
THE ‘FUSION FALLACY’ BETWEEN EQUITY AND COMMON LAW: A CRITICAL ANALYSIS

... [L]egal and equitable features compete on a level playing field, largely commingled and sometimes indistinguishable. The argument about law and equity is over; now we argue about what the rules ought to be on grounds that are substantive, political or jurisprudential.¹

I. Introduction

The contentious debate concerning the fusion of the Common Law and Equity has been a prolonged historical and judicial issue amongst legal scholars. The polarized opinions concerning the extent to which Common Law and Equity can be fused, or whether the fusion is a fallacy, were instigated following the introduction of the *Judicature Act 1873* (UK).² Controversially, fusion-advocates have characterised ‘fusion’ as the awarding of legal remedies for the breach of an equitable right. In contrast, the ‘purist’ view expresses to preserve that the Judicature legislation did intend for such fusion, labelling the notion as a fallacy.³ However, in the recent High Court case of *Harris v Digital Pulse*,⁴ Sir Mason P infamously dissented against the majority, electing to advocate for doctrinal fusion independent of the Judicature legislation. This paper will also argue that although the *Judicature Act 1873* (UK) only authorised administrative fusion,⁵ the nature of the interaction between Common Law and Equitable doctrines will inevitably open paths for an eventual doctrinal fusion independent of statute. In posing this argument, this paper will also critically address three core arguments presented by ‘purist’ fusion-fallacy advocates: (1) that implementing fusion would pre-requisitely involve statutory authorisation (2) that fusion will contradict legal historical foundations and (3) that fusion would result in cases being treated inconsistently.⁶ In critically addressing the above arguments, this paper maintains the approach expressed by Sir Mason P in *Harris v Digital Pulse*⁷ and the remarks of Professor Tilbury.⁸

¹ Douglas Laycock, ‘The Triumph of Equity’ (1993) 56 *Law and Contemporary Problems* 54, 81.

² *Judicature Act 1873* (UK).

³ Justice R P Meagher, Justice J D Heydon and M J Leeming (4th ed), *Meagher Gummow and Lehane’s Equity Doctrines and Remedies* (2002) 12. Note: Professor Ashburner also held that ‘the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters’.

⁴ (2003) 56 NSWLR 298.

⁵ *Judicature Act 1873* (UK) s 24 (1).

⁶ Michael Tilbury, ‘Fallacy or Furphy? Fusion in a Judicature World’ (2003) 26 *University of New South Wales Law Journal* 1.

⁷ (2003) 56 NSWLR 298.

⁸ Michael Tilbury, ‘Principles of Civil Remedies’ (1990), Vol. I, *Butterworths, Sydney*, 11-12.

II. The Judicature Legislation

The issue of ‘remedial fusion’, namely whether a common law remedy should be available for a breach of a purely equitable right, or conversely, whether equitable remedies should be available for common law wrongs⁹ has been the focal issue of the “fusion debate”.¹⁰ Whether the *Judicature Acts of 1873* (UK)¹¹ authorises remedial fusion sparks controversy as it opposes the traditionally held notion that “[e]quity does not destroy the law, nor create it, but assists it.”¹² In spite of this, international case law has authorised Common Law and Equity remedies to be fused, particularly in cases concerning breach of confidence.¹³ For example, in New Zealand, the court of Appeal recognised exemplary damages for breach of confidence in cases where the defendant’s conduct was so contemptible that compensatory damages do not adequately cover the plaintiff’s loss.¹⁴ Similarly in Canada a fusion of the common law and equitable jurisdiction was granted in a breach of confidence case.¹⁵

Nevertheless, it is indisputable that the meaning of the *Judicature Act* had two distinct purposes: (1) to amalgamate the procedures of the old common law and equity jurisdictions by abolishing the common law system of pleading and old tribunals to establish a single tribunal that would administer Law and Equity jurisdictions; and (2) to establish the power of equity over the common law in the event of a conflict or variance between the two jurisdictions.¹⁶ Effectively, the jurisdiction simply transferred the old jurisdictions of the Courts of Law and Equity to the new tribunal, providing instructions to the new tribunal as to how the combined jurisdictions were to be administered.¹⁷ Hence, the Judicature Act was not in itself designed to be a source of change of substantive rules. Furthermore, it may be argued that the wording of s25(11) presumes that there is a distinct difference between the jurisdictions of Common Law and Equity. It has also been highlighted that “there was nothing in the *Judicature Act* which attempted to codify law and equity in one subject matter or which severed the roots of the conceptual distinctions between law and equity.”¹⁸ The Act did not describe an alternative or new body of law neither in law or equity, and did

⁹ G W Dal Pont & D R Chalmers note that this point is arguably not limited to remedies, as there is case law recognising that the equitable defences of laches and acquiescence may be pleaded to a common law claim for breach of copyright: *Habib Bank Ltd (Aust) Pty Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265; *Hoover plc v George Hulme (Stockport) Ltd* [1982] FSR 565; *Autocaps (Aust) Pty Ltd v Pro-Kit Pty Ltd* (1999) AIPC 91-516 at 39,971 (FCA).

¹⁰ G W Dal Pont & D R Chalmers (4th Ed), *Equity and Trusts in Australia* (2007) 8.

¹¹ *Judicature Act 1873* (UK).

¹² *Lord Dudley and Ward v Lady Dudley* (1705) Pr Ch 241 per Sir Nathan Wright LJ in at 244.

¹³ *A-G v Wellington Newspaper Ltd* [1988] 1 NZLR 129, per Sir Cooke P at 172.

¹⁴ *Aquaculture Corporation V NZ Green Mussel C Ltd* [1990] 3 NZLR 299 at 301-302

¹⁵ *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577 at 602-605 per Binnie J (SCC).

¹⁶ *Judicature Act 1873* (UK) s25(11)

¹⁷ Leonard J Emmerglick, ‘A Century of the New Equity’ (1945) 23 Texas L Rev 244.

¹⁸ Justice R P Meagher, Justice J D Heydon and M J Leeming (3rd ed), *Meagher Gummow and Lehane’s Equity Doctrines and Remedies* (2002) 45.

not provide grounds of establishing a new court with a separate jurisdictions to the old courts.¹⁹ Hence when approached with the two questions posed by Justice Meagher; “what does it mean to say that a substantive ‘fusion’ occurred, and, what sections of the legislation had that result?”²⁰, upon analysing the Judicature legislation, a fusionist would have difficulties supporting a claim for substantive fusion. Thus to contend that the *Judicature Act* imposed a fusion of Equity and Common Law doctrines would be invalid. The ‘fusion fallacy’ exists to the extent that the *Judicature Act* itself does not permit the fusion of Equity and Common Law jurisdiction, but was purposed merely for procedural and administrative matters.

Despite the nature and purpose of the *Judicature Act*, arguments in support of the fusion of Equity and the Common Law are not fully abolished. Three crucial issues that stand in opposition are: the changing social realities that stem beyond historical preservation; the fact that statutory authorisation is not a pre-requisite to adopting fusion and the fact that fusion would still maintain consistency in cases that are alike or factually different. Hence Professor Tilbury maintains that “[f]usion can, and does, take place independently of the Acts.”²¹ Furthermore, the continual administration of the Law and Equity in a single court, and the fact that the two are co-existing in a harmonious relationship,²² suggest that such an interaction would inevitably result in a fusion of the two jurisdictions.

III. The Preservation of Equity’s Historical Roots

The common law and equity divide has often be described as an exercise of historical labelling – the two jurisdictions are creatures of history. However, it has also been argued that too much weight has been placed upon the justification for historical practice, resulting in a narrowing and limitation of the two jurisdictions.²³ Purists have maintained that the ‘fusion’ of the law and equity never occurred, and was never intended to occur, holding that the principle that equity trumped the law had been established since the early seventeenth century.²⁴ Hence at its root, the argument against fusion is historical thus condemning large and small-scale fusion as equally heretical.²⁵ Under this presumption it would be unacceptable for a fusion of equity and law to occur as it would function to sever Equity’s historical foundation. To date, Australian authority has supported this approach.²⁶ In *Harris v Digital Pulse*²⁷ the awarding of exemplary damages for breach of an equitable fiduciary duty was reversed on appeal on the grounds that it is never permissible to

¹⁹ Justice R P Meagher, Justice J D Heydon and M J Leeming, above n 18, 45.

²⁰ *G R Mailman & Assoc. Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 23 NSWLR 80 at 99, per Meagher JA.

²¹ Michael Tilbury, above n 8, 11-12.

²² A W B Simpson, ‘The Survival of the Common Law System; Then and Now’ (1974) *Sweet & Maxwell, London*, 65.

²³ G W Dal Pont & D R Chalmers above n 10, 6.

²⁴ A W B Simpson, above n 22.

²⁵ David A Hughes, ‘A Classification of Fusion after *Harris v Digital Pulse*’ (2006) 29 *University of New South Wales Law Journal* 6.

²⁶ *Felton v Mulligan* (1971) 124 CLR 367 (Windeyer J).

²⁷ (2003) 56 NSWLR 298.

award a common law remedy for an equitable wrong. In his judgment, Heydon JA emphasized that such “...a radical change, having no justification in traditional thinking, properly understood”.²⁸ Similarly, in his judgment Spigelman CJ also stated that developing a remedy similar to punitive damages “indicate that the development of the law in a case of this kind if inappropriate”²⁹ emphasizing that the necessity to ‘acknowledge and respect the collective wisdom of our predecessors’. However, Mason P in his dissenting judgment highlighted that “[d]istinctions with nothing but history to support them have, at times, been deliberately ironed out or conveniently overlooked as doctrines passed from generation to generation.” Hence although it is important to recognize and value historical underpinnings, it is also important to acknowledge that history “cannot dictate answers to present legal problems.”³⁰

Upon this basis, his Honour supported Professor Tilbury’s remarks that it is beneficial for the historical importance of the rules of law to be of decreasing concern as rules required adaptation to changing social contexts.³¹ In the case of *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*³² the New Zealand Court of Appeal did not tolerate the uncertain historical jurisprudence of the action for breach of confidence prevent its finding an appropriate remedy.³³ The historical distinctions of the law and equity divide were also discussed in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* where the New Zealand Court of Appeal approved an award of exemplary damages for breach of fiduciary duty. Sir Robin Cooke held this on the basis that:³⁴

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 partners 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.

The case exemplified the possibility of awarding the common law remedy of compensatory damages for breach of an equitable duty. Hence, the desirability of remedial fusion is highlighted as the historical distinctions of the law and equity divide and the hierarchical approach to remedies is overlooked. Despite this development in law, Heydon JA maintained a purist view arguing that;³⁵

What is contemplated is that the unified court administering the two systems may select a remedy historically granted by the courts of common law in relation to a wrong recognised only in the courts

²⁸ *Harris v Digital Pulse* (2003) 56 NSWLR 298, 413.

²⁹ *Harris v Digital Pulse* (2003) 56 NSWLR 298, 307.

³⁰ James Edelman and Simone Degeling, ‘Fusion: The Interaction of Common Law and Equity’ (2004) 25 *Australian Bar Review* 196, 11-12.

³¹ *Harris v Digital Pulse* (2003) 56 NSWLR 298, 154.

³² [1990] 3 NZLR 299.

³³ Julie Maxton, ‘Some Effect of the Intermingling of Common Law and Equity’ (1993), 5 *Canterbury Law Review*, 310.

³⁴ *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 per Sir Robin Cooke at 310.

³⁵ *Harris v Digital Pulse* (2003) 56 NSWLR 298, 444.

of equity. But whatever one calls the process, it must be recognised as a process involving a deliberate judicially-engineered change in the law...

The case of *Pilmer v The Duke Groups Ltd (in liq)*³⁶ demonstrates the narrow approach the court practices at the cost of fair remedies to be provided in a tortious breach of fiduciary duty claim of contributory negligence. This narrow approach as seen in many other cases³⁷ is influenced by an incessant need to preserve historical lineages at law. In his judgment, Kirby J stated that unifying Common Law concepts of contributory negligence with equitable remedies severs historical foundations dividing the two doctrines and creates further impediments for judges.³⁸ Yet the facts demonstrate that the appellant in this case was at contributory fault during the dealings with defendant, and it appears the judge's preoccupation on the calculation of common law at the expense of fairly compensating the appellant's loss under equity may be an unsatisfactory response to Equity's supposed notions of justice.³⁹ Such a wide array of unsatisfactory response may be argued to be a result of the stringent historical concepts held by judges, as Lord Nicholls stated;⁴⁰

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

Though it is evident that the historical divide between common law and equity is influential amongst courts and judicial members, the law must not be stagnant, but rather constantly evolving.⁴¹ Hence the development of concepts of fusion may operate to ensure 'accidents of history' in the remedial field are not repeated and that fairness is met.

IV. The Courts' Power to Administer Fusion

In *Harris v Digital Pulse*⁴² Heydon JA and Sir Mason P both suggest a fusion of the doctrines of Equity and Common Law may still occur by way of independent statute. Both judges in this case agreed on the crucial point that legislation, either in the *Judicature Act* or non-Judicature legislation, actually operate to proscribe doctrinal fusion. However their approaches differ after this point in that Justice Heydon states the award of

³⁶ [2001] HCA 31.

³⁷ *United Scientists Holdings Ltd v Burnley Borough Council* [1978] AC 904; *Walsh v Lonsdale* (1882) 21 Ch D 9

³⁸ [2001] HCA 31.

³⁹ Andrew Lynch, 'Equitable Compensation for Breach of Fiduciary Duty: Causation and Contribution – The High Court Dodges a Fusion Fallacy in *Pilmer*' (2001) 21 *Australian Bar Review* 190.

⁴⁰ *Attorney-General v Blake* [2001] 1 AC 268.

⁴¹ David Hughes, above n 25, 6.

⁴² (2003) 56 NSWLR 298.

exemplary damages in support of an equitable obligation can only be successful given there is legislation specifically authorising this;⁴³

...[T]he conclusion that the common law remedy of exemplary damages is available for equitable wrongs is to fall into a crude fusion fallacy. The conclusion arrived at could only be justified if there was some particular provision in the legislation effecting the administration of the two systems in a single court compelling it.

The argument held by purists against the fusion of law and equity raises can be contended on two basis: (1) it may imply that the courts have no ‘jurisdiction’ to determine such issues or (2) that the courts do not hold statutory authority to impose such issues of determination.⁴⁴ In regards to the first line of argument, Sir Mason P pointed out in his dissenting judgment in *Harris v Digital Pulse*⁴⁵ that courts have in fact been granted this power since 1823⁴⁶ and thus dismisses this argument as a ‘false issue’.⁴⁷

In regards to the second argument, purists advocate the prevention of creating ‘bad’ law which may be deemed to be inapplicable, emphasizing the important of basing judgments on existing case law.⁴⁸

However, Tilbury argued against the idea that the *Judicature Act* or any other legislation prohibits the fusion of law, labelling this approach as non-sequitur;⁴⁹ “unless one assumes without discussion that the ‘fusion fallacy’ must be taken as gospel truth, there is no *a priori* reason why equity could not, by analogy, adopt the legal remedy of exemplary damage.” Furthermore, even the strongest purist advocates recognise that the ‘strict and complete legalism’⁵⁰ approach was never intended to preclude the law from evolving to meet new needs through modification or restriction of existing principle.⁵¹ After all, Common Law retains a deeply ingrained heritage in fusion principles existing beyond the pre-conquest kingdoms of England.⁵² The concept that “law borrowed from equity and equity generally followed the law”⁵³ has long existed for centuries at law, and prior to the Judicature legislation. The fact that fusion has been inherently ingrained in the foundation of Common Law and Equity is historically evident in the administration of law during the period when the equity jurisdiction was governed by the Lord Chancellor and the common law jurisdiction by the common law judges. In short, as Tilbury describes, the common law is inherently an expert in fusion.⁵⁴ Thus the

⁴³ *Harris v Digital Pulse* (2003) 56 NSWLR 298, 402-3.

⁴⁴ Michael Tilbury, above n 6, 20.

⁴⁵ *Harris v Digital Pulse* (2003) 56 NSWLR 298, 321.

⁴⁶ David Hughes, above n 25.

⁴⁷ *Harris v Digital Pulse* (2003) 56 NSWLR 298 at 321.

⁴⁸ James Edelman and Simone Degeling, above n 30.

⁴⁹ Michael Tilbury above n 6, 11.

⁵⁰ Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (1965) 158-9.

⁵¹ Michael Tilbury, above n 6, 12.

⁵² Michael Tilbury, above n 6, 4.

⁵³ Michael Tilbury, above n 6, 13.

⁵⁴ *Ibid.*

undermining of the courts' power to operate substantive fusion by purists lack grounding against this background. Once again the crux issue between these divergent perspectives may be that there is a narrowly stringent focus on historical principles, rather than acknowledging that the very nature of the Common Law itself is derived through fusion.

V. Fusion's importation of 'Foreign Concepts'

The most substantial arguments held by purists against the fusion of Common Law and Equity is that 'foreign' concepts such as the maxim that 'equity and penalty are strangers'⁵⁵ will be imported amongst unlike cases.⁵⁶ However Burrows argues that fusion is required in areas where equity and common law do not co-exist coherently, namely, monetary remedies for civil wrongs.⁵⁷ Burrows holds that a remedial responses are necessary where both law and equity allow compensation, stating that wrongs exist both in law and equity.⁵⁸ This approach of direct fusion plainly contradicts the 'fusion fallacy' argument and is an extreme approach to fusion as it ignored historical doctrinal foundations altogether. As such, contrary to common assumptions, fusion-advocates also support the significance of like cases being treated alike. In *Harris v Digital Pulse*⁵⁹ Mason P maintained that the purpose of fusion is not to detach reasoning and outcomes of cases from the rationale supporting the cause of action.

Despite the flaws in both arguments, debate in the area creates awareness of the dangers of altering a remedy too readily as it provides room for potentially fusing not only remedies but those rights underscoring the remedies.⁶⁰ Nevertheless, from the arguments presented above and in considering the changing nature of law, Ashburner's fluvial metaphor of the two jurisdictions running side by side and not 'mingling' may be too restrictive an approach in our modern times.⁶¹

VI. Conclusion

Whilst the *Judicature Act 1873* (UK)⁶² did not authorise substantive fusion, it is apparent that a fusion of doctrines may still occur independently of statute. Furthermore, Australia's incessant pre-occupation with history and the fear that fusion will import 'foreign concepts' into unlike cases have been critically addressed, evoking that these anti-fusionist arguments often lack substance. As Professor Tilbury stated, "both in principle and in policy, it is desirable that the jurisdictional origins of rules of law become less and less

⁵⁵ Hughes, above n 25, 12.

⁵⁶ Tilbury, above n 6, 13.

⁵⁷ Andrew Burrows, 'We do this at Common Law but that in Equity' (2002) 22 Oxford Journal of Legal Studies, 5-6.

⁵⁸ Burrows, above n 57, 8-9

⁵⁹ (2003) 56 NSWLR 298.

⁶⁰ G W Dal Pont & D R Chalmers, above n 10, 9.

⁶¹ Burrows, above n 57.

⁶² *Judicature Act 1873* (UK).

important as those rules are adapted to changing social realities by courts in fused jurisdictions.”⁶³ Hence it may be argued that the jurisdictions of equity and law are indeed intertwining. Thus perhaps in the direction the law is approaching, the affluence of questions pertaining “what” can be done with the rules rather than “where” they came from are questions the law should be examining more carefully. As it has been said, the only matters not surviving the convergence of the waters are barriers which are inevitably becoming flotsam in the faster moving stream.⁶⁴

⁶³ Tilbury, above n 8.

⁶⁴ Maxton, above n 33, 13.

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