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The 'Fusion Fallacy' Revisited

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Abstract
[extract] The view expressed in Ashburner's Principles on Equity was the traditional interpretation of the relationship of law and equity. Under this approach, a court exercising jurisdiction in both law and equity was required to maintain the separation of equitable doctrine from common law rules (and vice versa). Proponents of this traditional approach have greeted any attempt to rationalise and integrate legal and equitable causes of action and remedies with suspicion and have described these attempts as examples of the 'fusion fallacy'.

However recent case-law indicates that, in at least some areas, the traditional approach enunciated in Ashburner's Principles of Equity and firmly held by some eminent commentators is now open to question.

Keywords
equity, common law, fusion fallacy

Cover Page Footnote
The author would like to thank Mr Charles Rowland for his constructive criticism of earlier drafts of this article.

THE 'FUSION FALLACY' REVISITED

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Introduction

Sixty years ago a well known statement concerning the relationship of law and equity appeared in *Ashburner's Principles of Equity* in the context of the function and nature of the *Judicature Act* 1873.[1] The learned author stated that:

> ...the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters. The distinction between legal and equitable claims - between legal and equitable defences - and between legal and equitable remedies - has not been broken down in any respect by recent legislation.[2]

The view expressed in *Ashburner's Principles on Equity* was the traditional interpretation of the relationship of law and equity. Under this approach, a court exercising jurisdiction in both law and equity was required to maintain the separation of equitable doctrine from common law rules (and vice versa). Proponents of this traditional approach[3] have greeted any attempt to rationalise and integrate legal and equitable causes of action and remedies with suspicion and have described these attempts as examples of the 'fusion fallacy'.[4]

However recent case-law indicates that, in at least some areas, the traditional approach enunciated in *Ashburner's Principles of Equity* and firmly held by some eminent commentators[5] is now open to question. In the

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* The author would like to thank Mr Charles Rowland for his constructive criticism of earlier drafts of this article.

1 Brown D, *Ashburner's Principles of Equity* 2nd (1933) ed London Butterworths.

2 Ibid at 18. The metaphor has been the subject of judicial reference in *Felton v Mulligan* (1971) 124 CLR 367 where Windeyer J (at 392) referred to this statement with apparent approval.

3 See for example Meagher RP, Gummow WMC and Lehane JRF, *Equity: Doctrines and Remedies* 3rd ed Butterworths (1992) paras [220]-[222] and [254]-[263].

4 Ibid.

5 Ibid; Baker PV and Langan P St J, *Snell's Equity*, 29th ed (1990) London Sweet and Maxwell 12-3.

recent New Zealand case of *Aquaculture Corporation v NZ Green Mussel Co* ('*Aquaculture*')[6] Cooke P described the relationship of equity and common law very differently. He stated 'For all purposes now material, equity and common law are mingled or merged'.[7]

The statement of Cooke P stands in sharp contrast to the traditional view and warrants careful attention. It is one example of the continuing re-evaluation of the relationship of law and equity taking place in Australia, New Zealand and Canada. The divergence between the traditional view and modern statements like that in *Aquaculture* demands analysis. Therefore, the purpose of this article is to consider:

(a) the various interpretations of the 'fusion' debate; and
(b) the recent far-reaching developments in the law of estoppel and equitable damages with reference to the fusion debate.

Fusion fallacy

Prior to the enactment of the *Judicature Act 1873*[8] law and equity were administered by two separate courts. The disadvantages of such a system were substantial.[9] For example, courts of law refused to recognise equitable rights, title and interests.[10] In addition there was always the prospect that a plaintiff might commence an action in the wrong jurisdiction or a defendant might raise a purely equitable defence before a court exercising jurisdiction at common law. In such situations, the plaintiff was required to recommence the action in the correct jurisdiction. The defendant was forced to employ the use of the common injunction to restrain the action or the execution of a judgment which had been obtained.[11]

The Judicature System was implemented in order to redress the problems and impracticalities which arose under the earlier system.[12] The effect of the Judicature System was twofold. First, the administration of common law and equity was brought under the control of one court which was composed of various divisions. Each division had power to determine legal rights and interests, recognise equitable rights and interests and provide both legal and

6 [1990] 3 NZLR 299.
7 Ibid at 301.
8 The present statutory equivalents in Australia are the ss 57-64 *Supreme Court Act* 1970 and the *Law Reform (Law and Equity) Act* 1972 (NSW); s 62 *Supreme Court Act* 1958 (Vic); ss 4-5 *Judicature Act* 1876 (Qld); ss 17-28 *Supreme Court Act* 1935 (SA); ss 24-25 *Supreme Court Act* 1935 (WA); ss 10-11 *Supreme Court Procedure Act* 1932 (Tas).
9 Above n 3, paras [144]-[153].
10 Ibid at [150].
11 Ibid at [153].
12 Ibid at [152]. Nevertheless, it is interesting to note that *pre-Judicature* procedure has been influential in the constitutional cases in the United States of America - see Bane CA, *Uses of English Legal History in America* (1982) 2 OxfJLS 297; Lord Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment* (1980) Col L Rev 43.

equitable remedies.[13] Therefore, a plaintiff who commenced an action in the wrong division or a defendant who wished to raise a variety of both equitable and legal defences no longer faced the bureaucratic morass of the earlier system. Secondly, section 25 (11) of the *Judicature Act* provided that where 'there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail'.[14] In short, the Judicature System introduced the administrative or procedural fusion of law and equity.

The framers of the *Judicature Act* were content with a judicial system which was administratively fused. The prospect of the substantive or doctrinal fusion of law and equity, for example the rationalisation and merging of legal and equitable causes of action or the granting of legal remedies for equitable wrongs (and vice versa), was not seriously countenanced. Indeed, any suggestion that a doctrinal fusion of the rules of common law and principles of equity had taken place was quickly dismissed. The Attorney General at the time, Sir John Coleridge, said:

> To talk of the fusion of Law and Equity was to talk ignorantly. Law and Equity were two things inherently distinct...All they could do was to secure that the suitor who went to one Court for his remedy should not be sent about his business without the relief he could have got in another Court.[15]

Yet the development of a more streamlined judicial system in itself has not become the most interesting aspect of the administrative fusion of law and equity. Rather, the advent of the Judicature System heralded the potential integration of legal and equitable actions and remedies. Indeed, even within a few years of the institution of the Judicature System, judges had begun to intermix legal and equitable doctrine to a degree which Sir John Coleridge would not have considered possible.[16] Indeed Maitland stated earlier this century:

> The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice it that it is a well-established rule administered by the High Court of Justice.[17]

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13 Ibid at [201]-[214].

14 See generally ibid at [223]-[224]. At one level s 25 (11) merely confirmed the pre-existing pre-eminence of equity established in the famous *Earl of Oxford* case (1615) 1 Ch Rep 1; 21 ER 485, where the Court of Chancery asserted its jurisdiction to provide injunctive relief against a plaintiff proceeding to execute judgment at law. At another level, there were a number of conflicts between equity and common law in relation to the treatment of certain issues during the nineteenth Century which s 25 (11) resolved - see above n 3 at [210]-[214].

15 Hansard 3rd Series volume 216 at 1601; cited above n 3 at [205]. A similar sentiment was expressed by Jessel MR in *Salt v Cooper* (1880) 16 Ch D 545 at 549.

16 See for example *Redgrave v Hurd* (1881) 20 Ch D 1; *Walsh v Lonsdale* (1882) 21 Ch D 9; *Nocton v Ashburton* [1914] AC 932; *Re Pryce* [1917] 1 Ch D 234.

17 Maitland FW, *Equity: A Course of Lectures* (1947) (Cambridge at the University Press) 20.

As the twentieth century draws to a close, a major question which has arisen is whether equity and law are capable of substantive or doctrinal fusion. In addressing this issue one may discern four responses from case-law and academic commentators.

Fusion is a fallacy

The views expressed by Meagher, Gummow and Lehane[18] represent the most conservative approach to this matter. These commentators have stridently and continuously opposed the doctrinal fusion of law and equity.[19] First, they maintain that the legislature never intended the fusion of law and equity.[20] Secondly, their argument contains an inherent assumption that the nature of equitable and legal actions and remedies were (and are) such that there were (and are) ample causes of action and remedies to provide a plaintiff with adequate redress for his/her complaint. Therefore doctrinal fusion was (and is) unnecessary.[21] Thirdly, after examining case-law since the introduction of the Judicature System, they conclude that the attempts to substantively fuse equity and law has unnecessarily 'distorted' the administration of justice.[22] Indeed, Meagher, Gummow and Lehane question whether the whole administrative exercise has been worth the changes wrought.[23] In England, the possibility of the doctrinal fusion of law and equity under the Judicature System has been rejected in *Snell's Equity*[24] and a similar position has been taken in the work of Sir Raymond Evershed,[25] PV Baker,[26] Leonard J Emmerglick[27] and Michael Evans.[28]

The problem is that such commentators, who wish for a paradise in which equity and law are administered as separate doctrines, fail to accept the reality that judges and commentators alike are becoming less afraid of

18 See generally above n 3 Chapter 2.

19 Meagher, Gummow and Lehane, *Equity; Doctrines and Remedies* 2nd edn, Butterworths, (1975) and above n 3 at [220]-[224] and [253-257]; paras [220]-[222] and [253]-[259]; and above n 3 at [220]-[222] and [254]-[263].

20 Above n 3 at [201]-[207].

21 Ibid at [226]-[245].

22 Ibid at [253]; In *Canson Enterprises Ltd v Boughton and Co* below n 49, Stevenson J expressed a similar view at 165.

23 Ibid at [254]-[263]. The views of Meagher, Gummow and Lehane are paralleled in the discussion of Professor Atiyah on the decline of equity in *The Rise and Fall of Contract* Clarendon Press, Oxford, (1978), 671-672 and Horwitz, *The Transformation of American Law* (1977) Cambridge, Mass. and London, 65. For a contrary view on the efficacy of procedural unification see Clark, 'The Union of Law and Equity' (1925) 25 Col L Rev 1.

24 Above n 5.

25 Sir Raymond Evershed 'Equity is not to be presumed to be past child-bearing' (1953) 1 Syd L Rev 1. See also a later article 'Reflections on the Fusion of Law and Equity after 75 Years' (1954) 70 LQR 326.

26 Baker PV, 'The Future of Equity' (1977) 93 LQR 529.

27 Emmerglick LJ, 'A Century of the New Equity' (1945) 23 Tex L Rev 244.

28 Evans M, *Outline of Equity and Trusts* 2nd ed (1993), Sydney, Butterworths, paras [[117]-[118].

integrating and intermixing law and equity. On the one hand Meagher, Gummow and Lehane opine that '[t]he scope for the fusion fallacy is...infinite and varied'.[29] Yet on the other hand, they devote considerable space to a discussion of cases where, in their view, law and equity have been inappropriately fused. Surely, this evaluation could suggest that, if there is such a scope for doctrinal fusion, it is justifiable in some cases. Indeed, such material may be simply interpreted as direct authority for the proposition that law and equity are fused in a doctrinal as well as a procedural sense. However, it is important to recognise that the concern of such commentators as Meagher, Gummow and Lehane about the potential effect of doctrinal fusion is valid on some occasions. Substantive fusion may seem attractive, but many unanswered questions still remain.[30] For example, if fusion has already occurred at a substantive level is there any merit in retaining a distinction between common law and equitable damages, and if so, should the common law or equitable method of calculation prevail?[31]

In the context of arguments against substantive fusion, it is worthy to note a pre-eminent article by Roscoe Pound on the subject of administrative and doctrinal fusion.[32] Meagher, Gummow and Lehane refer to Roscoe Pound's survey of the operation of the fused system in the United States as further proof of the demise of equity under such a system.[33] Roscoe Pound perceived the development of four trends in a substantively fused system:

> (1) legal rules superseding equitable rules in certain cases; (2) equitable rules, or portions of them, disappearing; (3) equitable principles becoming hard and fast and legal in their application; (4) equitable rules becoming adopted in such a way as to confuse instead of supplement the legal rule.[34]

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29 Above n 3 at [226].

30 Gareth Jones and William Goodhart have expressed support for the view that law and equity are fused substantively in their book *Specific Performance* below n 58. JRF Lehane in his review of the book in [1987] CLJ 163 intimates that such a view is oversimplistic and untenable. He notes (at 165): 'To ask that those who assert law and equity are fused should explain what they mean, how it happened and what follows from it is not merely to indulge in an idiosyncratic belief that things were better before 1873, or, still less, to suggest that law and equity then became incapable of future development...Sadly, the authors, like their numerous predecessors (including their Lordships in *United Scientific Holdings*) do not offer any such explanation.'

31 See generally the Hon Mr Justice Gummow, 'Compensation for Breach of Fiduciary Duty' in Youdan TG (ed) *Equity, Fiduciaries and Trusts* (Carswell Ltd, 1989) 57.

32 Pound R, 'The Decadence of Equity' (1905) Col L Rev 20; Nearly twenty-five years later Walsh WF in his article 'Is Equity Decadent?' above n 66, concluded contrary to Pound (at 496-497) that:

> ...modern equity, instead of being decadent, has tremendously extended it effectiveness as the spiritual principle or soul of law in remedying its shortcomings, correcting its mistakes and leading in its reform by the establishment of broad principles of social justice under merger of law and equity.

See also The Honourable Mr Justice LJ Priestley, 'A Guide to a Comparison of Australian and United States Contract Law' (1989) 12 UNSW Law Journal 4.

33 Above n 3 at [255].

34 Above n 32 at 29.

Subsequently Meagher, Gummow and Lehane have identified these tendencies in our own legal system.[35] Certainly there is some truth in Pound's arguments. For example, at the time Roscoe Pound was enunciating these general trends equitable estoppel had become substantially limited by common law notions.[36] However, it is erroneous to assume that the view expressed in *Ashburner's Principles on Equity* represented Roscoe Pound's interpretation of the relationship of law and equity. Pound's concern was more fundamental than simply whether a substantive fusion of law and equity had taken place. For the purpose of ensuring that our legal system operated in accordance with principles of justice, he wished to preserve the hallmark of equity jurisprudence - judicial discretion.[37] For Pound, the fight to preserve equitable principles was also one for a legal system with discretion:

> Law must be tempered with equity, even as justice with mercy. And if, as some assert, mercy is part of justice, we may say equally that equity is part of law, in the sense that it is necessary to the working of any legal system.[38]

In order to elucidate Pound's views, two additional points should be made. First, on the subject of substantive fusion, Pound displayed surprising acceptance. The pre-Judicature System was

> merely ... an accident of judicial administration, requiring men for historical reasons to seek relief here rather than there, or in this way rather than that, without sensibly affecting the substance of the rules applied.[39]

He concluded that substantive fusion was simply a response to the 'needs of the future'.[40] Secondly, Pound was aware of the historical context in which equity had arisen and accordingly described the context in which he envisaged its decline. As well as referring to administrative fusion as a factor in the decline of equity in relation to law, Pound described, *inter alia*, the growing emphasis on predictability of legal rules and the minimisation of judicial discretion;[41] the development of the theory of binding precedents in

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35 Above n 3 at [225].

36 See for example, Finn PD, 'Equitable Estoppel' in Finn PD(ed) *Essays in Equity* (1985) The Law Book Company Ltd, 59 at 62-71.

37 Above n 32 at 21-6.

38 Ibid at 35.

39 Ibid at 23; See also above n 27 at 249 where Emmerglick has noted that Pound was 'upholding a unified court.'

40 Ibid. In arriving at this view, Pound cited John F. Dillon, *The Laws and Jurisprudence in England and America* (1895) Boston, Little, Brown and Company, where Dillon stated (at 386): 'The separation of what we call equity from law was originally accidental, or at any rate was unnecessary; and the development of an independent system of equitable rights and remedies is anomalous and rests upon no principle. The continued existence of these two sets of rights and remedies is not only unnecessary, but its inevitable effect is to produce confusion and conflict. The existing diversity of rights and remedies must disappear and be replaced by a uniform system of rights as well as remedies.'

41 Ibid at 21.

equity;[42] and the adoption of equitable actions and remedies in law.[43] It may seem ironic that Pound was not overly worried by the prospect of substantive fusion, yet the process he described was one in which the common law at that time increasingly dominated equity. Pound's attitude could be explained by the fact that he foresaw benefits in the rationalisation of two sources of legal doctrine into one fused legal system. In Pound's view, the real problem was that the legal system was developing in such a manner as to formalise and systematise equity. In that process, equity's discretionary capacity was being lost. Roscoe Pound's identification of an historical context and factors (other than simply an amalgamated system) which lead to the decline of equity, was important. Accordingly, it was simply inaccurate to portray the Judicature System as the only factor responsible for the decline of equity.

Modified fusion fallacy

The second approach (which is a variation of the first above) acknowledges the intended limited administrative effect of the Judicature System, albeit with some regret. Delaney[44] has noted that the prospect of substantive fusion had 'been propounded by Mansfield and restated by Blackstone in the eighteenth century.'[45] However, 'old habits die hard' and the Judicature System effected 'nothing more than a fusion of jurisdiction'.[46] Interestingly, Delaney does not suggest that substantive fusion would distort the legal system or lead to confusion. Rather, the simple fact was that substantive fusion was not envisaged under the *Judicature Act*.

The empirical approach

The third approach is a cautious acknowledgment that the Judicature System has wrought an impact on substantive issues. According to *Hanbury and Maudsley: Modern Equity*,[47] the state of the law is such that whilst law and equity are not completely fused:

> ...a century of fused jurisdiction has seen the two systems working more closely together; each changing and developing and improving from contact with the other; and each willing to accept new ideas and developments, regardless of their origin. They are coming closer together. But they are not fused.[48]

The judgment of La Forest J in *Canson Enterprises Ltd v Boughton and*

42 Ibid at 25.
43 Ibid.
44 VTH Delaney, *Equity and the Law Reform Committee* (1961) 24 MLR 116.
45 Ibid at 117.
46 Ibid.
47 Martin JE, *Hanbury and Maudsley: Modern Equity* 13th ed (1989) London Stevens & Sons .
48 Ibid at 26.

Co ('*Canson*')[49] discussed below,[50] accords with this view. Sheridan and Keeton have concluded also that the relationship between equity and law has become closer,[51] to the extent that on occasions it 'has sometimes led to the creation of a sort of amalgam of common law rules and rules of equity'.[52] However, Sheridan and Keeton point out that an 'amalgam' of law and equity has not always taken place.[53] This evaluation is attractive in three respects. First, there is a recognition that the development of substantive fusion is in differing stages, depending on the nature and function of the legal and equitable actions and/or remedies involved. Secondly, there is an attempt to differentiate the sorts of actions and remedies which are inherently more capable of operating in a substantively fused system.[54] Thirdly, the operation of law and equity is neither cast in a conservative mould unresponsive to change, nor is it portrayed as a achievement wrought by simple legislative action. Rather, this approach suggests that the substantive fusion of the two systems is an ongoing process. Naturally, this view contains its own problems. It seems that we are faced with a legal system comprised of some substantively fused areas, whilst in other respects, equity and law remain apart. The operation of a legal system with such characteristics could give rise to confusion.

Fusion is fact

The fourth interpretation is in complete contra-distinction to the views of Meagher, Gummow and Lehane. This approach has two aspects. First, there is a ready acceptance that the Judicature System has automatically and inevitably produced the substantive merger of law and equity. The difficulty with this view is that, an empirical analysis of the case-law may not fully support this proposition.[55] Secondly, proponents of the substantive fusion of law and equity assume not only that such a process has been achieved, but that it has been achieved with ease. Again, this approach glosses over the many real difficulties which have arisen.[56]

The most famous early exponent of this attitude was Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council* ('*United Scientific*').[57] In this case, Lord Diplock referred to Ashburner's famous statement and concluded that it was 'mischievous and deceptive'.[58] He then went on to point out:

49 (1991) 85 DLR (4th) 129.
50 See my discussion of this case at n 163 above.
51 Sheridan LA and Keeton GW, *The Nature of Equity* (1984) Chichester Barry Rose Publishers Ltd.
52 Ibid at 35.
53 Ibid.
54 Above n 47 at 24-6; see also above n 3 at [226]-[245].
55 Ibid.
56 Above n 3, Chapter 2.
57 [1978] AC 904; [1977] 2 All ER 62.
58 Ibid at 925; Ibid at 68.

> If Professor Asburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.[59]

Lord Diplock is not alone in his evaluation of the relationship of law and equity. Jones and Goodhart have relied on *United Scientific* as authority for the proposition that law and equity are fused.[60] In another case, *Seagar v Copydex*[61] Lord Denning suggested that damages were available in response to a breach of an equitable obligation.[62] Much later, Lord Denning specifically noted that the Judicature System fused law and equity, and that 'the fusion is complete'.[63] As noted above, Cooke P of the New Zealand Court of Appeal has made similar comments.[64] In Australia, Deane J in *Waltons Stores (Interstate) Ltd v Maher*[65] has not only suggested that law and equity are fused, but that to consider otherwise is to risk the future development of an orderly legal system:

> Knowledge of the origins and development of the common law and equity and an awareness of the ordinary and continuing distinctness of controlling equitable principles are prerequisites of a full understanding of the content of a fused system of modern law. To ignore the substantive effects of the interaction of doctrines of law and equity within that fused system 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.[66]

It is surprising (as well as illuminating) that such diverse views pertain to the relationship of law and equity. Equally important is the fact that the potential effect of substantive fusion is interpreted so differently. On the one hand, Meagher, Gummow and Lehane consider that substantive fusion, with its attendant confusion and uncertainties, will only lead to the demise of our

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59 Ibid; see also *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 122.

60 Jones G and Goodhart W, *Specific Performance* (1986) London, Butterworths at 3 and 21.

61 [1967] 2 All ER 415.

62 Ibid at 417-8. Heydon JD, Gummow WMC and Austin RP, *Cases and Materials on Equity and Trusts* 4th ed (1993) Butterworths point out (at para [118]) that 'it appears that the damages referred to by Lord Denning were common law damages as awarded in tort.'

63 Lord Denning, *Landmarks in the Law*, (1984) London Butterworths at 86.

64 Above n 6.

65 (1988) 76 ALR 513.

66 Ibid at 556; In his article 'Is Equity Decadent' (1938) 22 *Minnesota Law Review* 479 Walsh WF stated in a similar vein (at 486):

> 'When equity now extends specific relief to cover a constantly broadening field the new law so established becomes at once a part of the general law applied and enforced in all courts and in all actions, since in every such case every court is a court of both law and equity and every such action is both legal and equitable. There is no longer any occasion for the adoption at law of equitable rules. They become at once part of the single system made up of law and equity combined'.

legal system.[67] On the other hand, Deane J identifies substantive fusion as a formidable instrument which can and should be employed in the 'orderly development' of a 'simplified' legal system.[68] These very different reactions to substantive fusion suggest that we do need to evaluate the direction our legal system is taking.

Three major criticisms of the treatment of the issue of substantive fusion can be made. First, it is evident that there is a lack of analysis of the specific legal contexts in which the question of substantive fusion has arisen. For example, Meagher, Gummow and Lehane focus on certain areas where, in their opinion judges have mistakenly fused equity and law. But these commentators canvass these cases for the purpose of refuting the proposition that the substantive fusion of law and equity is possible. The exposition in *Hanbury and Maudsley: Modern Equity* further illustrates the problem. Whilst there is an identification of areas where doctrinal fusion has arisen,[69] the discussion is still predominantly descriptive. In short, three significant questions have not been answered, namely:

(i) in what areas of our law has the fusion issue arisen most clearly and consistently?

(ii) in the light of the answer in (a), why has the fusion issue emerged in some areas of law and not in others?

(iii) why have modern courts embraced the concept of doctrinal fusion, or to put it another way, how do judges justify the fusion of law and equity?

Secondly, there has been no consideration of the fusion debate in the context of philosophical and legal changes wrought in areas of law such as contract law which have traditionally interfaced with equity. It is impossible to discuss these changes and challenges at length.[70] However, it is submitted that equitable doctrines are becoming increasingly part of this scrutiny.[71] Certainly, in the context of a debate concerning the substantive fusion of law and equity, concerns for doctrinal purity may not rest well with what some commentators have referred to as the 'emergence of conscience and the decline of legalism'.[72] So, whilst there is no doubt that the question of the

67 Above n 3 at [254]-[263].

68 Above n 65 at 556.

69 Above n 47.

70 For an overall discussion of nineteenth Century contract theory and the kinds of theories which have influenced the course of contract law in the twentieth Century, see DW Greig and JLR Davis, *The Law of Contract* (1987) The Law Book Company Limited, at 1-74; StarkeJG QC, Seddon NC and Ellinghaus MP, *Cheshire and Fifoot's Law of Contract* 6th ed (1992) Butterworths paras [001]-[053].

71 See for example Drahos P and Parker S, 'Critical Contract Law in Australia' (1990) 3 *Journal of Contract Law* 30 where they subject the decision in *Waltons Stores (Interstate) Ltd v Maher*, above n 65, to the theories of the critical legal studies school.

72 Above n 70, Starke, Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract* para [052].

fusion of law and equity is a complex one, in the last decade some judges have increasingly viewed substantive fusion, in at least some areas, as both inevitable and preferable.[73] Moreover the complete demise of equity, presaged by some commentators,[74] has not occurred. For example equity has played its part in the decline of formalism. Equity has been called upon to protect the more vulnerable members of society; and set aside unconscionable contracts and bargains obtained in the context of undue influence.[75]

Thirdly, there is little or no analysis of the potential benefits which substantive fusion offers; or, to put it another way, how the substantive fusion of two sources of our legal system could change (in a beneficial way) the topography of our legal landscape. Meagher, Gummow and Lehane simply argue that substantive fusion produces doctrinal impurity and confusion.[76] The empirical approach describes and classifies various examples of substantive fusion without any consideration of the direction in which judicial decision making is travelling. Lord Denning has referred to the 'new equity'[77] which will engender change and provide a forum in which matters of public policy may be canvassed. However, he does not suggest how the 'new equity' will change the form of our legal doctrines and remedies.

Pathways Toward Fusion

It is acknowledged that the above critique indicates that the doctrinal fusion of law and equity is a complex matter. The purpose of the remaining parts of this article is to consider the issue of substantive fusion with reference to the law of estoppel and notions of equitable damages. It is submitted that an immediate and automatic substantive fusion did not follow the implementation of the Judicature System. However, the administration of law and equity under one judicial roof for over one century has given rise to:

(i) a possible rationalisation of causes of action which exist in law and equity and which have striking similarities; and

(ii) the potential for a flexible use of equitable and legal remedies.

Recent cases in the High Court of Australia,[78] the Court of Appeal in New

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'73 See for example the views of Cooke P in *Aquaculture* above n 6 at 301.

'74 Above n 3 at [254]-[257]; n 32 at 29; n 23, Morton M Horwitz, *The Transformation of American Law* 65.

'75 A well-known case in relation to unconscionability is *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. See also Rossiter CJ and Stone M, 'The Chancellor's New Shoe' (1988) 11 UNSW Law Journal 11.

'76 Above n 3 at [254]-[257].

'77 The Rt Hon Sir Alfred Denning, 'The Need for a New Equity' (1952) 5 Current Legal Problems 1

'78 *Commonwealth of Australia v Verwayen* (1990) 64 ALJR 540

Zealand[79] and the Supreme Court of Canada,[80] point the way towards a partial fusion (at least) of equity and law. These cases will be discussed below.

Common law estoppel and equitable estoppel - the prospect of a single doctrine of estoppel

Even today, there are separate jurisdiction of estoppel in common law and equity. Meagher, Gummow and Lehane have suggested that the rationalisation of the many varieties of estoppel into one single principle is not possible.[81] However, this view has been put into question by two judges of the High Court of Australia.[82] During the nineteenth century, equity evolved a jurisdiction in estoppel known as estoppel by representation which was wider than the jurisdiction exercised in the courts of common law.[83] First, at law, a court could compel a defendant to adhere to a representation of fact made to a plaintiff upon which the plaintiff had relied to his/her detriment.[84] However, the jurisdiction of a court of law did not extend to a mere representation of intention. A plaintiff who had relied on a defendant's representation of future intention, that is, a defendant's representation that he/she would act in a particular way in the future, had recourse to the courts of equity. The plaintiff did not have a right of redress before a court of law.[85] Secondly, estoppel at law was not a cause of action in itself.[86] Rather, if a defendant was held to the assumed state of affairs and such a state of affairs gave rise to a cause of action, a plaintiff was entitled to commence that cause of action against the defendant. However, equitable estoppel operated as a cause of action. If a plaintiff successfully established equitable estoppel he/she was entitled to redress for any loss occasioned by the defendant's failure to adhere to the representation upon which the plaintiff had relied to his/her detriment.[87]

By the end of the nineteenth century, the scope of equitable estoppel was

79 Above n 6.

80 Above n 49.

81 Above n 3, [1725]-[1726].

82 Above n 78, (per Mason CJ and Deane J).

83 Two important examples of common law estoppel are estoppel by judgment and estoppel *in pais*. See for example Dixon J in *Thompson v Palmer* (1933) 49 CLR 507; above n 28 at [402].

84 In *Grundt v Great Boulder Gold Mines Pty Ltd* (1937-1938) 59 CLR 641 Dixon J commented (at 674-5) that :

> 'The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by another party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations.'

85 See for example, *Hammersley v de Biel* (1845) 12 Clark & Finelly 45; 8 ER 1312; *Loffus v Maw* (1862) 3 Giff 592; 66 ER 544; *Burrowes v Locke* (1805) 10 Ves 470; 32 ER 927.

86 See, for example *Seton v Lafone* (1887) 19 QBD 68; *Low v Bouverie* [1891] 3 Ch 82; *In re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618; *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563; *Spiro v Lintern* [1973] 1 WLR 1002; [1973] 3 All ER 319.

87 See for example, the early case of *Burrowes v Locke* (1805) 10 Ves 470; 32 ER 927.

severely limited in two mayor ways.[88] Firstly, its operation was limited to representations of fact. In *Jorden v Money*[89] the House of Lords held that a representation of future intention was only enforceable when it was accompanied by consideration. The effect of the decision in *Jorden v Money* was that a defendant would not be compelled to adhere to a representation of future intention which was not accompanied by the common law relationship of contract. In so doing the House of Lords removed a significant type of case from equity's jurisdiction, namely, the situation where a defendant convincingly represented to a plaintiff the course of his/her future actions upon which the plaintiff relied. Secondly, the decision in *Low v Bouverie,*[90] extended the famous common law decision of *Derry v Peek*[91] to equitable jurisdiction as well. In *Derry v Peek* damages were available for fraudulent representations. There was no relief for innocent or negligent representations.[92] It should be noted that the Judicature System was not the catalyst for decline of equitable estoppel, although it did later hasten the demise of equitable estoppel. Increasingly throughout the nineteenth century, equity jurisprudence had fallen victim to the nineteenth century preoccupation with laissez-faire individualism, legal positivism and the bargain theory of contract.[93] The administration of equity had become a judicial exercise in the systemisation of rules.[94] The initial decline of equitable estoppel was attributable to the decision in *Jorden v Money*,[95] a case which was decided well before the advent of the Judicature System.[96]

However, equitable estoppel declined, it did not die. Equitable estoppel still applied to representations of fact. In addition, there remained three discrete areas where equitable relief was available to found causes of action, namely, representations in the context of pre-existing contractual relationships,[97] representations in relation to legal rights in land,[98] and representations made in the context of imperfect gifts.[99] It is not proposed to discuss this jurisdiction in any detail. Rather, what is important to note, is that the jurisdiction to grant a remedy to a plaintiff where a defendant had

88 For a lengthy discussion of equitable estoppel in the nineteenth Century see Finn PD, 'Equitable Estoppel' above n 36 at 62-71.

89 (1854) 5 HLC 184; [1843-50] All ER Rep 350; In *Maddison v Alderson* (1883) 8 App Cas 467, the Court of Appeal left no doubt that the principles in *Jorden v Money* applied to equitable jurisdiction as well.

90 [1891] 3 Ch 82.

91 (1889) 14 App Cas 337.

92 See above n 36 at 65.

93 See above n 72.

94 *Haywood v Cope* (1858) 25 Beav 140 at 151; 53 ER 589 at 594 (per Romilly MR).

95 Above n 89.

96 Above n 36 at 64-5.

97 *Jackson v Cator* (1800) 5 Ves Jun 68; 31 ER 806; *Hughes v Metropolitan Railway* (1877) 2 App Cas 439; 1874-80 All ER 187; *Birmingham & District Land Co v London & North Western Railway Co* (1888) 40 Ch D 268.

98 *Ramsden v Dyson* (1866) LR 1 HL 129; *Falcke v Scottish Imperial Insurance Co* (1886) 36 Ch D 243.

99 *Dillwyn v Llewellyn* (1862) 4 De GF & J 517; 45 ER 1285.

failed to adhere to the representation made in these separate and discrete contexts was settled well before the Judicature System came into operation. The existence of these specific applications of equitable estoppel did not severely challenge the prevailing orthodoxy described by Greig and Davis as '[t]he sanctity of promises through the medium of bargain'.[100] For example, the capacity of a court to compel a defendant to adhere to a representation made in the context of contractual relations, upheld the theory of bargain (albeit a revised one) because of the pre-existence of contract.

The recent history of estoppel in law and equity (particularly in the last ten years), presents a contrasting picture. First, the operation of equitable estoppel in relation to interests in land and imperfect gifts gave rise to a revised estoppel, known as proprietary estoppel.[101]

Secondly, in the *High Trees* case, Lord Denning considered the capacity of equity to compel a defendant to adhere to representations of intention made in the context of a pre-existing relationship.[102] Lord Denning's views were a source of some controversy.[103] He cast doubt on the correctness of *Jorden v Money*. In doing so, he considered that a court could compel a defendant to adhere to his/her representation of *future* intention within the context of a pre-existing legal relationship.[104] Lord Denning made his decision in *High Trees* on the basis of 'a natural result of the fusion of law and equity'.[105] But the full effect of the fusion of law and equity in the area of estoppel was not elaborated. Nevertheless, Lord Denning presaged the ascendancy of equitable estoppel over the narrowly drawn common law estoppel; and, the potential for substantive fusion of law and equity in this area.

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100 Above n 70, Greig and Davis, *The Law of Contract* at 24.

101 Above n 62 at [1810]; See, for example, *Crabb v Arun District Council* [1976] Ch 179; *Morris v Morris* [1982] 1 NSWLR 61; *Riches v Hogben* [1986] 1 Qd R 315.

102 *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 at 134-5.

103 Above n 3 at [1705]-[1708]; The statement of principle has been criticized by Meagher, Gummow and Lehane - see above n 3 at [1709]-[1710]. In contrast, Donovan W M Waters, an eminent Canadian academic has commented favourably on Lord Denning's contribution to the law of estoppel and equity in general - see 'Where is Equity going? Remedying Unconscionable Conduct' (1988) 18 *WALRev* 3 at 4. The major issue was the breadth of the doctrine. In *Legione v Hately* (1982-1983) 152 CLR 406, Mason and Deane JJ held (at 437) that a party is estopped from reverting to his/her earlier position where the other party would otherwise suffer material disadvantage. This view has prevailed in subsequent cases. The contrary view, which has not been followed in Australia was that it would be sufficient to show that a party had conducted his/her affairs on the basis of the representation: see *Brikom Investments Ltd v Carr* [1979] 2 All ER 753 at 758-9. Nevertheless, *High Trees* has been followed by the Privy Council in *Ajayi v Briscoe* [1964] 3 All ER 556 and in a number of cases in Australia including: *Wilson v Kingsgate Mining* [1973] 2 NSWLR 713; *Re Continental Resources Ltd* (1976) 10 ACTR 19; *Je Maintiendrai Ltd v Quaglia* (1980) 26 SASR 101. In New Zealand *High Trees* was followed in *IRC v Morris* [1958] NZLR 1126 and *McCathie v McCathie* [1971] NZLR 58.

104 Above n 102 at 134. Lord Denning relied on *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 to support his position.

105 Ibid.

Thirdly, it should be noted in passing that the famous torts case, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ('*Hedley Byrne*'),[106] reversed the trend set in motion by cases such as *Derry v Peek*. *Hedley Byrne* opened the way for a party to be liable for negligent misstatement in certain circumstances.[107]

Fourthly, the landmark decision of the High Court of Australia, *Waltons Stores (Interstate) Ltd v Maher* ('*Waltons Stores*'),[108] led the way towards a re-vitalisation of equitable estoppel. A majority of the High Court[109] decided that:

(i) equitable estoppel was available to compel a defendant to adhere to a representation of future intention;[110] and

(ii) equitable estoppel was available to compel a defendant to adhere to a representation made by him/her although the representation was given in a pre-contractual or non contractual context.[111]

The High Court recognised that the doctrine of consideration has always been a pivotal factor in our legal system.[112] Without consideration there could be no bargain and so no legal obligation. Nevertheless, the Court was unable to ignore the fact that in certain circumstances, it was simply unconscionable for a defendant to change his/her mind and depart from the original representation.[113] The underlying rationale for the renewal of equitable estoppel was clear - the principle of unconscionability:[114]

> Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.[115]

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106 [1964] AC 465.

107 See below n 141 at 173-4.

108 Above n 65.

109 Mason CJ, Wilson and Brennan JJ.

110 Above n 65 at 519-526 (per Mason CJ and Wilson J), 534-543 (per Brennan J).

111 Ibid.

112 Above n 65 at 521-522 (per Mason CJ and Wilson J), 537-9 (per Brennan J), 547-559 (per Deane J) and 566 (per Gaudron J).

113 Ibid at 521-3 where Mason CJ and Wilson J pointed out that in the case before them Waltons Stores:

> '...was under an obligation to communicate with the respondents within a reasonable time after receiving the executed counterpart and certainly when it learnt...that the demolition was proceeding'.

114 See above n 3 at (xi) where Meagher, Gummow and Lehane have described (somewhat derisively) the principle of unconscionability as 'incoherent' and the new '*grundnorm*' of equity.

115 Above n 65 at 524 (per Mason CJ and Wilson J). Brennan J expressed similar views (at 538):

> 'The unconscionable conduct which is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation, or otherwise to avoid the detriment which that failure would occasion'.

Significantly, there was no discussion of the potential dominance of equitable principles in the law of estoppel. Yet the judgments of the majority of the High Court decisively liberated equity from the impediments set in train during the nineteenth century, particularly the decision in *Jorden v Money*.[116] At the same time, the doctrine of consideration and the notion of bargain were not sacrificed. Before equitable estoppel would operate in favour of a plaintiff, he/she would have to satisfy some important criteria.[117]

It is interesting in this context to consider briefly the judgment of Deane J because his Honour considered the issue of substantive fusion.[118] He pointed out that prior to the implementation of the Judicature System 'the unity at common law and in equity of the doctrine of estoppel by conduct has been consistently assumed'.[119] The Judicature System did not change the situation. Indeed, the advent of the Judicature System encouraged the development of a unified legal system.[120] Accordingly there was no doctrinal or historical reason why equitable and common law estoppel should not, as one fused principle, apply to representations of future intention as well as to representations of fact.[121] His Honour re-iterated and clarified his views in *The Commonwealth of Australia v Verwayen ('Verwayen')*.[122]

In *Waltons Stores* equitable estoppel had developed a renewed independent existence. However, only Deane J broached the issue of substantive fusion. In *Verwayen* the High Court considered the nature of the remedy available in an action for equitable estoppel. This time Mason CJ developed a theory of integrated estoppel.

Commonwealth v Verwayen

In this case Verwayen and others commenced proceedings against the

116 Above n 89.

117 Their Honours found a balance between the formal common law doctrine of consideration on the one hand, and the more fluid (and sometimes elusive) equitable estoppel on the other. Before equitable estoppel would operate, the promisee would need to adduce evidence that: (a) in making the promise, the promisee had created the assumption in the mind of the promisee that the promisor would perform the promise; (b) the promisee had relied on the original promise; (c) the promisor knew or ought to have known that the promisee was relying on the representation to his/her detriment; and (d) any departure from that promise on the part of the promisor would cause the promisee detriment. See above n 65, 525 (per Mason CJ and Wilson J), 542 (per Brennan J) and 567 (per Gaudron J).

118 In direct contrast to the judgments of the Mason CJ, Wilson J and Brennan J, Deane J decided (at 546-547) that the facts of the case disclosed that the Mahers had believed, notwithstanding the absence of a physical exchange of contract, that there was a binding contract between them and Waltons. Therefore, His Honour held that there was a representation of fact involved, and not a representation of future intention. Accordingly, he based his analysis on common law estoppel.

119 Ibid at 556.

120 Ibid.

121 Ibid 557.

122 Above n 78.

Commonwealth Government for injuries sustained as a result of the collision of HMAS Voyager and HMAS Melbourne. It was alleged that the injuries had been cause by the negligence of officers and crew on both vessels. Verwayen had commenced action against the Commonwealth outside the period specified under the relevant legislation.[123] Initially, the Commonwealth did not plead that the limitation period had expired. However, when proceedings were well under way, the Commonwealth sought leave to raise this defence. A majority of the Full Court of the Supreme Court of Victoria[124] held that the Commonwealth was estopped from resiling from its earlier position.[125] The Commonwealth appealed to the High Court. In the context of the relationship of equity and law the judgments of Mason CJ and Deane J were significant. Both judgments reflected the view that former doctrinal rigidity should not deter a rationalisation of our law.

Deane J reiterated his position expressed in *Waltons Stores* that common law estoppel and equitable estoppel were (and are) fundamentally unified:

> ...promissory estoppel is but one aspect of a general doctrine of estoppel by conduct which should, under a modern *Judicature Act* system with merged availability of remedies, be seen as operating indifferently in both law and equity.[126]

This general doctrine of estoppel was derived from the common law. Although such a form of estoppel may apply to representations of future intention,[127] it is limited. It does not give rise to an independent cause of action.[128]

Mason CJ approached the inter-relationship of common law and equity from an entirely different perspective. Having acknowledged the different paths which equitable estoppel and estoppel at common law originally took,[129] Mason CJ posited a rationalisation of 'the complex array of rules spanning various categories'.[130] First, he dismissed a long held view that the designation of common law estoppel as a rule of evidence, rather than a cause of action, presented a barrier to a single doctrine.[131]

Secondly, he drew a fundamental distinction between the function of common law estoppel and equitable estoppel. Common law estoppel was

123 *Limitation of Actions Act* 1958 (Vic).
124 *Verwayen v Commonwealth of Australia* [1988] Aust Torts R 68 at 224.
125 Per Kaye and Marks JJ (at 68, 235); King J dissented (at 68, 243-5),
126 Above n 78 at 555. In *Lorimer v State Bank of NSW* (unrep) NSW CA 5 July, 1991, Kirby P expressed his support for the formulation of Dean J.
127 Ibid at 560.
128 Ibid; see, for example, above n 3, paras [1713]-[1714].
129 Ibid at 545.
130 Ibid.
131 Ibid.

concerned simply with holding a promisor to a representation upon which a promisee has relied to his/her detriment.[132] Therefore, in a successful action based on common law estoppel, a promisor was required to honour the representations which he/she had made. On the other hand, when adjudicating the application of the principles of equitable estoppel, a court provided the minimum relief necessary to do justice in the situation. Equitable estoppel was (and is) a cause of action which relieved the effect of detrimental reliance. Consequently, the remedy granted by a court should bear a direct relationship to the detriment suffered by a plaintiff.[133] In relation to the case itself, he held that an order for costs (for the various interlocutory proceedings which had taken place) would adequately compensate Verwayen for the detriment he had suffered on account of the representations made by the Commonwealth.[134]

Thirdly, Mason CJ suggested that the characteristics of equitable estoppel[135] formed the basis for an unified doctrine of estoppel.[136] The approach was (and is) quite a radical one. Clearly, it was premised on the view that the division between common law and equitable estoppel should (and can) be abolished.[137] Mason CJ stated:

> There is no longer any purpose to be served in recognising an evidentiary form of estoppel operating in the same circumstances as the emergent rules of substantive estoppel. The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs) which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption...[138]

In *Waltons Stores* His Honour endorsed the existence of an estoppel doctrine which operated in the context of a non-contractual relationship.[139] In *Verwayen* (where again a non-contractual relationship existed) he limited the remedy for equitable estoppel (and any fused system of estoppel) to the

132 Ibid at 545-6; cf Deane J in the same case who refers (at 555) to the 'merged availability of remedies.'

133 Ibid at 547-8.

134 Ibid at 548; see also the judgment of Brennan J who (at 553) referred to the 'relevant detriment.'

135 Ibid at 547-8.

136 Ibid at 546.

137 Meagher, Gummow and Lehane naturally consider the views of Mason CJ with some scepticism - see above n 3 paras [1725]-[1726].

138 Ibid at 546.

139 Above n 65, 519-526.

minimum equity required to do justice. In doing so he made a subtle, but significant, choice. The net effect of the remedy for common law estoppel was holding the promisor to the representations made; or, to put it another way, holding a promisor to the terms of a representation (subject to the requirements for common law estoppel) in a similar way as if the representation had constituted a contract. However, the effect of a remedy set to relieve detrimental reliance is quite different. A cause of action which:

(i) is based on a non-contractual relationship; and

(ii) provides a plaintiff with a remedy based on the detriment he/she has suffered,

is more akin to a tortious action rather than an action in contract.[140] This distinction becomes critical in the light of the proposed fused system based on equitable principles. Certainly, it can be accommodated into Fleming's definition of tort:

> In very general terms, a tort is an injury other than a breach of contract, which the law will redress with damages...Tort liability... exists primarily to compensate the victim by compelling the wrongdoer to pay for the damage done.[141]

In addition, it is submitted that such a cause of action is analogous to the tort of negligence because the requirement of actual detriment outweighs any suggestion of wrongdoing.[142] Deane J has stated (admittedly *obiter*) that there is a relationship between estoppel and negligence.[143] In the case of equitable estoppel (and the form of fused estoppel enunciated by Mason CJ), two parties are in a relationship of close proximity. The defendant sets up a situation by virtue of his/her representation. The plaintiff justifiably relies on the representation. The defendant party knows or ought to have known - in other words he/she ought to have reasonably foreseen - the activity of the plaintiff who was relying on the representation. The defendant knows or ought to have known that in doing so the plaintiff is acting to his/her detriment - in other words, the defendant ought to have reasonably foreseen the potentially injurious situation. The defendant does nothing to avert the detriment or injury. In terms of remedies, the function of an action in tort is to compensate the victim for the damage done - to provide a party with a form of reparation for the injury suffered.[144] In the case of equitable

140 The idea that equitable doctrine could give rise to tort like actions is not new. In the United States Donald B. King mooted the idea of the tort of unconscionability in 'The Tort of Unconscionability: A New Tort for New Times' 23 (1979) *Saint Louis University Law Journal*, 97.

141 Fleming JG, *The Law of Torts* 8th ed (1992) The Law Book Company Limited, 1.

142 Ibid at 101-4.

143 Above n 65, 561; cf supra fn 49, at 154-6 where the McLachlin J of the Supreme Court of Canada expressed a contrary view.

144 Above n 141 at 3-4.

estoppel, the court seeks to relieve the plaintiff of the effects of detrimental reliance. In doing so, the court attempts to compensate the plaintiff in such a way that he/she is in the same position as if he/she had not relied on the representations of the defendant. Prior to the decision in *Verwayen*, Professor Finn demonstrated that equitable estoppel was an example of a non-fiduciary neighbourhood relationship in which an equitable duty of good faith may arise.[145] The proposals of Mason CJ re-affirm the neighbourhood relationship. In addition, a plaintiff would have the opportunity to argue an action analogous to tort action and obtain relief relevant to the detriment suffered. Such relief may constitute holding a party to the representation, if doing so adequately relieves detriment. However, this may not be the case. For example, in *Verwayen*, monetary relief proved adequate.

The recent developments in equitable estoppel raise the possibility of substantive fusion and the formation of an 'equitable tort', namely:

(i) a 'fused' cause of action derived from equitable jurisprudence for which,

(ii) the courts provide a wide range of remedies so as to ensure that the plaintiff is compensated adequately for the loss he/she has suffered.

However, this is not the only area of equity jurisprudence where such issues have come to light. The capacity of equity to award damages - a fundamental element in traditional torts law - has received broader judicial endorsement.

The notion of equitable damages for equitable wrongs

Traditionally, the capacity of equity to award damages for breaches of equitable obligations (as distinct from specific forms of monetary relief such as account of profits and abatement) was virtually non-existent.[146] In *Ex parte Adamson*,[147] James and Baggallay LJJ stated:

> The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had

145 Finn PD, 'Equity and Contract' in Finn PD (ed) *Essays on Contract* (1987) The Law Book Co Ltd at 108-9.

146 However, note that ICF Spry in the *Principles of Equitable Remedies* (4th edn, The Law Book Company Ltd, 1990), suggests (at 608) that:

> The better view is that courts of equity have always had it within their power to award damages but that from a very early time they considered it ordinarily undesirable to do so, partly because their main concern was to enforce performance in specie of legal and equitable obligations and partly because in many instances damages could be obtained in the courts of law...

147 (1878) 8 Ch D 807.

been cheated.[148]

The situation was not ostensibly changed when *Lord Cairns Act*[149] was passed. The legislation permitted damages in certain circumstances[150] in addition to or in substitution for an injunction or specific performance. *Lord Cairns Act* was designed to deal with the situation where:

(i) a legal wrong had been committed;

(ii) specific performance and /or injunctive relief had been sought; and

(iii) the court considered that neither remedy was available nor suitable; or in addition to these remedies, damages were necessary.

Until recently, it was unclear whether damages were substitutable under *Lord Cairns Act* where an equitable wrong was in issue, and specific performance and /or an injunction had been pleaded unsuccessfully. In *Wentworth v Woollahra Municipal Council (Wentworth')*[151] the High Court of Australia held (admittedly *obiter*) that *Lord Cairns Act* extended to equitable wrongs as well. Thus the gate was opened to allow damages for equitable wrongs in the limited circumstances envisaged by the Act.[152]

Recently, damages have been awarded for breach of an equitable duty where the damages:

(i) were not traditional monetary relief such as account of profits; and

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148 Ibid at 819.

149 21 &22 Vict c 27; formerly s 32 *Equity Act* 1880 (NSW) and s 9 *Equity Act* 1901 - now s 68 *Supreme Court Act*, 1970 which states:

> 'Where the Court has power -
>
> (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act; or
>
> (b) to order the specific performance of any covenant, contract or agreement, the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance'.

It is interesting to note that the original English legislation came into operation prior to the *Judicature Acts*.

150 See above n 3, paras [2306]-[2312].

151 (1982) 149 CLR 672; (1982) 42 ALR 69.

152 In High Court stated (per Gibbs CJ, Mason, Murphy and Brennan JJ (at 676; 72):

> 'The main object of the Act was to enable the Court of Chancery to do `complete justice' between parties by awarding damages in those cases in which it had formerly refused equitable relief in respect of a legal right and left the plaintiff to sue for damages at common law. An incidental object of the Act was to enable the court to award damages in lieu of an injunction or specific performance, even in the case of a purely equitable claim.'

This view has been criticised by Meagher, Gummow and Lehane above n 3 at para [2321].

(ii) were awarded in situations other than contemplated under *Lord Cairns Act*.

Here, three issues are discernible.

First, there are some cases where the court has *substituted* damages for traditional equitable relief.[153] In *Dusik v Newton*[154] the British Columbia Court of Appeal found that the relevant dealing was an unconscionable bargain derived by virtue of unequal bargaining power and oppression.[155] The Court decided that damages (rather than rescission) were the appropriate remedy:

> An award of damages in a case where rescission is unavailable also accords with general principles of unjust enrichment...it is unjust that the board ought to benefit from an unconscionable bargain, and the court should provide a remedy...The effect of rescission is to restore the plaintiff 'to the position he would have been in had the contract not been made' (*Snell's Principles of Equity* 28th ed. (1982), at p 606). An award of damages in lieu of rescission must achieve the same result.[156]

Thus, the Court considered that rescission was the primary remedy for unconscionable dealings. However, consistent with the policy behind *Lord Cairns Act*, the Court was willing to substitute damages where an equitable remedy was impractical. Furthermore, the Court pointed out that the calculation of the quantum of damages should reflect the equitable nature of the primary relief. In this sense, the damages awarded in *Dusik v Newton* were equitable damages. As McLelland J stated in *United States Surgical Corporation v Hospital Products International Pty Ltd*:

> This remedy differs from an account of profits in that the loss to the plaintiff rather than the gain to the defendant is the measure of relief. The principles of assessment of equitable compensation do not necessarily coincide with those

153 See for example, the statement of Rogers J *in Catt v Marac Australia Ltd* (1986) 9 NSWLR 639 at 659. For damages for breach of fiduciary duty *see Coleman v Myers* [1977] 2 NZLR 255 where Cooke J (as he then was) held that there had been undue influence and a breach of fiduciary duty. However, Cooke J considered (at 359-362) that to simply order rescission of the contract would have provided the plaintiffs with an unnecessary windfall. Therefore he awarded damages instead. It is worth noting that Cooke J cited the famous case of *Nocton v Lord Ashburton* [1914] AC 932 as authority that damages were available for breach of fiduciary duty, although it has been pointed out that the proposition is by no means clear on the facts of that case - see for example, above n 3 paras [2302] and [2304] and Rider BAK, *Insider Trading* (1983), Jordan and Son Ltd, Bristol at 82; For other cases dealing with breach of fiduciary duty see *Markwell Bros Pty Ltd v CPN Diesels Queensland Pty Ltd* (1983) 2 Qd R 508; *Fraser Edmiston Pty Ltd v AGT (QLD) Pty Ltd* (1988) 2 Qd R 1. For damages for undue influence see *Treadwell v Martin* (1976) 67 DLR (3d) 493.

154 (1985) 62 BCLR 1.

155 Ibid at 46.

156 Ibid at 48.

applicable to common law damages.[157]

Secondly, the New Zealand Court of Appeal in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd (Aquaculture)*[158] has taken the trend exemplified in *Dusik v Newton* further. In *Aquaculture*, the Court considered the appropriate remedy for breach of confidence. Cooke P (with whom Richardson, Bisson and Hardie Boys JJ concurred) held:

> Whether the obligation of confidence in a case of the present kind should be classified as purely an equitable one is debatable, but we do not think that the question matters for any purpose material to this appeal. For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the parties, the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.[159]

It is clear that this statement of general principle represents a radical departure from traditional views.[160] The historical origins of breach of confidence no longer matter, particularly for the purposes of ascertaining a remedy. Surely then in New Zealand, the substantive fusion of law and equity in relation to breach of confidence has been achieved. Indeed, the result is doctrinally identical to the judgment of Mason CJ in *Verwayen*, namely, a fused cause of action with a wide variety of remedies including damages to rectify the breach by a defendant.

Another consequence of the statement is that the traditional equitable remedies for equitable causes of action no longer constitute *primary* remedies for breach of an equitable cause of action. Rather, the traditional equitable remedy is one of many *alternative* remedies open to the court; or to put it another way, damages are a primary remedy as well. Therefore, whilst substitutional damages such as in *Dusik v Newton* are calculated to give effect to the original equitable remedy, arguably, damages as a primary remedy are not so calculated. Again, in the context of breach of confidence, the relationship between the parties is a close one. A duty is imposed by law. Damages calculated by reference to common law principles are a potential remedy. The concept of some kind of equitable tort (as defined above) springs to mind.

In the light of the above, a third issue arises, namely, whether there is a

157 [1982] 2 NSWLR 766 at 816; see Davidson IE, 'The Equitable Remedy of Compensation' 13 [1982] *Melbourne Law Review* 349.

158 Above n 6.

159 Ibid at 301.

160 For criticism of the decision see above n 3, para [259] and Michalik PW, 'The Availability of Compensatory and Exemplary Damages in Equity: A Note on the *Aquaculture* Decision' (1991) 21 *VUWLR* 391.

confluence of equitable damages and common law damages; that is, should there be a single form of damages calculated in accordance with common law principles? There is much controversy surrounding this point. On the one hand, The Hon Mr Justice Gummow has argued that the function of equitable causes of action and traditional remedies were (and are) specific. The interposition of criteria relevant to common law damages was (and is) impossible.[161] On the other hand, a majority of the New Zealand Court of Appeal in *Aquaculture* held that there was:

> no reason in principle why exemplary damages should not be awarded for actionable breach of confidence in a case where a compensatory award would not adequately reflect the gravity of the defendant's conduct.[162]

This is in accord with the view that a wide range of remedies should be available - the remedies having been drawn from common law and equity.

The Canadian Supreme Court has considered this issue in *Canson Enterprises Ltd v Boughton & Company ('Canson')*.[163] The immediate issue for our purposes was whether a court could award damages for breach of fiduciary duty and, if so, how such damages would be calculated. The Supreme Court of Canada were divided on the issue. On the one hand, McLachlin J (with whom Lamer CJ and L'Hereux-Dube J agreed) expressed the concern that adopting common law approaches by way of analogy 'overlooks the unique foundation and goals of equity'.[164] Compensation (or equitable damages) were awarded to restore a party to his/her position before the breach of equitable duty and to enforce the equitable obligation.[165] Stevenson J simply considered that 'to talk of the fusing of law and equity only results in confusing and confounding the law'.[166]

However, in direct contrast, La Forest J (with whom Sopinka, Gonthier and Cory JJ concurred) held that 'equitable principles were not frozen in time'.[167] Whilst there was a paucity of cases illustrating that a party to whom a fiduciary duty was owed could obtain damages (or compensation) for breach,[168] this remedy was available in appropriate circumstances. For example, damages were available where a fiduciary breaches his/her

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161 Above n 31, 75-92; In *Aquaculture* above n 6, Somers J expressed (at 302) a consistent view in relation to breach of confidence:

> 'The exclusion of exemplary damages in this case can be justified...on the ground that equity and penalty are strangers...'

This statement was quoted with approval by Meagher, Gummow and Lehane above n 3 at para [259].

162 Above n 6 at 310-302.

163 Above n 49.

164 Ibid at 154. Meagher Gummow and Lehane above n 3 have cited McLachlin J with approval at para [263].

165 Ibid at 154-5

166 Ibid at 165.

167 Ibid at 147.

168 Ibid at 144.

fiduciary duty, but obtains no profit from the breach.[169] This view suggests that damages were no longer restitutory in nature.[170] Further, in some circumstances a court may consider common law principles when ascertaining the quantum of damages involved. In a lengthy (but crucial) statement of principle La Forest observed:

> I am aware that reservations have been expressed in some quarters about this fusion or, perhaps more accurately, mingling of law and equity...But no case was brought to our attention where it has lead to confusion, and there are many cases... where it has made possible a just and reasonable result. It simply provides a general, but flexible, approach that allows for direct application of the experience and best features of both law and equity, whether the mode of redress (the cause of action or remedy) originates in one system or the other. There might be room for concern if one were indiscriminately attempting to meld the whole of the two systems. Equitable concepts like trusts, equitable estates and consequent equitable remedies must continue to exist apart, if not in isolation, from common law rules. But when one moves to fiduciary relationships and the law regarding misstatements, we have the situation where now the courts of common law, now the courts of equity moved forward to provide remedies where a person failed to meet the trust or confidence reposed in that person. There was throughout considerable overlap. In time the common law outstripped equity and the remedy of compensation became somewhat atrophied. Under these circumstances, why should it not borrow from the experience of the common law? Whether the courts refine the equitable tools such as the remedy of compensation, or follow the common law on its own terms, seems not particularly important where the same policy objective is sought.[171]

In relation to the statement, it is worth noting four matters. First, La Forest J was careful to acknowledge that doctrinal fusion was an ongoing and subtle development. Some areas of law and equity were more capable of a successful doctrinal fusion than others. In this respect, his views accord closely to the empirical approach to doctrinal fusion identified above.

Secondly, the flexibility of the remedy and the necessity for justice outweighed any concern for the historical origins of causes of action and traditionally relevant remedies. A similar approach was evident in the judgment of Mason CJ in *Verwayen* and the decision of the New Zealand Court of Appeal in *Aquaculture*.

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169 This was the situation in *Canson* itself where a solicitor failed to disclose to his client that he was acting for an intermediary purchaser who obtained secret profits. For a full account of the facts of the case see above n 49 at 132-4. The Court decided that the loss suffered by the client was not sufficiently connected or proximate to the breach of fiduciary duty.

170 cf *Dusik v Newton* above n 154 at 48.

171 Ibid at 152-3.

Thirdly, La Forest J referred to the need for rationalisation and integration where causes of action and remedies gives effect to the same policy objectives. This raises the question whether common law and equitable causes of action and remedies still have a separate policy rationale. At least in relationship to estoppel, it seems that Mason CJ did not think so.[172] In relation to the law of breach of confidence, Cooke P discerned a single cause of action underpinned by a single policy objective, namely, protection of parties in a relationship of confidence.[173]

Fourthly, the award of damages for an equitable wrong was originally restitutory. However, La Forest J suggested that there is room for the interposition of criteria relevant to the calculation of common law damages when determining damages for breach of an equitable duty. The question remains as to what extent the introduction of common law criteria would alter the nature of equitable duties, for example, how would the award of exemplary damages for breach of an equitable duty change the topography of our legal landscape? Again, it is submitted that such doctrinal fusion could result in the development of 'equitable torts', namely:

(i) causes of action of equitable origin for which,

(ii) the courts exercise flexibility in the provision of a wide range of remedies including common law damages in order to ensure a just result.

Conclusion

It is submitted that the judgments of Mason CJ,[174] La Forest J[175] and the New Zealand Court of Appeal[176] indicate that the doctrinal fusion of law and equity could occur on four interrelated levels:

(i) Where there is an overlap of legal and equitable causes in action, such as in the law of estoppel and breach of confidence, courts may decide to rationalise them. Courts may shift away from multiple causes of action towards the establishment of a single cause of action generally reflecting the common underlying policy objectives of the earlier causes of action. However, in any rationalisation of causes of action from differing sources, the courts may need to make subtle choices.[177] Discerning the underlying objectives of various causes of action and rationalising them, may prove a complex matter;

172 Above n 78 at 546.
173 Above n 6 at 301.
174 Above n 78 at 546-8.
175 Above n 49 at 152-3.
176 Above n 6.
177 For example, in this article it has been suggested (albeit tentatively) that in *Verwayen*, Mason CJ preferred a model of estoppel akin to tort rather than contract.

(ii) Inter-linked with the rationalisation of causes of action, there would be more flexibility in the granting of remedies. Courts would avail themselves of the whole range of legal and equitable remedies in order to assist a plaintiff. The granting of a particular remedy would be determined by reference to an overall objective. For example, for estoppel the objective is the prevention of 'unconscionability'.[178]

(iii) With respect to the flexibility of remedies, common law damages and equitable damages would be open to rationalisation. Courts could borrow criteria from one and incorporate it in the other.

(iv) As a result of (i), (ii) and (iii) above, traditional equitable causes action would be transformed into 'equitable torts'.

In the light of *Verwayen*, *Aquaculture* and *Canson*, the blanket views enunciated by Meagher, Gummow and Lehane,[179] on the one hand, and Lord Diplock[180] on the other, seem overly simplistic. It is clear that the framers of the Judicature System did not intend the substantive fusion of law and equity. Nevertheless, some eminent judges have increasingly taken it upon themselves to re-evaluate those areas where law and equity interface and suggest a radical shift towards doctrinal fusion. It is submitted that we are at an intermediate stage of development where substantive fusion is still limited and prospective. The cases discussed show a path that may be followed towards substantive fusion. Only time will tell whether Maitland's view that 'lawyers will cease to enquire whether a given rule be a rule of equity or a rule of common law'[181] was prophetic, over-simple or fanciful.

178 Above n 65 at 524.
179 Above n 3 at paras [254]-[263].
180 Above n 57.
181 Above n 17.