The availability of compensatory and exemplary damages in equity: A note on the Aquaculture *decision*

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In this article, the author questions the basis upon which the Court of Appeal decided in Aquaculture Corp *v* NZ Green Mussel Co Ltd *that both compensatory and exemplary damages were available in suits in equity. The author argues that a bald assertion of the fusion of law and equity as a basis for compensatory and exempl[ary damages in equity is misleading. A better view is to see both as inherent powers of the courts of equity.*

I INTRODUCTION

A The Nature of Equity

The Equitable Jurisdiction arose originally from the power of the King to allow to his subjects, in individual cases, relief from the laws, where justice, acting on the royal conscience, so required.[1] This relief was a matter of the Royal Prerogative. No subject could claim equitable relief as of right.

Gradually the power of the King to hear petitioners and grant relief came to be delegated to the Lord Chancellor, as keeper of the King's conscience, and exercised through the Court of Chancery. The Court of Chancery was not a court of law, but a court of conscience. Its "function was to use the King's prerogative to interfere with the administration of the law, in the interests of justice, where conscience rendered such interference necessary."[2] The principle that permitted granting relief from the laws had been known since ancient times as Equity. The system of rules administered by the Court of Chancery ameliorating the sometimes harsh operation of the common law also became known as equity. Equitable remedies were not such as to ensure compensation was available to a plaintiff who had been wronged. Rather they were the remedy required to preserve the health of the soul of both the defendant and the plaintiff.[3] Equity arises from the King's conscience. It operates upon the subject's conscience. An equitable remedy was a decree from the court, directed to the defendant personally, to take the action the court considered necessary to ensure his or her conscience was clear. It was relevant only to the case in question.

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1 Strahan J A *A Digest of Equity* (5ed, Butterworth & Co, London, 1928) 4.

2 Above n 1, 5. For a modern expression of the nature of equity as firmly based on conscience see *Powell* v *Thompson* [1991] 1 NZLR 597, 610 per Thomas J.

3 Above n 1, 413.

Later, the Court of Chancery began to take notice of the principles underlying those cases where relief had been given in the past. From about 1673 on, the Court of Chancery gradually became bound by its own precedent. By 1928 Strahan was able to declare: "The last new precedent openly made by the Chancellor was in 1848 (*Tulk* v *Moxhay* 2 Phil 774)."[4]

It is undeniable that today courts of equity are bound by precedent. What is less clear is whether such courts may continue to develop new equitable rules in cases where no clear precedent exists. Strahan's work shows that the English Courts of Chancery did not do so, at least for 80 years after 1848. However, recent dicta from the New Zealand Court of Appeal observe that equity "has not petrified and has lived up to the spirit of its maxims."[5] In the case *Aquaculture Corporation* v *NZ Green Mussel Co Ltd*[6] the Court of Appeal accepted arguments described in the High Court as "disposing of any suggestion that Equity is an organism now long past the age of childbearing."[7] The Court of Appeal, in the absence of direct authority, decided that both compensatory and exemplary damages are available in cases on a purely equitable cause of action.

B The Question of Damages in Equity

The question whether awards of money are available in equity purely as compensation for harm done is controversial. In his authoritative work on damages McGregor begs the question entirely. By defining "damages" as money available for success in an action at law for tort or breach of contract, he excludes the need to consider in depth the equitable remedy of compensation.[8] Admitting his definition is too narrow, he excuses himself by asserting the cases it fails to cover (damages for breach of a purely equitable right or for threatened or apprehended tort or breach of contract) "are so very few it would be unwise to spoil the simplicity of the present definition by forcing them into its confines."

Similar definitional ploys are used by the learned authors Meagher, Gummow and Lehane in their book *Equity, Doctrines and Remedies*, where they declare "damages" were never available in equity.[9] However, the equitable focus of their volume necessitates consideration of the further question, "Under what circumstances will compensation be available in equity for harm done?"

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4 Above n 1, 6.

5 *Day* v *Mead* [1987] 2 NZLR 443, 451 (per Cooke P).

6 *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299 (noted by J Beatson J at (1991) 107 LQR 209).

7 *Aquaculture Corp* v *NZ Green Mussel Co Ltd (No 2)* (HC) (1986) 1 NZIPR 667, 672.

8 H McGregor *McGregor on Damages* (15ed, Sweet & Maxwell, London, 1988) para 5.

9 R Meagher, W Gummow & R Lehane *Equity: Doctrines and Remedies* (2ed, Butterworths, Sydney, 1984) para 2304.

As a remedy of money ordered to compensate for harm done, the remedy is indistinguishable from damages, except that it is awarded in equity.[10] Therefore it may be termed "equitable damages". Meagher *et al* clearly see the equitable damages remedy as restricted to circumstances where a breach of trust has caused the loss of trust money or property of which restitution may be ordered. If the property itself is not available to restore, then equitable damages may be ordered.[11]

In contrast to this view, I C F Spry, in his book *Principles of Equitable Remedies* sees the power to make awards of damages in purely equitable claims as inherent in the equitable jurisdiction.[12] The Court has power to make orders necessary to do equity between the parties. M J Tilbury, author of a new textbook on *Principles of Civil Remedies* agrees.[13] Although it is little used, the courts of equity do have a power to award damages. Where Meagher, Gummow and Lehane ask "Why", Tilbury and Spry seem content to ask "Why not?".

Another approach appears in the work of P D Finn. His volume *Fiduciary Obligations* also treats the vexed question of equitable damages. Faced especially with some recent English cases (most notably *Seager* v *Copydex*[14]) which awarded damages for breach of fiduciary duty, Finn suggests the power to make such awards ought to be considered a recent development of equity.[15]

All the authors agree that the Chancery Amendment Act 1858 UK[16] otherwise known as Lord Cairns' Act, gives the courts power to award damages in lieu of or in addition to specific performance or injunction for "wrongful acts". However it is regarded as controversial whether the Act confers power to award such damages in the exclusive jurisdiction of equity, or only in equity's concurrent jurisdiction. Meagher, Gummow and Lehane argue that the words "wrongful acts" in the legislation were meant to encompass only acts wrong at law, and do not include acts wrong only in equity.[17]

Thus they argue that equitable damages are only available where an action would lie for specific performance or injunction for tort or breach of contract. In the exclusive jurisdiction of equity, the question as to whether the court may make an award of damages for the breach of a purely equitable right is by no means settled.

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10 M J Tilbury *Civil Remedies: Vol 1 Principles of Civil Remedies* (Butterworths, Sydney, 1990) para 324.

11 Above n 9, para 2302. (Presumably any equitable damages ordered would be calculated on a restitutionary measure).

12 I C F Spry *Principles of Equitable Remedies* (3ed, The Law Book Co, Sydney, 1984) 587-589.

13 Above n 10, para 3243.

14 [1967] 1 WLR 921 and [1969] 1 WLR 923.

15 P D Finn *Fiduciary Obligations* (The Law Book Company, Sydney, 1977) para 343.

16 21 and 22 Vic c 27.

17 Above n 9, para 2307.

The question of exemplary damages in equity may be even more doubtful. Although most of the English and Australian authors do not address this point, Spry says there is no reason in principle why a court of equity should not award exemplary damages.[18] Dobbs, writing from a US perspective, states that equity has previously disclaimed the power to award exemplary damages.[19] Writing in 1973, Dobbs reported that this trend was reversing. Previously, equity considered its financial remedies did not include damages, and punishment may have been thought foreign to the nature of equity.

It is clear that the availability of either remedy is a subject of some debate. Authors may be found to support either side of each argument, and authorities are few. A judgment that sought to introduce either remedy certainly ought to be carefully considered. The authorities relied on or overruled, and the court's reasoning process ought to be clearly set out. This is true of appellate court judgments generally, and doubly so in any area where there is controversy. The basis in legal theory for the court's adoption and application of the remedy ought to be clearly set out, to maximise the authority and utility of the judgment.

Our understanding of the basis in legal theory underlying a particular remedy can have a profound effect on the shape of that remedy, its current use, and its future development.[20] This paper will examine the *Aquaculture* judgment and the authorities cited there. It will attempt to set out the reasoning the court uses to arrive at its decision, and to identify what the court sees as the legal theoretical basis underlying the two remedies. It will attempt to criticise this apparent basis and will suggest an alternative basis in each case, a basis in harmony with the nature and history of the equitable jurisdiction.

C *The* Aquaculture *Case*

Aquaculture was a US company. It sued The NZ Green Mussel Co Ltd and one MacFarlane for misuse of confidential information, in producing and marketing as a cure for arthritis, products made from the meat of the Green-lipped mussel.

A first interim judgement of Prichard J found the defendants liable to Aquaculture for breach of confidence.[21]

A second interim judgement considered whether the court had jurisdiction to award compensatory damages in the action for breach of confidence, and whether exemplary and/or aggravated damages were available.[22] Prichard J decided that no compensatory

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18 Above n 12, 600.

19 D B Dobbs *Handbook on the Law of Remedies: Damages, Equity, Restitution* (West Publishing Co, St Paul, 1973) 211.

20 To see this one need only glance briefly at the field of restitution, where a review of the basis of certain actions from quasi-contract and waiver of tort to unjust enrichment is currently having an immense effect on legal development.

21 (1985) 5 IPR 353.

22 (1986) 1 NZIPR 667.

award could be made where the plaintiff's claim was founded solely on the breach of an equitable obligation. The judge held that there was no valid authority for making compensatory awards in equity. The Judicature system means that Common Law and equity are administered by the same courts, but this has not brought any substantive changes to doctrines of law or of equity. Lord Cairns' Act,[23] when read correctly, did not empower the making of such awards. Dicta of Cooke J in *Coleman* v *Myers*[24] favouring the availability of compensatory damages in equity seem to have been thought to be of unattractive simplicity. The argument that such awards might be regarded as a modern development of equity was rejected as "not founded on the reasoning of the judgments it seeks to explain."[25]

Applying a less rigourous approach, Prichard J held that exemplary damages could be awarded in a purely equitable claim.[26] Although there was no valid Commonwealth authority making such an award, neither was there any refusing it. His Honour cited dicta of the English Court of Appeal in *Smith* v *Day*[27] adverting to the possibility of such awards.

Prichard J distinguished aggravated from exemplary damages. Aggravated damages are those that are awarded to compensate the plaintiff for injury to his or her feelings caused by the particular manner in which the wrong was committed.[28] Aggravated damages are a subset of compensatory damages. As such they are not available in equity. Exemplary damages, on the other hand, are assessed if the award of compensatory damages, including aggravated damages, is not regarded by the court as sufficient punishment for the wrongdoer. They are purely to punish, and are awarded to "top up" the amount of any award to a level commensurate with the court's view of the defendant's conduct as deserving punishment.

Factors to be taken into account in determining the size of an award of exemplary damages include: that the plaintiff ought to be the victim of the punishable behaviour, so that they do not constitute a complete windfall; that the awards should be made with restraint, so as not to be greater punishment than the criminal law might allow; and the weight of any particular amount as punishment to a person of the defendant's means.[29]

Starting from the position that compensatory damages are not available in equity, but that exemplary (or punitive) damages are; the third hearing determined the quantum of

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23 Chancery Amendment Act 1858 (UK), 21 and 22 Vic c 27.

24 [1977] 2 NZLR 225, 359. "Since the fusion of law and equity any argument to the contrary would be of unattractive technicality".

25 (1986) 1 NZIPR 667, 673.

26 See also J Beatson "Damages for Breach of Confidence" (1991) LQR 209, 211 where another inconsistency in Prichard's J approach is noted.

27 (1882) 2 Ch D 421, 428. His honour's reported reference to Bolt LJ is in fact a reference to the judgment of Brett LJ.

28 This distinction was made by Lord Devlin in *Rookes* v *Barnard* [1964] AC 1129, at 1221. It was adopted as law for New Zealand in *Donselaar* v *Donselaar* [1982] 1 NZLR 97.

29 *Rookes* v *Barnard* [1964] AC 1129, 1227-1228.

the award to be made.[30] Although he had held that compensatory damages were not available in equity, Prichard J recognised that this was a contentious area, and he could be wrong. Accordingly he determined the amount of any compensatory award as $1.5M ("a fair, if conservative estimate").

He briefly considered the question of exemplary damages. Holding that NZ Green Mussel Co ("NZGMC") had acted in ruthless disregard of the plaintiff's interests, and had acted in a manner which they knew to be illegal, but believed to be safe, because Aquaculture could not afford to sue, the Judge awarded the "substantial sum" of $100 000 exemplary damages. He also granted an injunction prohibiting McFarlane or NZGMC from dealing in any way with products made from the freeze-dried meat of the green-lipped mussel, or from making any claims as to such products' theraputic value.

Aquaculture appealed against his Honour's determination that there was no jurisdiction to award compensatory damages in equity.

D The Aquaculture *Appeal*

In the Court of Appeal Prichard J's decision as to compensatory damages was overturned.[31] Cooke P, with whom Hardie Boys, Richardson and Bisson JJ concurred, stated:

> There is now a line of judgments in this Court accepting that monetary compensation (which can be labelled damages) may be awarded for breach of a duty of confidence, or other duty deriving historically from equity.

(Cooke P then referred to five cases from the last fourteen years, referring in particular to passages from his own judgment in all of the cases except one.) His Honour went on to say:[32]

> 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.

Having thus held that compensatory damages were available in the amount of $1.5M, the exemplary damages award of $100,000 was superceded. The exemplary award is an assessment of the punishment required by the defendant's wrong (ie of the blameworthiness of what he or she has done). It is acknowledged that an award of compensatory damages has a punitive effect on a defendant who is required to pay it. Thus, if the harm done and repayable by the defendant in the form of compensatory damages exceeds the amount of punishment the defendant's conduct is assessed as deserving, the plaintiff can hold only the compensatory award. To allow him or her to

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30 *Aquaculture Corp* v *NZ Green Mussel Co Ltd (No 3)* (1986) 1 NZIPR 678.

31 *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299.

32 Above n 31, 301.

hold both awards would be to ignore the punitive effect on the defendant of damages paid primarily as compensation. This being the case, Cooke P stated:[33]

> applying the foregoing approach as to the available range of remedies, we see 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.

Cooke P's comments with respect to exemplary damages were expressed as potentially applying only to cases of breach of confidence. It is submitted, however, that in the light of his declaration that "the foregoing approach as to the available range of remedies" is to be applied, Cooke P cannot have intended his remarks to be of such limited application. The foregoing approach is entirely general. It relates to the availability of compensatory damages in all claims in equity, not merely to breach of confidence. Although he has expressed his conclusions on the exemplary damages question in terms of breach of confidence only, the analysis applies equally well to any claims based in equity.

Somers J delivered his own short judgment. On the question of compensatory damages, he agreed that these were available in equity, and concurred in the result of the majority judgment. (Although he did not expressly concur in the majority reasoning, he offers no alternative reasons of his own.) On the exemplary damages question, however, he refused to decide, noting that the court had heard no argument on the question and there was no authority actually making such awards.

The decision amounts, therefore, to a unanimous decision by a full bench of the Court of Appeal that compensatory damages are available in equity, and by a majority of four to one that exemplary damages are also available in equity. It remains to examine the basis of the decision to identify what exact shape the two remedies will take, and how they may be expected to be used and developed in the future.

II COMPENSATORY DAMAGES

A What is the Basis for Compensatory Damages in Equity?

Cooke P's basis for the finding that "monetary compensation (which can be labelled damages) may be awarded for breach of a duty of confidence or other duty deriving historically from equity"[34] is not explicitly set out in the judgment. His Honour noted briefly that a line of New Zealand cases accept such awards are available. He stated that for all material purposes equity and common law are now mingled or merged. For the breach of the duty of confidence imposed by law a full range of remedies should be available, no matter whether they originated in equity, common law or statute.[35]

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33 Above n 31, 301.
34 Above n 31, 301.
35 Above n 31, 301.

Cooke P seems to be saying that all types of remedy are now available in all claims as the court thinks just, regardless of the legal basis of the claim and of the remedy. This approach would be a radical departure from established practice.

It is necessary to turn to the authorities cited to identify what reasoning lies behind this new approach. Any limits Cooke P sees as restricting the remedy of equitable damages may be identified, and in particular we may see just what the remedy of equitable damages itself amounts to.

B The Authorities Discussed

Cooke P cited page references to five New Zealand cases.[36] Four of these are no more than examples of the Court of Appeal either making an award of compensatory damages in a claim in equity without further analysis, or mentioning the possibility of such awards. These cases are *Coleman* v *Myers*[37], *AB Consolidated Ltd* v *Europe Strength Food Co*[38], *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*[39] and *Attorney-General for the United Kingdom* v *Wellington Newspapers Ltd.*[40] No detailed analysis is given to support the comments referred to in any of these cases. While they may be said to provide authority for the availability of compensatory awards in equity, they do not supply any information as to the basis of such awards.

The single New Zealand authority cited that is both fully explained and clearly supportive of Cooke P's view is *Day* v *Mead.*[41] Cooke P referred to passages from all four judgments delivered in the Court of Appeal. Casey and Hillyer JJ were cited merely for agreeing in a line or two that damages are available in an equitable claim.[42] His Honour the President also cited his own judgment and that of Somers J.[43] These references are much more revealing.

On page 450 of the *Day* v *Mead* report Cooke P referred to a remedy of monetary compensation being available independently of Lord Cairns' Act, for breach of a duty deriving historically from equity. He mentioned Spry's view that the power is one that has always belonged to courts of equity,[44] and Finn's view that such damages are a modern development of the equitable jurisdiction,[45] without preferring either. He mentioned that although breach of confidence is generally regarded as a claim in equity, the English Court of Appeal in *Dowson & Mason Ltd* v *Potter*[46] awarded damages for

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36 Above n 31, 301.
37 [1977] 2 NZLR 225, at 359-362 per Cooke P, and 379 per Casey J.
38 [1978] 2 NZLR 515, 525 per Woodhouse J.
39 [1984] 1 NZLR 354, 361 per Cooke J (speaking for the Court).
40 [1988] 1 NZLR 129, 172 per Cooke P.
41 [1987] 2 NZLR 443.
42 Above n 41, at 467 and 469 respectively.
43 Above n 41, at 450-451, and 460-462 respectively.
44 I C F Spry *Principles of Equitable remedies* (3ed, Law Book Co, Sydney, 1984) 610.
45 P D Finn *Fiduciary Obligations* (The Law Book Co, Sydney, 1977) 167-168.
46 [1986] 2 All ER 418.

it on a basis generally held to be appropriate in tort cases, without once using the words equity or equitable.

According to Cooke P these "developments" are in accord with Lord Diplock's view of the effect of the Judicature Acts in the United Kingdom, expressed in *United Scientific Holdings Ltd* v *Burnley Borough Council*[47] that law and equity are now merged, not merely procedurally but substantively as well.[48]

In fact, although this is the view commonly taken of Lord Diplock's meaning in the passages referred to,[49] J C Corry convincingly argues that Lord Diplock's remarks ought to be treated as severely limited by their context.[50] Corry suggests that, in referring to the fusion of law and equity, Lord Diplock meant to include only those situations where (as in the case before him) a Statute expressly fused competing common law and equitable rules to the equitable one.[51]

Be this as it may, it is clear that Cooke P believes that law and equity are completely fused. From his judgments in *Day* v *Mead* and in *Aquaculture* it is clear that he regards remedies previously available only at law or in equity as now available in every case at the court's discretion. Yet the origin of the jurisdiction to award compensatory damages in equity remains unclear. His Honour did not state whether it is to be regarded as an inherent power of the court, a new development of equity, or a result of the substantive fusion of law and equity allowing cross-over of the common law remedy into equitable claims.

His next paragraph is problematic if he regards the remedy as arising from fusion and crossover. He contrasted damages in equity with those at common law. The measure of damages was found to differ very slightly, most often being "a difference without distinction". More significantly, his Honour pointed out that courts of equity have wider discretion than common law courts, and, in consequence, the order for damages in equity is much more flexible than the order for damages at law. In the result of this case the flexibility was manifested by taking into account the extent to which the plaintiff was the author of his own loss.[52]

Given that Cooke P regards law and equity as substantively fused, how is it that he can also regard equitable damages as a separate remedy from common law damages? He

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47 [1978] AC 904, 924-927.

48 Alternatively one could see these facts as representing errors rather than developments, symptomatic of the confusion in this area rather than of a considered adoption of Lord Diplock's views.

49 See for example M Tilbury, M Noone & B Kercher *Remedies: Commentary and Materials* (Law Book Co, Sydney, 1988) 8.

50 J C Corry *Fusion of Law and Equity in New Zealand* (paper submitted for LLM seminar, Equity and Restitution, Victoria University of Wellington, Sept. 1989) 29-33.

51 Section 41 of the Law of Property Act 1925 UK (equivalent to s 90 of the Judicature Act 1908 NZ) which provides that the equitable rule as to time provisions in contracts being generally not of the essence shall apply to all contracts.

52 Above n 41, 462.

can only regard the two concepts as retaining separate identities to the extent that both existed prior to this fusion, or to the extent that , if the remedy is a product of this fusion, the fusion itself is an incomplete one. Either way, the result of Cooke P's judgment is one that is only possible if law and equity retain some separate nature. At least those remedies that were previously equitable must still have equitable characteristics. They are still discretionary, and still governed by equitable maxims. The remedy that is applied is not just common law damages available in an equitable claim.

In fact the whole concept of the substantive fusion of law and equity seems to be a red herring here. Although his Honour the President expressed his support for it, it is in no way necessary to his judgment. He applied equitable rules to a claim based in equity, and gave a remedy on equitable principles. The fusion he supported seems to have no effects, either on any of the concepts applied, or on the result of the case.

Cooke P's approach in *Day* v *Mead* was to refer to fusion, but his analysis is consistent with a straight application of equitable principles, or even a unified law of obligations approach. This type of approach denies the categorising of legal obligations into separate groups (Tort, Contract, Equity, Restitution etc), with different substantive rules and remedies applicable to each. Instead it asks a series of more fundamental questions: "What is the basic obligation recognised by the law in this circumstance?"; "Has this been breached?"; "What remedy is available to the court that will best satisfy the interests intended to be protected by this obligation?". Identifying the cause of action as a breach of fiduciary duty, Cooke P found this made out on the facts of the case. Next he decided on the appropriate response, being for the court to award compensation in equity. He applied this remedy, including an allowance for the competing equities, and arrived at a result in the case. Mention of fusion complicates rather than clarifies the judgment.

Somers J also believes in substantive fusion.[53] However, he reached the same result in this case without reference to the concept. For Somers J, the power of courts of equity to award monetary compensation is inherent in the jurisdiction of the court to do equity. If there are few precedents awarding sums directly as monetary compensation, it is because the other monetary remedies of the court have almost invariably proven better suited to the circumstances of the cases that arose.[54]

His Honour described equitable damages as unfettered by requirements of foresight and remoteness that attach to damages at law. The fact that equitable damages are available to compensate for the breach of the very strict duty of a trustee to preserve trust property means that a simple *sine qua non* test is to be applied. If the harm would not have ocurred but for the default of the trustee, then it is recoverable, even if the common law might have considered the harm too remote.

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53 See his Honour's judgment in *Elders Pastoral* v *Bank of New Zealand* [1989] 2 NZLR 180, 193.

54 *Day* v *Mead* [1987] 2 NZLR 443, 461.

The remedy is discretionary. It arises where the remedy at law is inadequate, and it is flexible to do justice between the parties, taking into account all equitable considerations, such as laches, estoppel or acquiesence etc.

Somers J's result does not depend in any way upon the fusion of law and equity. His concept of the power to award damages as a longstanding power of courts of equity produced the result that Cooke P also reaches. However Cooke P's references to fusion serve to confuse the grounds for his decision. The result he reached must depend on some continuing separation of law and equity for the damages he awarded to have their equitable characteristics.

This then is the major authority on which the *Aquaculture* judgment relies. It shows the basis for Cooke P's approach to the question of equitable damages was to rely in some unspecified way on notions of the substantive fusion of law and equity. His Honour also referred to two international cases which he says take a broadly similar approach.

In so far as a "broadly similar approach" is to refer to the possibility of equitable compensation as a remedy, this statement is true. However, in the leading judgment in the Canadian case *Lac Minerals* v *International Corona Resources*[55] La Forest J stated:

> it was not argued that the court may not have jurisdiction to award damages as compensation and not merely in lieu of an injunction, and since I am of the opinion that a constructive trust is in any event the appropriate remedy I need not consider the question of jurisdiction any further.

Thus the majority refused even to express a tentative view as to the availability of equitable compensation. A minority of two judges held that the appropriate remedy was equitable compensation, and not a constructive trust. However these two judges emphasised the importance of:[56]

> the jurisdictional basis supporting the particular claim in determining the appropriate remedy.

Even the minority's view is a far cry from Cooke P's approach of relying on ideas of substantive fusion to avoid the need to identify a separate jurisdictional basis. His Honour the President seems to regard separate jurisdictional bases as having been abolished in favour of having all remedies available for breach of any obligation imposed by law.

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55 (1989) 61 DLR (4th) 14, 46-47.

56 Above n 55, 75 per Sopinka J.

In the Australian case *Catt* v *Marac Australia Ltd*,[57] Rogers J in the Supreme Court of New South Wales discussed the remedy of equitable compensation. The remedy was described as:[58]

> A jurisdiction to remedy breaches of fiduciary duty (which) extends to decreeing compensation to the person whose confidence has been abused.

This seems to be a much more limited appreciation of the jurisdiction, as available only in cases involving fiduciary relationships. As such, this approach is not "broadly similar" to Cooke P's approach. Both allow for compensation to be awarded in equity. There the similarity ends. Cooke P's words are potentially misleading. His Honour could be taken to be saying that his fusion-based approach has the full support of two international authorities. An examination of those cases shows, however, that the similarity of approach referred to by Cooke P goes only as far as permitting (or minority acceptance of) some form of equitable damages, and does not include any reference to fusion.

C Criticism of the Judgments

Cooke P's approach was to declare that at least for all purposes now material, "a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute". He presented this position as a result of the substantive fusion of law and equity, yet on consideration, the fusion he relied on must be an incomplete one. Each fused element retains enough separate character to affect the shape of post fusion remedies. Equitable damages as applied are still equitable in character. They are discretionary and flexible and subject to equitable defences. Fusion seems to affect only availability of remedy, not substance of remedy at all.

With the greatest respect, this approach is not beyond criticism. It represents a radical departure from most current theory and from current practice as to the availability of remedies. At the present time different remedies are treated as available in different circumstances as a result of both their historical development, and their basis in law.

History can affect the availability of a remedy by the workings of precedent. Like cases may be researched and cited in cases of a similar cause on similar facts until it seems that a particular remedy is available only in cases in that line. An example of this process is Meagher's *et al* view of damages in the exclusive jurisdiction of equity as an aberration restricted to a line of wrongly decided restrictive covenant cases under Lord Cairns' Act.[59]

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57 (1986) 9 NSWLR 639, 660.

58 Rogers J is quoting Dixon AJ from *McKenzie* v *McDonald* [1927] VLR 134, 146.

59 R Meagher, W Gummow, & R Lehane *Equity: Doctrines and Remedies* (2ed, Butterworths, Sydney, 1984) 140-142. See also *Aquaculture Corp* v *NZ Green Mussel Co (No 2)* (1986) 1 NZIPR 667, 671 per Prichard J.

The basis in law of a particular remedy can affect its availability as it defines the particular task the remedy must perform. The basis in equity of equitable remedies has required that they be discretionary remedies. The courts of equity must have the flexibility required to live up to the spirit of their maxims, for example to deny relief when the plaintiff's hands are not clean.

While it is progressive to discard the limitations on the availability of a remedy arising purely as an accident of history, it is in my view a retrograde step to discard those limitations on a remedy arising from the nature of that remedy itself, from its basis in legal theory.[60]

The approach adopted by Cooke P seems to be a free-for-all. A complete remedial lolly scramble would be the result. This would create undesirable uncertainty in the law. For the very strict duties imposed on Trustees not to misuse trust funds a very strict remedy is appropriate. The wrong is an equitable one. The basic forum of equity is the conscience.[61] The basis of the equitable wrong is the effect on the conscience of the trustee if he or she were to profit in any way from his or her position of trust and honourable responsibility. To cleanse completely the wrongdoing Trustee's conscience all damages caused by his or her default, no matter how remote, must be restored to the cestui que trust.

In the more general and public duties imposed by the tort of negligence, however, the availability of such a strict remedy would be most inappropriate. Negligence requires every person to take reasonable care that his or her actions should do no unreasonable harm to his or her neighbour. Imposing a remedy that requires compensation to be made for all harm, including harm not reasonably foreseeable, would be going too far. Planning of commercial transactions is difficult enough with the uncertain state of negligence liability. It would be fraught with incalculable dangers if a wrong step could render an advisor liable not only to tort damages for not too remote harm done, but to equitable damages for all loss and loss of profits in any way consequential on the occurrence of the wrong.

In any given case how would the court choose which remedy to give for any given wrong? Quite likely some scale of blameworthiness would have to be developed. More blameworthy wrongs in general would probably attract the stricter equitable damages remedy. However, these wrongs, when categorised anew would likely comprise those wrongs consisting of abuse of trust and of positions of power that we now categorise as equitable. It may be that the only effect of such an intermingling of doctrines would be years of uncertainty, followed by the gradual re-emergence of those wrongs we now

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60 Birks also regards the approach that refuses "to allow the mixed jurisdictional history" of a claim to leave the court, "without reason, with an inadequate jurisdictional regime" as "absolutely right." See P Birks "The Remedies for Abuse of Confidential Information" [1990] LMCLQ 460.

61 J A Strahan *A Digest of Equity* (5ed, Butterworth & Co, London, 1928) 413. See also *Powell* v *Thompson* [1991] 1 NZLR 597.

categorise as equitable into a separate category once more.[62] Peter Birks, in a note on the *Aquaculture* and *Lac Minerals* cases, outlined the undesirability of uncertainty in the law of remedies that both these cases could be seen to create.[63] He felt that remedial rigidity as a result of nothing but the history of a particular cause of action is certainly something to be overturned, but argued that the guidance of "objectively ascertainable rules and principles" is essential for all areas of the law.

So, from this decision, it is clear that equitable damages are to be available in New Zealand. A close examination of the judgment of the majority reveals a possible weakness in the use of authority. Most of the New Zealand authorities cited are no more than bare references to the possibility of equitable damages made by Cooke P himself. The international authorities that are referred to may be viewed as unsupportive of the concept, or at least as taking a very different approach.

The underlying basis for the availability of the remedy is thus left uncertain. Probably the Court would prefer the view that such damages are available in purely equitable claims on the basis of an inherent jurisdiction in the Court to do equity. Cooke P may also feel that these damages should be available in other claims as the cases may require, on the basis of his conception of the fusion of law and equity.

D Three Possible Bases

The basis in theory of a legal concept is of great importance. The legal theory behind a remedy can tell us what that remedy is trying to achieve, and how far this may legitimately be taken. The Canadian case, *Degelman* v *Guaranty Trust Co of Canada and Constantineau*[64] is a striking example of how the legal basis of a remedy can affect the result. In the circumstances of the case recovery for services provided on the basis of an unenforceable contract would be unavailable if the *quantum meruit* remedy were based in Quasi-contract (and thus required an implied promise). However the court held the remedy was instead to be regarded as based on the unjust enrichment, and the inability to imply a promise between the parties when there was an express promise made would not defeat the claim.

In many cases it may not be crucial whether a remedy sought has this basis or that basis. However, in many other cases, especially in borderline cases, or cases that present new fact situations for decision, the basis can help to reveal if the facts are such as should give rise to the remedy in question. A clear appreciation of the theory behind a legal remedy can have a strong effect on the way that remedy is to be used in practice.

It can also help to shape future development of the remedy. If a remedy is introduced without a closely reasoned basis, it is very difficult to decide if it is appropriate to apply

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62 See also P V Baker "The Future of Equity" (1977) 93 LQR 529, 537. Baker's point here is that if fusion leads to the end of equity as a separate category, new doctrines will need to arise to ensure justice is done in any particular case.

63 P Birks "Remedies for Abuse of Confidential Information" [1990] LMCLQ 460.

64 [1954] SCR 725, 734-735.

it to new fact situations. Judges may shy away from its use altogether. Alternatively, it may simply be imposed in situations where individual judges find it just and appropriate, leading to the undesirable uncertainty of "palm tree" or "chancellor's foot" justice.

The remedy of equitable damages as set out by Cooke P lacks the necessary clear theoretical basis. At least three alternatives are possible from his judgments in *Day* v *Mead* and *Aquaculture*.

The first is that equitable damages are an inherent power of the courts of equity.[65]

The second is that equitable damages are the result of the substantive fusion of law and equity, which allows all remedies to be available for any claims.[66]

The third is that equitable damages are a modern development of equity.[67]

Each alternative basis produces a remedy with different characteristics. If equitable damages are an inherent power of courts of equity, it follows that they will be available in suits in equity, and in suits at law where the legal remedy is inadequate, at the discretion of the court. It should be noted that this may allow the court a discretion to sidestep the rules of common law damages where these rules cause hardship to the plaintiff or the defendant. In a claim for damages at law, if the common law damages remedy could be described as inadequate, the more flexible equitable jurisdiction can be invoked at the judge's discretion. It is accepted that, equitable remedies being discretionary, equitable damages are also discretionary.[68] They may be shaped to suit the circumstances of the case (as in *Day* v *Mead* they were reduced for contributory fault).[69] They may be ordered to be paid in instalments or against the prospect of future harm occurring.[70]

If equitable damages were a direct result of substantive fusion, then the form of the remedy would be identical to common law damages. The common law remedy would simply be available in an equitable cause of action. Once the cause was made out, the damages would be available as of right, and would be bound by all the rules of damages law such as requirements of foreseeability, remoteness and once-and-for-all.[71] They could not be awarded now for harm to arise in the future. The equitable remedy could not logically differ from the legal one.

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65 *Day* v *Mead* [1987] 2 NZLR 443, 450 at line 52.
66 *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299, 301.
67 Above n 65, 451 line 1, see also above n 58.
68 Above n 65, 451 line 23.
69 Above n 65, 451 line 30, 462 line 20.
70 M Tilbury, M Noone & B Kercher *Remedies: Commentary and Materials* (The Law Book Co Ltd, Sydney, 1988) 293.
71 Above n 70, pp 40, 88 and 100.

If equitable damages are a modern development of equity, then the nature of the remedy is a little less clear. If they are an inherent remedy in equity then equitable damages must partake fully in the nature of the equity of old. However, if they are a modern development, it will not necessarily be possible to discern the characteristics of the remedy except from those modern cases that develop equitable damages and award them. They may be assumed to have the essential characteristics of an equitable remedy, such as being flexible and available at discretion. Indeed they are applied this way in *Day* v *Mead*. However, especially if it be significant that law and equity are fused, the essential characteristics of an equitable remedy may be in doubt.

Somers J in *Day* v *Mead* expressed the view that the correct basis for the remedy of equitable damages is that the power is inherent in the courts' powers to do equity.[72]

Cooke P mentioned the fusion of law and equity, but applied the remedy as a discretionary remedy to which all equitable maxims apply.[73] This is clearly not simply the common law remedy of damages now available in a claim in equity. The second possible basis for equitable damages must be ruled out.

E The Most Appropriate Basis

The most appropriate way to consider the remedy of equitable damages seems to be as a remedy always inherent in the jurisdiction of courts of equity. It cannot be thought that in the old days of petitions to the Chancellor, that worthy gentleman would have stopped short of ever awarding a sum of money directly as compensation. Tothill, a reporter of Chancery cases from 1559 to 1646, lists eleven cases from 1588 to 1640 under the heading "damages".[74] In more modern times, with greater development of the courts, the need to award monetary compensation in equity may have subsided. Common law courts could award damages in almost all cases where they were required. If courts of equity needed a monetary remedy, then the liability to account or constructive trust were very often remedies better suited to the cases that arose. However, certain later cases still sometimes refer to and even exercise the power of the court to make compensatory awards. In *Todd* v *Gee* (1810)[75] Lord Eldon LC supported the view that the courts can make an order of compensation out of the purchase money for lost value to a plaintiff who is praying for specific performance of a contract of sale of land. He expressly refused to declare that such compensation could never amount to damages against the defendant, but must always be strictly limited to compensation for value of the property itself, lost due to delay in completion.

The case of *Phelps* v *Prothero* (1855)[76] took the view that in such cases the court is assessing damages and ought not be limited to awarding compensation for loss of value in the property itself.

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72 [1987] 2 NZLR 443, 461.
73 Above n 72, 451.
74 Tothill 51-52; 21 ER 121.
75 17 Ves Jun 274; 34 ER 106.
76 7 De G M & G 722; 44 ER 280.

A case after the passing of Lord Cairns' Act is *Mold* v *Wheatcroft* (1861).[77] There damages were awarded in Chancery for the defendant's actions in pulling up a railway to which the plaintiff was entitled by Act of Parliament. The railway lay across the defendant's land. The action was for an injunction to prevent the defendant interfering with the plaintiff's lawful activities. No mention was made in the judgment of Lord Cairns' Act (then only three years old) and the necessary requisites to be established under it before the court may award compensation. The Judge simply considered the damages claimed and awarded or denied them as he considered each part of the claim.

The case of *Re Leeds and Hanley Theatres of Varieties Ltd* (1902)[78] concerned the fiduciary duties owed by those who promote companies to those who purchase the shares of the company. It was found that the promoters of the music-hall company had breached their fiduciary duty by making a secret profit on the sale of two theatre properties to the company. Vaughan Williams LJ decided:[79]

> The authorities are not all perfectly conclusive that there is no remedy by way of an account of profits, but I prefer to say that, whether there is such a remedy or not, I am clear that there is a remedy in the shape of damages.

In his decision Stirling LJ stated:[80]

> I think the conclusion is inevitable that the promoters of this company have been guilty of a misfeasance in the nature of a breach of trust.
>
> The only question which then remains is whether it has been shewn that the Theatres Company have been damaged by the misfeasance.

The Judges here clearly saw the primary remedy for breach of fiduciary duty, a purely equitable cause of action, as damages. This case is irreconcilable with the view that the only monetary remedy in equity is the liability to account.[81]

These cases show a willingness in courts of equity to make awards of damages in compensation for wrongdoing of the defendant. The early cases are before Lord Cairns' Act. The later ones do not refer to it. Damages as a remedy cannot be said to be in the exclusive province of the common law. If such awards are relatively few and far between, Somers J suggested in *Day* v *Mead* that this is:[82]

> because there are few reported cases in which the remedies of restitution and account have not been a more satisfactory and available remedy.

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77 30 Law J Rep (NS) (Chancery) 598.
78 [1902] 2 Ch D 809.
79 Above n 78, 825.
80 Above n 78, 833.
81 See H McGregor *McGregor on Damages* (15ed, Sweet and Maxwell, London, 1988) para 5.
82 [1987] 2 NZLR 443, 461.

In spite of being little used, the power to award damages has never been removed from courts of equity. It has at times been disclaimed.[83] Now in a time of rapid development in the areas covered by equity, and in particular the extension of equitable principles into areas previously thought to be the exclusive domain of contract law,[84] the time may be ripe for this power to be reclaimed.

Alongside the ability to rescind a contract, declare a constructive trust, trace the proceeds of property and order the taking of accounts, the power to award a sum of money in compensation for harm caused is a simple and non-disruptive power indeed. So simple a power must be included in the jurisdiction of courts of equity. It would be strange if a court that could follow the proceeds of misapplied trust property into the form of a yacht and from there into any other form could not order a simple payment of money to compensate for the money misapplied.

Even if the forum of equity as the conscience of the defendant is taken into consideration, nothing militates against a court having the power to order a payment. In many cases the conscience of the defendant could not be assuaged unless he or she had paid full compensation for any harm he or she had caused. It would be distinctly out of place, if the court of conscience could not order the less-than-conscientious defendant simply to pay over compensation where conscience requires.

The approach that holds equitable compensation to be an inherent power of courts of equity also gives a flexible remedy with characteristics defined by what we already know of equity, and other remedies available there. The remedy is discretionary. Equitable defences apply. It may be shaped so as to allow for the competing equities in the parties. The nature of the remedy is clear, and is not tangled up with questionable ideas of partial fusion of law and equity, with the corresponding uncertainty as to what remedy results.

The modern cases that give this remedy in New Zealand certainly treat it as having all the characteristics of the established equitable remedies.[85] If this is the case, the fusion arguments are simply a red herring. The remedy cannot be the common law remedy now available in causes "deriving historically from equity". The remedy is equitable in nature. The effect of fusion cannot go beyond allowing remedies and causes to mix, without changing the nature of either. Thus the remedy must be either inherent in the equity of old or a development of a modern equity, left substantially unchanged by fusion.

It is submitted that it is far better to think of the remedy as old and inherent in equity. This avoids the uncertainty associated with considering the remedy a modern development of equity, and avoids altogether the need to consider the problematic concept of fusion.

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83 See for example *King* v *Poggioli* (1923) 32 CLR 222, 246-247.

84 See for example *Elders Pastoral* v *Bank of New Zealand* [1989] 2 NZLR 180.

85 *Day* v *Mead* [1987] 2 NZLR 443, *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299.

III EXEMPLARY DAMAGES

A *The Aquaculture Decision*

The *Aquaculture* decision approved by a majority of 4 to 1 the High Court decision awarding exemplary damages in a claim based purely in equity.[86] Although the question was not argued on appeal, the Court of Appeal would have had the benefit of the full record of the proceedings below. In the High Court, that question was fully argued. Although Somers J refused to decide the question, the majority concur in Cooke's P decision that there is no reason in principle why such damages ought not to be available in claims in equity.

In the final result, however, the Court did not sustain Prichard J's award of $100 000 exemplary damages. As Cooke P stated in his judgment:[87]

> Exemplary damages are awarded only in so far as compensatory damages do not adequately punish the defendant for outrageous conduct.

The punishment deserved by the defendant's conduct was assessed by Prichard J at $100 000 worth. The awarding of $1 500 000 compensatory damages clearly provided more than adequate punishment. The exemplary award was overtaken and concealed by the award of a larger sum as compensation.

The exemplary award itself was not under appeal. There is no question but that, had the award not been swamped in amount by the compensatory award, it would have stood as decided by Prichard J. There is no doubt that *Aquaculture* provides proper authority that in New Zealand law awards of exemplary damages may now be made in claims in equity.

B *The Reasoning of the Court of Appeal*

The majority judgment gives no separate reasoning or authority on the question of the availability of exemplary damages in equity. Cooke P stated that the purpose of such awards is to punish the defendant for outrageous conduct, insofar as compensatory damages awarded do not adequately punish already. He then referred to the case of *Auckland City Council* v *Blundell*,[88] and the cases mentioned there, for the relevant principles. It is "applying the foregoing approach as to the available range of remedies" that shows "no reason in principle why exemplary damages should not be awarded" in cases such as that before the court.[89] The foregoing approach referred to is the comments about fusion of law and equity, and statements to the effect that all remedies

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86 Cooke P, Richardson, Bisson, Hardie Boys JJ in favour, upheld this part of the decision of Prichard J in *Aquaculture Corp* v *NZ Green Mussel Co Ltd (No 3)* at (1986) 1 NZIPR 678, 691. Somers J refused to decide this question.

87 *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299, 301.

88 [1986] 1 NZLR 732.

89 *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299, 301.

should now be available as appropriate for breach of a duty imposed by law, made first in relation to the availability of compensatory damages in equity. Here Cooke P sought to rely on the same reasoning to suggest exemplary damages should be available in equity equally as they are available in law. This immediately begs the question "How available are exemplary damages at law?"

C *Exemplary Damages at Common Law*

The remedy of exemplary damages in New Zealand has moved away from the remedy of exemplary damages in England. This development has occurred partly because the English approach has been criticised as arbitrarily limited, but, perhaps more importantly, also because of the New Zealand Accident Compensation system. The English case of *Rookes* v *Barnard*[90] set strict limits on the availability of the remedy in English law. The remedy of exemplary damages at law was held to be only available in cases of:

a) express authorisation by statute.[91]
b) oppressive, high-handed or arbitrary action by a public official (including a member of the Police Force)
c) continuance in a course of action by a defendant in the belief that any award of damages will be less than the profit he or she will reap from his or her actions ("the efficient wrong")

These limits have been the subject of intense academic debate.[92] They have been rejected in Australia as too arbitrary, and putting undue weight on financial motives.[93] If the rationale of such awards is to punish wrongdoing that would otherwise go unpunished, why is wrongdoing motivated by greed regarded as more reprehensible than that motivated by prejudice, hatred and pure malice? The former is much more likely to be commercial torts such as passing off or journalistic defamation. The latter would more frequently be violent acts such as racially motivated assaults, or sex attacks.

In the area of violent assault our true criminal law is likely to be able to deal with the punishment of the offender. However assaults stopping short of actual violence, perhaps amounting only to harrassment or intimidation, perhaps themselves a lead-up to violence, are notoriously difficult for our criminal processes to deal with. Police often may be unable to do more than warn those who persist in harrassing others, until it is too late. Surely society would not regard such acts as less blameworthy than acts amounting to sharp commercial practice? An effective means of punishing such behaviour, before it blossoms into violence may be found in the civil process, if the wrongdoer may be sued for an amount of money beyond proveable harm caused.

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90 [1964] AC 1129.
91 See for example s 109 Residential Tenancies Act 1986 (NZ).
92 See H McGregor *McGregor on Damages* (15ed, Sweet and Maxwell, London, 1988) para 420.
93 *Australian Consolidated Press* v *Uren* [1969] AC 590.

Such wrongs may call for aggravated damages to be awarded as well.[94] The effects of these assaults and intimidations may well be exacerbated by the manner and motive with which they are done. These damages are appropriate as extra compensation to the plaintiff, not merely as an extra fine to the defendant. The need for exemplary damages only arises if consideration of all harm caused to the plaintiff, including aggravated damages for the especially offensive nature of the wrong, does not lead to the defendant paying enough damages to properly punish the defendant for his or her actions. In general wrongdoing motivated by malice must be at least as blameworthy as wrongdoing motivated by greed.

If it is the defendant's open contempt of the judicial process that offends when we find that he or she has gone ahead with a course of conduct known to be illegal because, on balance, it is efficient, then the appropriate answer lies in extended powers of the court to punish contempt, or an enlarged law of restitution to strip away the profits. It is not open on this basis to declare such commercially "sharp" conduct punishable by exemplary damages. This amounts to a declaration that such conduct is inherently more blameworthy than beating someone to death with a hammer.

For these reasons and for reasons to do with the Accident Compensation system and public policy the New Zealand courts have also rejected the limited English approach of *Rookes* v *Barnard*. In New Zealand the leading cases are *Donselaar* v *Donselaar*,[95] *Taylor* v *Beere*[96] and *Auckland City Council* v *Blundell*.[97] In New Zealand exemplary damages will be available in tort actions where there is something outrageous in the defendant's conduct, and the damages awarded as compensation (if any) are not enough to adequately punish the defendant.[98]

This is a more conceptually pure approach. It focuses on the reasons for exemplary damages, and applies the remedy where the reasons apply, ignoring arbitrary limitations and restrictions.

D Exemplary Damages and Equity

The question whether exemplary damages are available in equity has not been the subject of such intense debate as that generated by the same question as to compensatory damages. Perhaps this is because those authors who believe compensation in equity is controversial, believe *a fortiori* that no exemplary damages are available there. Also, the uncertain status of exemplary awards, even at law in the UK, may mean the question has not been regarded as worth raising there.

Dobbs, writing in the USA in 1973 (where the remedy of exemplary damages has been well accepted) stated that exemplary damages were probably not available in equity,

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94 Above n 90, 1230.
95 [1982] 1 NZLR 97.
96 [1982] 1 NZLR 81.
97 [1986] 1 NZLR 732.
98 Above n 95, 104.

although he felt this trend may have been reversing.[99] Two justifications were given for denial of exemplary damages in equity. First, that the equitable monetary remedy is relief. Secondly, that punishment is foreign to the nature of equity.[100]

As far as the first argument is concerned, it is interesting to note that, in denying that compensatory damages are available in equity, McGregor asserts that the principal equitable monetary remedy is an account of profits.[101] It seems that the two authors would at least agree that equity's monetary remedies are limited, even if they could not agree on exactly what those remedies were limited to.

In the light of the first part of the *Aquaculture* decision, this consideration can no longer be relevant to New Zealand law. Equity here has full power to award equitable damages, as well as to give equitable relief, order an account of profits, give compensation in place of misused trust property that can not be returned and order damages in lieu of specific performance under Lord Cairns' Act.[102] The "discovery" of the remedy of compensatory damages in equity shows that the categories of equitable monetary remedies cannot be regarded as limited and closed.

The argument that punishment is foreign to the nature of equity was mentioned briefly by Somers J in his dissenting judgment, without express approval.[103] To test this argument requires an appreciation of the nature of equity. Equity takes as its forum the conscience. It guards not the rights but the consciences of the parties coming before it. Its remedies were not directed to secure compensation, but to ensure both the plaintiff and the defendant should act in such a manner as to leave their consciences void of offence.[104] When it is realised that the forum of equity is the conscience and its remedies are those that wipe clean the plaintiff's and defendant's consciences, the argument that punishment is foreign to the nature of equity may be seen as misconceived. In certain circumstances the conscience of the defendant may demand that he or she not only return any profit he or she has made from property of the defendant, but also that he or she make good any damage that he or she has done, and submit to an appropriate punishment. Penance may sometimes be the very remedy required to restore "the health of men's souls."[105] In fact old Chancery reports show that, not only did equity sometimes punish defendants with fines, pillory and irons, but that this court of equity operated a substantial criminal jurisdiction covering such acts as forgery, and perjury.[106]

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99 D B Dobbs *Handbook on the Law of Remedies: Damages, Equity, Restitution* (West Publishing Company, St Paul, 1973) 211.

100 Above n 99, 212.

101 See H McGregor *McGregor on Damages* (15ed, Sweet and Maxwell, London, 1988) para 5.

102 Chancery Amendment Act 1858 (UK); 21 and 22 Vic c 27 (in force in New Zealand. See cases cited in *Aquaculture Corp* v *NZ Green Mussel Co Ltd (No 2)* (1986) 1 NZIPR 667, 669.

103 *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299

104 J A Strahan *A Digest of Equity* (5ed, Butterworth & Co, London, 1928) 413.

105 Above n 104, 413.

106 Tothill (especially 103 and 156), 21 ER 105 (especially 137 and 153).

The remedy of exemplary damages has sometimes been criticised as bringing a windfall to the plaintiff who receives it.[107] It may be thought that such windfalls themselves are foreign to the nature of equity as unconscionable gains to the plaintiff. However, restitutionary awards in equity may award to a plaintiff all of a defendant's profit from a wrong done to him or her. In some cases this may be a complete windfall to the plaintiff. *Boardman* v *Phipps*[108] was such a case. There a fiduciary, in benefitting his cestuis que trust had taken a private benefit as well, at no detriment to them. Indeed his taking of this benefit created the opportunity for the trust property to be benefitted, thus actually advantaging the cestuis que trust. Nevertheless, his private benefit was taken in breach of trust, and thus was forfeit. Clearly the mere fact of a windfall to the plaintiff cannot be regarded as a valid objection to a remedy in equity. In many cases retention of the benefit is simply too unconscionable for the windfall to concern the court. Similarly, if a defendant's conduct truly deserves punishment for the good of his or her soul, then the windfall to the plaintiff can be disregarded. Equity does not shrink from punishment, or from allowing a windfall, if the defendant's behaviour merits this in all conscience.

Thus it can be seen that there is no fundamental theoretical objection to allowing awards of exemplary damages in equity. Indeed, if exemplary damages are now available across the board in actions at law, wherever the defendant's conduct has been so outrageous as to call for punishment, it would be most inequitable not to allow them in equity. The accident of the historical basis of the claim ought not to affect the wrongdoer's liability for punishment, if that is what is called for by his or her outrageous behaviour.

Where substantive differences in rights call for different or restricted remedies, the differences between remedies available can and should persist. Where purely historical factors have led to different restrictions on the shape or availability of remedies, the restrictions, in place for no good reason, should be abolished. Exemplary damages, already discretionary, and in many ways like a remedy available at law according to the conscience of the court, should certainly be available in equity.

While there may be no fundamental opposition to such awards in the nature of equity, there is nevertheless little or no authority in their favour, and little academic writing on the question. A case adopting this remedy ought to examine such writings as are available, and the precedent that does exist, and should carefully set out the basis of the remedy, together with any limits on its application. Unfortunately, the *Aquaculture* judgment, as regards exemplary damages, is quite limited.

E Exemplary Damages in Equity - The Aquaculture *Judgment*

The court again singles out no express basis for the decision. The fusion of law and equity looms large as the suggested possibility. Cooke P made his decision "applying

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107 See for example D B Dobbs *Handbook on the Law of Remedies: Damages, Equity, Restitution* (West Publishing Company, St Paul, 1973) 219.

108 [1967] 2 AC 46.

the foregoing approach to the available range of remedies". His approach to compensatory damages thus also applies to exemplary damages. Exactly what then was his Honour's approach to compensatory damages?

The discussion above has shown that at least three approaches are possible. These damages are either a result of the fusion of law and equity, or a modern development of equity, or a power inherent in equity. The shape of the remedy as applied by the Court of Appeal helped to show that fusion as expounded by Cooke P can not logically be the basis of the compensatory remedy. The remedy was more than simply the common law remedy of damages available in claims in equity. As nothing in the nature and history of equity precludes such awards, and some old cases seem to accept them, the preferred approach is to regard compensatory damages as inherent in the jurisdiction of the courts to do equity. This approach avoids uncertainty as to the scope of the modern-day remedy, and as to its equitable nature.

The same analysis does not quite apply to the equitable exemplary damages remedy. Here the shape of the remedy seems to be quite consistent with it simply being the common law remedy available in equity after fusion. If, however, the remedy were available in equity in the days before fusion theory became popular, then the fusion arguments are irrelevant again.

The single authority cited in this regard in the whole reported progress of the case is cited by Prichard J, in the second interim judgment.[109] This judgment concerned the availability of exemplary and compensatory damages in an equitable claim. After referring to a divergence of opinion in the texts, his Honour is reported as stating the possibility of such awards was adverted to by Bolt LJ in the English case of *Smith* v *Day*.[110] (In fact it is to obiter dicta of Brett LJ that his Honour refers.)

That case concerned an undertaking to the court made by the plaintiff in an action for an interim injunction to pay damages as the court should order, if the defendant should suffer damage by the awarding of the injunction. Brett LJ said the court ought to award such damages, if at all, on principles akin to those it would use if there were a direct undertaking between the parties, including giving exemplary damages in the case of fraud or malice. As there was no direct agreement between the parties, the party who suffered the injunction had no legal right to enforce the other's promise of indemnity. As a third party beneficiary of the undertaking to the court, he or she could have only equitable rights to the benefit of the promise. The court here entertained the notion that in an action for breach of an equitable duty to indemnify it may award exemplary damages for the fraud or malice of the promisor.

These statements are obiter dicta. However, they do show a willingness by a nineteenth century English Court of Appeal Judge to impose exemplary damages in an action in equity, should appropriate circumstances arise. This willingness seems to be regarded by Brett LJ as no matter of any controversy. He felt no need to refer to other

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109 *Aquaculture Corp* v *NZ Green Mussel Co Ltd (No 2)* (1986) 1 NZIPR 667, 676.
110 (1882) 2 Ch D 421, 428.

cases to support the proposition that damages may be awarded in equity, and should be awarded as closely as possible according to the fixed rules for damages at law. So much is clear. It needed no explanation or excuse. Exemplary awards were apparently mentioned just for the sake of completeness.

Writing soon after the passing of the Judicature Act 1873, his Honour saw no need to refer to that Act, or to any theories of fusion to justify his remarks. Taken all together, this indicates very strongly that the power to give damages in appropriate cases, including exemplary damages where these are appropriate, is an inherent power of courts of equity. At least it seems to have been considered so by those courts in 1882, a good 34 years after new precedents ceased to be made in Chancery according to Strahan.[111]

So it seems that fusion once again is unnecessary to the result. Exemplary damages may also be seen as an inherent power of courts of equity, an equity which does not scruple to punish outrageous wrongdoing in a manner consistent with conscience. The same standards apply at common law, where the court has a discretion to award exemplary damages to the extent that compensatory damages do not adequately punish the wrongdoer. It is submitted that the adequacy of the punishment is assessed by the judge with reference to the standards of the community as reflected in the conscience of the court. These are the same standards against which the court of equity measures the conscience of the defendant. Thus exemplary damages, both at common law and in equity, form an appropriate and homogeneous remedy, applied at discretion on a similar basis, no matter where the claim originated.

IV CONCLUSION

Both compensatory and exemplary damages are authoritatively declared by the Court of Appeal in *Aquaculture* to be available in suits in equity. The court set out no clear reasoning to justify its decision. It referred somewhat obliquely to the fusion of law and equity and asserted that the remedies are now available.

This article has attempted to show that it is highly desirable for a clear basis in theory to be shown for any legal concept. The limits on, the use of and the development of a remedy are greatly enhanced by a clear appreciation of how it arose, and what it is meant to achieve.

It has also attempted to show that the bald assertion of fusion of law and equity as a basis for the remedies of compensatory and exemplary damages in equity has been unhelpful, and potentially misleading. By far the better view , for an understanding of these remedies and their limits, is to see them both as inherent powers of the courts of equity. Introduction of a concept of fusion has been irrelevant, and is likely to lead to increased uncertainty in the law.

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111 J A Strahan *A Digest of Equity* (5ed, Butterworth & Co, London, 1928) 6.

The use of authority in the Court of Appeal may be questioned. The citation of cases without discussion of the references is at times baffling, and even misleading. When a case extends the law into new areas in a controversial, even radical, way, the authorities should be fully discussed, and the reasoning clearly laid out. *Aquaculture* is a case of potentially far reaching import. Yet it is decided in three sides of A4 paper typed double-spaced. The reported version of the reasoning occupies less than one whole page of the New Zealand Law Reports.[112]

In the final analysis both types of award are fully justifiable in equity as the rediscovery of a jurisdiction inherent in courts of equity by their very nature as courts of conscience.

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112 *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299, 301. Beatson mentions the shortness of the judgment in his case note at (1991) 107 LQR 209, 210. In fact the brief LQR note is longer than the reasoning it discusses.