, Baroness Hale and Lord Wilson all agreed with Lords Toulson and Reed.

The decision in *AIB* has been criticised in a recent paper by Edelman J, mentioned at the beginning of this paper as 'an English Misturning with Equitable Compensation'. In his paper he refers to the judgment of the High Court in *Youyang* and its endorsement of Hodgson JA who dissented in the New South Wales Court of Appeal saying:

If a trustee wishes to assert that a breach of trust caused no damage for the reason that the beneficiary would, if asked, have authorised the very action which constituted the breach of trust, then there is at least an evidentiary onus on the trustee to make good that proposition.

Edelman J has suggested that the High Court's approach endorsed in some contexts the accounting liability approach described extra-judicially by Lord Millett, who said of *Target Holdings* that:

¹²⁹ Ibid 1397 [119].

¹³⁰ Ibid.

¹³¹ Ibid 1401 [135].

The plaintiff could not object to the acquisition of the mortgage or the disbursement by which it was obtained; it was an authorised application of what must be treated as trust money notionally restored for the trust estate on the taking of the account.

Edelman J also argued that the High Court in *Youyang* had distinguished *Target Holdings* on two grounds, one of which was that the proposed commercial transaction, involving the provision of security, was not completed after delay as in *Target Holdings* — the security was never provided and the solicitors should not have dispersed Youyang's moneys. He suggested that the same point could have been made about *AIB*.

It is appropriate, having referred to important general issues about the nature and measures of equitable compensation to look to its use to award bonus payments in the form of punitive damages.

Punitive damages — two case studies

Can punitive damages be accommodated within the concept of equitable compensation? An affirmative answer was offered in *Norberg v Wynrib*¹³² which involved claims by a former patient of a medical practitioner for damages on a variety of grounds, including breach of fiduciary duty. Sex for drugs was the central element of the case. La Forest J, Gonthier and Cory JJ treated the case as one of tortious battery attracting aggravated and punitive damages at common law. L'Heureux-Dubé and McLachlin JJ treated the case as one of breach of fiduciary duty. They related the damages remedy to the restorative goal of equity seeking to put the plaintiff as fully as possible in the position he or she would have been had the equitable breach not occurred.¹³³ Damages attracted 'the same generous, restorative remedial approach, which stems from the nature of the obligation in equity...'. The fiduciary could not be heard to complain that the victim of the abuse cooperated in his or her defalcation or failed to take reasonable care for his or her own interest.¹³⁴ In holding that punitive damages were available, McLachlin J quoted from Ellis on *Fiduciary Duties in Canada*:

¹³² [1992] 2 SCR 226.

¹³³ Ibid 269.

¹³⁴ Ibid.

Where the actions of the fiduciary are purposefully repugnant to the beneficiary's best interests, punitive damages are a logical award to be made by the Court. This award will be particularly applicable where the impugned activity is motivated by the fiduciary's self-interest.¹³⁵

Specific and general deterrence were identified as purposes of punitive damages.¹³⁶ McLachlin J observed that the phenomenon of sexual exploitation of patients by physicians was 'more widespread than it is comfortable to contemplate.' Punitive damages served to 'reinforce the high standard of conduct which the fiduciary relationship between physicians and patients demands be honoured.'¹³⁷ That approach might meet an argument that the punitive element is a foreign cuckoo in the equitable nest. It seems, on any view, to be a qualitative step in the development of the remedy.

The decision of the Court of Appeal in New Zealand in *Aquaculture Corporation* has already been mentioned and the Court's acceptance of the availability of exemplary damages for breach of confidence noted. The plurality in that case stated that '[e]xemplary damages are awarded only in so far as compensatory damages do not adequately punish the defendant for outrageous conduct.'¹³⁸ Somers J agreed with the outcome but observed that there had been no argument on the question whether the heads and other features of monetary awards for breach of equitable obligation could be fully equated with those applicable to awards of damages at common law.¹³⁹

The availability of punitive damages in equitable compensation has not been accepted at intermediate appeal level in Australia. The leading case is *Harris v Digital Pulse Pty Ltd*.¹⁴⁰ The Court of Appeal by majority (Spigelman CJ and Heydon JA) allowed an appeal from a decision of Palmer J who had awarded punitive damages for breach by an employee of a fiduciary obligation to his employer. In allowing the appeal, Spigelman CJ viewed the assertion, for the first time, of a power to make monetary awards of a punitive character in equity, as transgressing the limits on the development of the law by judges.¹⁴¹ His Honour's reasoning included the following propositions:

¹³⁵ Ibid 299 citing Mark V Ellis, *Fiduciary Duties in Canada* (Carswell, 1988) 20-24.

¹³⁶ Ibid 300.

¹³⁷ Ibid.

¹³⁸ [1990] 3 NZLR 299.

¹³⁹ Ibid 302.

¹⁴⁰ (2003) 56 NSWLR 298.

¹⁴¹ Ibid 307 [25].

- equity, contract and tort are each distinct bodies of law;¹⁴²
- to the extent that reasoning by analogy is appropriate, the contract analogy is more appropriate than tort;¹⁴³
- a punitive monetary award imposes a burden upon both parties for purposes unconnected to the relationship between the two parties;
- where a fiduciary relationship arises out of contract, punitive damages are incompatible with the purposes applicable to contract at common law and equity;¹⁴⁴
- there is nothing to suggest that in the case of a contract enforceable at common law equity would interfere to override the common law doctrine of penalties.

Heydon JA in an extensive treatment of the subject rejected the proposition that punishment was always foreign to the Chancery Courts. He gave historical examples. He accepted that even in modern times equity could exact a punishment from a defendant by restricting or denying allowances for the work and skill of a dishonest fiduciary in producing a profit of which an account was to be taken in favour of the plaintiff.¹⁴⁵ A grossly dishonest fiduciary could be deprived of allowances altogether. His Honour did not accept that punishment was always foreign to equity jurisdiction. In this respect he disagreed with Somers J in *Aquaculture*.¹⁴⁶ However, where Spigelman CJ based his conclusion upon the proposition that there was no power to make a punitive monetary award for breach of fiduciary duty arising out of a contractual relationship, Heydon JA said that the Supreme Court of New South Wales had no power to award exemplary damages for equitable wrongs generally. On the question of the change in the rules of equity generally, he accepted that they had changed from time to time and that individual Chancellors had effected those changes. He also accepted that they could be changed in the future. However, his Honour went on:

But those deeds of single judges were done when there was no appellate jurisdiction in the House of Lords, or very limited access to it, at a time before modern parliamentary democracy had developed, and members of parliaments consisted largely of wealthy men who in turn supported Cabinets composed largely of

¹⁴² Ibid 308 [29].

¹⁴³ Ibid 308–9 [36].

¹⁴⁴ Ibid 312 [57].

¹⁴⁵ Ibid 348 [164]–[165].

¹⁴⁶ Ibid 414 [440].

aristocratic oligarchs whom it was difficult to interest in the details of private law. What individual judges did in those constitutional and forensic conditions is not a sound guide to what modern Australian courts, at least at levels below the High Court, can do.¹⁴⁷

He accepted as a sound modern approach for courts below the High Court of Australia that:

If the claim in equity exists it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the 'justice' of the present case requires it, we should invent such a jurisdiction for the first time.¹⁴⁸

Heydon JA held both that there was no power in the law of New South Wales to award exemplary damages for equitable wrongs and, consistently with Spigelman CJ, that there was no power in the law of New South Wales to award exemplary damages for equitable wrongs of the type involved in the circumstances of that case.¹⁴⁹ Mason P who dissented, held it was appropriate to award exemplary damages for breach of fiduciary duty as a matter of principle and in the interests of consistency and doctrinal coherence there was no general doctrine of equity that would prevent such an award.

Conclusion

This paper offers no firm views on the questions posed at the outset. There is a degree of commonality in our jurisdictions but some important issues are ongoing including the proper scope of equitable compensation and how it may differ according to the nature of the equitable wrong. The question also remains whether its compensatory character can accommodate punitive awards.

¹⁴⁷ Ibid 419 [456].

¹⁴⁸ Ibid 419 [457] quoting *Re Diplock; Diplock v Wintle* [1948] Ch 465, 481–82.

¹⁴⁹ Ibid 422 [470].