TOPIC ONE: HISTORY AND RELATIONSHIP BETWEEN LAW AND EQUITY

EQUITY AND JUSTICE

Equity refers to an intangible sense of justice rather than anything tangible or physical. It has both ethical and legal connotations.

There are 5 stages of equity:

1. The introduction of the common law theory of binding precedents and resulting case-law equity;
2. as a legitimate consequence, the crystallization of equity culminating under Lord Eldon;
3. the adoption of equitable actions and equitable defenses in the common law;
4. the conjunction of legal and equitable jurisdiction in the same courts, so general in America; and
5. the abolition of the distinction between law and equity in procedure and the resulting power of courts to administer both or either in the same action

There is a distrust of equity in that it is:
- Uncertain, amorphous concepts
- Strong influence of religious principles in the evolution of equity
- Fear of religious absolutism
- Exploitation of discretion – uncertainty regarding scope of remedy can generate commercial difficulties.
- Fact based analysis – too individualised.

EQUITY AS A BODY OF LAW

Equity now represents a structured body of law: a source of legal obligation rather than a notion of justice. The most common legal understanding of equity today is not as an intangible sense of justice, but rather as a discernable body of law, developed by the early Courts of Chancery and administered by modern Court of Justice. The primary different between common law and equity today lies in the method of implementation.

- Equity follows the law: supplements does not overrule;
- Equity is equality: equity tries to balance out transactions in the form of relief granted;
- Equity assists only those with clean hands - must be ‘equitable’ to seek equity;
- Equity deems that to be done which ought to be done;
- Relief in equity is: discretionary, personal and damages must be inadequate.

EQUITY CORRECTS THE LAW

Equity has a discretionary operation: it operates to meet the demands of individual circumstances and does not abide by generalised, formal doctrine.

In some cases it is necessary to leave the words of the law, and to follow that which reason and justice requires, and to that intent equity is ordained, that is to say, to temper and mitigate the rigour of the law.

Equity operates to correct the law, not to overwhelm it. The jurisdictional foundation of equity is corrective rather than distributive; it prescribes relief against the proscriptive operation of the common law, thus acting as a corrective to the law when the law operates to harshly that it undermines itself. Justice cannot be properly achieved without the ability to move from the general to the particular; equity endows the law with this capacity so that what is legally equitable is synonymous with what is singularly just.

In its function as a corrective jurisdiction, equity interprets the law according to substance rather than form. Consideration is given to the underlying intent of the law rather than its strict form.

Equity is not obliged to follow the letter of the law, where the universality of this ‘letter’ produces injustice; equitable principles follow the reason and spirit so that deficiencies arising from a strictly literal interpretation of the local, written law can be corrected.

STANDARDS OF CONDUCT

Most equitable principles are concerned with prescribing standards of conduct; these standards are based upon the basic precepts of good faith, honesty and generosity. Whether consideration is being given to a behavioural, relational or
proprietary matter, equity imposes broad-based standards, which form the foundation for an examination of the circumstances in issue.

One of the most fundamental themes of equitable intervention is the concept of unconscionability. Unconscionability is a modern derivation of the doctrine of equitable fraud. As outlined by Owen J in *The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9) [2008] WASC 239* at [4845], ‘fraud is abhorrent to the good conscience on which the principles of equity are based.’

The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard. A court exercising equitable jurisdiction must assess the relational fairness between the applicants. Equity applies a behavioural standard based on what it considers would constitute fair conduct for institutions and individuals within such a context. Relief is only granted after a full assessment of the circumstances.

The concept of unconscionability is something more than bare inequality. It must be proven that the circumstances are such that it would be against the conscience of a court of equity to refuse relief. Modern courts have indicated on increasing preference for the language of conscience as it provides a clearer reminder of the ethical origins of equity. Behaviour coming within the ‘unconscionability’ standard may include:

- Abusing a position or relationship of trust or confidence
- Exploiting a recognised vulnerability or weakness
- Unfair insistence on strict legal rights in circumstances where this would be harsh or oppressive; and
- Unfair refusal to perform legal obligations.

The term ‘unconscionable’ is used as a description of various grounds of equitable intervention to refuse enforcement of or to set aside transactions which offend equity and good conscience.

Conduct can, however, only be characterised as unconscionable where a clear injustice is established and the court determines that it would be against the ‘conscience’ of a court of equity to deny relief in the circumstances. Unconscionability must be given meaning within the context in which it is applied.

**Equitable relief is discretionary**

One of the primary identifying characteristics of the equitable jurisdiction lies in its discretionary approach to the determination of relief. At the first and primary level, consideration must be given to whether the particular circumstances warrant the award of any equitable relief, if applicable, is adequate and, if not, whether in the circumstances it would be against the conscience of the court to deny equitable relief. Once it is determined that equitable relief is available, the secondary level of discretion involves an assessment of the type or measure of relief to be granted in the circumstances. In exercising this secondary discretion, a court may consider a wide variety of circumstantial factors including hardship on the defendant, laches or delay, the overall conduct of both parties, the adequacy of the relief sought and the overall consequences of the relief on both parties.

**Equitable maxims**

With the evolution of equity as a body of law, a set of structured maxims that assists in the interpretation of the discretionary jurisdiction have emerged. These maxims represent the accumulated insight and wisdom of the early courts of equity and were often used as a guide in the application of equitable principles.

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<th>Equity assists only those with clean hands</th>
<th>The doctrine of unclean hands is an equitable defence to an equitable claim. Secondly, where it applies the party suing may still assert such rights as are available to law. Thirdly, the defence is distinct from the defence of illegality so where that defence is available it is not necessary to rely on the equitable principle. Fourthly, the conduct relied on must relate directly to the equity relief on. Finally, a party who offends the principle may wash his or her hands of the impropriety. The impropriety or uncleanliness necessary to generate the maxim is generally constituted by some sort of fraud or improper behaviour on the part of the plaintiff. The maxim functions as a defence and therefore focuses on the conduct of the plaintiff seeking the assistance of equity rather than the conduct of the defendant. Further, the conduct which is relevant for this maxim is past rather than prospective conduct of the plaintiff.</th>
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cause of action but it cannot actually overrule or invalidate a legal principle. Equity may prevent a legal right being asserted where the holder has acted unconscionably or the assertion itself would be unconscionable. Apart from these situations, any claim requiring equity to overrule or contradict the law will be rejected. This never overrides or invalidates the common law and always where possible, attempts to follow the common law. If the common law is defective, equity may provide an alternative cause of action. However, equity cannot actually overrule or invalidate an existing legal principle.

**Equity is equality**

Equity will try to act with a balanced and equal perspective. When applying relief, equity attempts as far as possible to grant relief which is proportionate to the loss suffered or the unfairness involved. The maxim is particularly relevant in cases involving more than two parties where a pro rata distribution is generally presumed. This should only be applied when it is not otherwise possible to determine the respective shares or equities.

**Equity looks to intent, rather than form**

Equity will only look at substantial fairness and not consider itself bound by form. When considering the circumstances and law applicable to a particular case, equity will not regard itself as being bound by formality.

**Equity deems that to be done which ought to be done**

Equity will attempt, where fair and possible, to enforce all transactions which were agreed upon. For example, equity may enforce an agreement pursuant to an order for specific performance. Equity ensures that any transaction or arrangement which has been fairly and honestly agreed upon is also properly performed. The true meaning of this maxim is that equity will treat the subject matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties have been executed exactly as they ought to have been, not as the parties might have executed them.

**No relief if damages are adequate**

If damages are adequate relief, equity will not overwhelm the common law by imposing an equitable form of relief. This is a well-entrenched principle. A voluntary promise does not constitute a contractual relationship involving the conferral of binding legal obligations. Hence, equity does not regard a voluntary promise as binding on the conscience of a promisor and will therefore withhold its assistance from a volunteer.

Exclusive jurisdiction → The exclusive jurisdiction applies to all equitable principles and remedies exclusively developed and recognised by the equitable such as trusts and fiduciary relationships. Where a principle is exclusively recognised by equity, it may only be enforced by an equitable remedy; common law relief is inapplicable.

Concurrent jurisdiction → The concurrent jurisdiction will apply to situations where both equity and the common law recognise the unfairness and are prepared to apply relief. The equitable jurisdiction aims to supplement the deficiencies of the common law therefore it can only provide relief concurrently with the common law where it is established that the relief under common law would be inadequate. A classic example of this is the award of specific performance for the enforcement of a contract.

Auxiliary jurisdiction → The auxiliary jurisdiction is an additional, ancillary jurisdiction in equity to provide assistance for the enforcement of legal rights and includes the award of injunctive relief and the law relating to discovery.

**The Judicature System**

S25(11) of the English Judicature Act sets out that, in the event of any conflict or variance between the rules of equity and the rules of the common law regarding the same matter, the rules of equity will prevail. This confers superiority on equitable principles in the event of any conflict or variance between equity and the common law. The possibility of conflict or variance is really only relevant where one principle is directly contrary or inconsistent with another. Where the equitable jurisdiction is functioning effectively as a rectification of common law, a conflict or variance should not emerge. In practice, the conflict provision should be rarely, if ever, used because equity and common law were intended to function consistently.

- The Act introduced a new court which had both a legal and an equitable jurisdiction.
- The Act introduced a single, consistent method of procedure.
- The Act introduced concurrent jurisdiction over law and equity in all divisions.
- The Act set out that equity would prevail over the common law whenever there was a conflict.
- The Act abolished the common injunction and replaced it with a new jurisdiction giving the court the right to grant an injunction in all cases where the court felt it to be ‘just and convenient’.
**FUSION FALLACIES**

The term ‘fusion fallacy’ refers to the fallacy of assuming that the provisions of the Judicature Act effected any substantive alteration to the rules that previously existed under common law and equity. It is clearly illustrated in the following case.

A fusion fallacy is described as an incorrect interpretation of the effects of the Judicature system on the orthodox jurisdictional relationships between common law and equity. A fallacy, which amounts to an erroneous assumption, may be distinguished from a fiction, which is invented or untrue, and a lie which is an untruth that is intended to deceive. In Redgrave v Hurd (1881), Jessel MR held that the differences between common law and equity have now disappeared by operation of the Judicature Act which makes the rules of equity prevail. The Judicature Act does not, by its express words, allow an award of damages for the breach of a purely equitable right and there is nothing in the legislation to justify this conclusion. Where a court has issued such an award it will not necessarily be a product of fusion fallacy. There are a number of ways it may be rationalised:

- The ‘damages’ award may actually constitute an award of equitable compensation and therefore be jurisdictionally acceptable.
- The ‘damages’ award may constitute an award of damages under the Lord Cairns Act legislation and therefore be available to support equitable actions in particular situations. The legislation entitles the equitable jurisdiction to award damages in addition to, or in substitution for, specific performance or injunctive relief. Where such equitable damages are to be issued, it must be clear that they satisfy the primary requirement of being in addition to, or in substitution for, specific performance or injunctive relief.
- The ‘damages’ award may be issued without reference to the Judicature Act but justified on a developing awareness of the need for remedial flexibility. The idea that remedies should be awarded separately to the jurisdictional character of the action is a contemporary one and represents a radical shift in orthodoxy. This process has been described as distasteful because the rights of action and remedies that exist in common law and equity developed with greater reason and purpose than merely to produce a remedial smorgasbord with which a plaintiff could select that which was thought most attractive. Judgements evincing remedial flexibility are not examples of fusion fallacy and are best regarded as the consequence of a broader liberation in remedial perspectives. This remedialism may too radical in approach and heretical to that of fusion fallacy.

Despite the procedural focus of the J.Act – cases have misinterpreted it:

1. **Walsh v Lonsdale**: Written lease – not executed by deed – for seven years. Ineffective at law. Prior to J.Act – court would have issued specific performance by ordering landlord to execute a lease.

Post J. Act – Sir George Jessel said a tenant holding under an agreement to grant a lease of which specific performance would have been decreed, stood in the same position as if it had been decreed:

 ‘...since the J.Act the possession is hld under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court and equity rules prevail in it.’

2. **Redgrave v Hurd**: Sir George Jessell held that common law damages could be awarded for innocent misrepresentation (a purely equitable action) because the difference between law and equity no longer existed since the passing of the J.Act.

3. **Seager v Copydex/Aquaculture Corp v New Zealand Green Mussel**: Damages awarded for breach of confidence (purely equitable action). President Cooke in Aquaculture stated:

 ‘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 or appropriate, no matter whether they originated in common law, equity or statute’ (CB 23)

**LEGITIMATE FUSION DEVELOPMENTS**

The effect of the Judicature Act meant that a person could pursue both legal and equitable remedies in one proceeding, but that the two streams of jurisdiction, ‘though they run in the same channel, run side by side and do not mingle their waters’.

Legitimate fusion developments may occur where the introduction of a merged administration has resulted in greater interaction and association between law and equity producing an inevitable intermingling of ideas. It is not correct to say all fusion is a fallacy because legitimate development within a merged jurisdiction may be inevitable.

Spigelman CJ concluded that legal remedies are not available for a breach of an equitable action and any change to this was a matter for the High Court. His Honour preferred a contractual rather than a tortious analogy for breach of fiduciary duty and an award based upon punishment is inconsistent with the balanced approach of equitable deduction.

Spigelman CJ at 306 noted: ‘The heart of the fusion fallacy… is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other. That is no more true of equity and common law
than it was and is true of tort and contract in the common law context. That is not to say that one body of law does not influence the other. It is only to say that they remain conceptually distinct.’

In Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) where the High Court concluded that ‘there must be a real question as to whether considering the unique foundation and goals of equity, there is any warrant for assimilation, even to a limited extent with the measure of compensatory damages in contract and tort.’

This was also in Giller v Procopets (2008) where the court concluded that the decision in Harris does not stand in the way of an award of aggravated damages (a legal remedy) for breach of confidence because such damages should be classified as compensatory rather than punitive. On the facts this meant that the plaintiff was entitled to damages for the mental distress caused through the publication of confidential images.

Contributory negligence has increased interaction between common law and equity. Whilst high standards are generally expected of fiduciaries and a strong case will be required to relieve a fiduciary of complete responsibility where a breach has occurred, it is possible that the circumstances will be such that a court of equity would deem it fair and appropriate to reduce a compensation award by taking into account the contributory negligence of the principal. Whilst equitable compensation and common law damages had different perspectives, with compensation in equity being aimed at restoration or restitution and common law tortuous damages being directed at compensation for a harm done. Cooke P felt that this was a distinction without a difference given that law and equity are not either mingled or interacting.

Another increased interaction between common law and equity lies in the application of remoteness and foreseeability in the determination of equitable compensation for breach of trust and breach of fiduciary duty. There should be a rule in fiduciary law limiting the recovery of losses stemming from a breach of a fiduciary obligation according to their remoteness from the breach. A majority of the court developed the principle of remoteness for fiduciaries in equity according to the approach adopted by common law tortious principles.