

# Unity in Remedies – Finding the Best Remedy – The Adequacy of Common Law Remedies\*

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*The great barrier faced by the court when awarding the best remedy is the “adequacy of common law remedies” rule. The rule is such that the availability of the equitable remedy is theoretically dependent on the inadequacy of the remedy at law. Importantly it imposes a jurisdictional limitation (or rule). This rule is wrong in theory and not followed in practice. Gradually this rule has morphed into a consideration in the award of remedies. Unfortunately this consideration uses essentially the same wording as the rule, so while textbooks and judges still employ this language, now they are essentially talking about the consideration, not the rule. In its own way and at its own pace, each jurisdiction is searching for the best or most appropriate remedy.*

## I INTRODUCTION – THE ADEQUACY RULE

The great barrier faced by the court when awarding the best remedy is the “adequacy of common law remedies” rule. The rule, as explained by Tilbury, is such that “the availability of the equitable remedy is theoretically dependent on the inadequacy of the remedy at law.”<sup>1</sup>

This rule, which represents the traditional law of remedies, suggests a remedial hierarchy, with common law remedies having priority and equitable remedies being regarded as the exception.<sup>2</sup> Importantly it imposes a *jurisdictional limitation*, depriving courts’ discretion and limiting the number of equitable remedies.<sup>3</sup> The rule is a piece of historical baggage that is both theoretically outdated and factually incorrect in the modern context. But many books and courts still refer to the “adequacy” requirement. Why? This rule has now morphed into a consideration in the award of remedies. Unfortunately this consideration uses essentially the same wording as the rule, so while textbooks and judges still employ this language now they are really talking about the consideration not the rule. Same words, different meanings.

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1 Michael Tilbury, *Civil Remedies* (Butterworths, 1990) vol 1, [1021].

2 The term “remedial hierarchy” has been used by Tilbury, *ibid* [1021]ff.

3 That is, it constituted a rule.

## II THE RESURRECTION OF THE RULE THAT NEVER WAS

Laycock<sup>4</sup> has shown that the adequacy ‘rule’ was never a rule. The eminent scholar and judge William Gummow, after detailing Laycock’s work, stated that Australian law “has avoided the misunderstanding referred to by the learned author, and has been expressed in terms consistent with those advocated by him.”<sup>5</sup> Basically, the rule never was a rule. But it has to be admitted it has become a rule, primarily by repetition.<sup>6</sup> The US Supreme Court seems to have resurrected the rule in *eBay v MercExchange*.<sup>7</sup>

The reason why it only “seems” to have done this is for two reasons. First, this rule had never previously been applied to final (permanent) injunctions, only interlocutory (preliminary) injunctions. Further, the Court failed to recognize it was making this change to the law. This point is all the more relevant because in the paragraph immediately after imposing the rule into a new context, the Court observed “[a]s this Court<sup>8</sup> has long recognized, ‘a major departure from the long tradition of equity practice should not be lightly implied.’”<sup>9</sup> Although this comment was made in the context of attacking the lower courts for reading this implication of removing the rule into the relevant Act, this is a false accusation.

The court had held the rule, which is clearly evident in the four factor test for preliminary injunctions stated by the court as “well-established principles of equity” is not, in the context of seeking a final injunction are not well-established principles of equity. Not only does Laycock attack this decision,<sup>10</sup> with its four factor test, inserting the rule into preliminary injunctions. As Rendleman has noted,

4 Douglas Laycock, *The Death of the Irreparable Injury Rule* (Oxford University Press, 1991).

5 Justice William Gummow, ‘The Injunction in Aid of Legal Rights - An Australian Perspective’ (1993) 56 *Law & Contemporary Problems* 84, 94.

6 How the “rule” became a rule is beyond the scope of this paper. However, the role of the profession in this process should not be overlooked. In his article ‘How Remedies Became a Field: A History’ (2008) 27 *The Review of Litigation* 161, 167-8, Douglas Laycock observed the lack of specialists in the field, apart from academics. Moreover, remedies did not become a serious area of academic study until the last few decades of the twentieth century. In this vacuum it was very easy for a discretionary consideration to become a rule. The profession was also grappling with the tricky relationship between common law and equity (which is where most remedies come from). The rule offered an easy solution to this tricky issue. And the role of the profession in the development of the legal system should never be underestimated. The great legal historian J H Baker in his magnificent work *The Law’s Two Bodies* (Oxford University Press, 1991) discussed the important (but largely unrecognized) source of law: the understanding (be it correct or not) of the law by the profession.

7 547 US 388 (2006).

8 Citing the earlier Supreme Court case of *Weinberger v Romero-Barcelo*, 456 US 305, 320 (1982).

9 *eBay v MercExchange* 547 US 388 (2006), 395.

10 See, eg, Laycock, above n 6, 168; Douglas Laycock, *Modern American Remedies: Cases and Materials*, Concise Fourth Edition (Wolters Kluwer, 2012).

“[r]emedies specialists had never heard of the four-point test.” The learned author goes on to state “the Court appears to vindicate a “traditional” standard for a *final* injunction that never existed, except perhaps for a *preliminary* injunction”.<sup>11</sup> It is clear that the Court has made “a major departure from the long tradition of equity practice”. As the Court said itself, this should not have been done lightly. But is exactly what the Supreme Court had done, with no discussion of this change nor any overt recognition of this departure.

The second, and most important, reason why it only “seems” the Supreme Court imposed the old rule, is it didn’t impose a rule at all. It imposed only a discretionary consideration. As the concurring judgment of Justice Kennedy, with whom Justice Stevens, Justice Souter, and Justice Breyer joined, held, “[t]he Court is correct, in my view, to hold that courts should apply the well-established, four-factor test—without resort to categorical rules—in deciding whether to grant injunctive relief in patent cases.”<sup>12</sup> So the four factor test does not contain “categorical rules”: essentially the “rule” is not a rule. So what is it? It seems it is merely a discretionary consideration. It is instructive that Chief Justice Roberts, with whom Justice Scalia and Justice Ginsburg joined, devoted most of their judgment to discussing discretion. The word “discretion” is employed repeatedly in the entire judgment. If the “rule” was a rule which had to be obeyed, such a discussion would be otiose.

But one thing is clear from the judgment in *eBay v MercExchange*: the continuing power of the rule.

### III THE VERY LIMITED PRESENT USE OF THE RULE

The most important applications of the rule are to specific performance and injunctions. Regarding specific performance, a categories approach has been traditionally adopted but determining the inadequacy of damages using this categorization approach is undesirable. As Windeyer J has stated, “[t]here is no reason today for limiting by particular categories, rather than by *general principle*, the cases in which orders for specific performance will be made.”<sup>13</sup> According to the Privy Council in *Wertheim v Chicoutimi Pulp Company*,<sup>14</sup> the “ruling principle” with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman*:<sup>15</sup>

11 Doug Rendleman, ‘The Trial Judge’s Equitable Discretion Following *eBay v MercExchange*’ (2007) 27 *The Review of Litigation* 63, 76, nn 71; see also Doug Rendleman, *Complex Litigation: Injunctions, Structural Remedies, and Contempt* (Foundation Press, 2010) 86–8.

12 *eBay v MercExchange* 547 US 388 (2006), 395–96.

13 *Coulls v Bagot’s Executor & Trustee Co* (1967) 119 CLR 460, 503 (emphasis added). See also *Zhu v Treasurer of NSW* (2004) 218 CLR 530, 575 [129], attacking both the categories approach and Holmes J’s “efficient breach” theory, an attack the High Court of Australia returned to in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 285 [13].

14 [1911] AC 301, 307.

15 (1848) 154 ER 363, 365.

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

Oliver J was correct to say in *Radford v De Froberville*<sup>16</sup> that the words “the same situation, with respect to damages, as if the contract had been performed” do not mean “as good a *financial* position as if the contract had been performed” (emphasis added). In some circumstances putting the innocent party into “the same situation ... as if the contract had been performed” will coincide with placing the party into the same financial situation. But sometimes it won’t.

There is little case law on the role of inadequacy of common law remedies in the granting or refusal of an injunction. Justice Gummow suggests a major reason for this is that the adequacy requirement was never a rule relevant to injunctions.<sup>17</sup> In *Irving v Emu & Prospect Gravel & Road Metal Co Pty Ltd*,<sup>18</sup> Street CJ stated that the equitable remedy by injunction can only be used to restrain actionable wrongs when justice cannot be done at law.

According to Justice Gummow the adequacy requirement regarding injunctions has become more of a discretionary consideration than a jurisdictional limitation.<sup>19</sup> However, this issue plays a larger role in cases involving specific performance than those concerning injunction; hence the requirement is to be applied differently in these two areas. One justification for this fact involves the existence of rights, particularly property rights. Injunctions generally protect existing rights, while specific performance involves creating new rights. The disinclination to create new rights, especially property rights, might explain the judicial reluctance in granting specific performance.

The selective application of this requirement is also witnessed in other areas. In the law of declarations the issue of the adequacy requirement is made irrelevant by legislation.<sup>20</sup> Importantly, legislation frequently renders the entire remedial hierarchy obsolete.

Furthermore, the adequacy requirement only seems to apply to specific relief<sup>21</sup> and not the “newer” equitable monetary remedies, such as *Lord Cairns’ Act* damages. This equitable remedy permits a monetary award either in lieu of or in addition to an injunction or specific performance. In his exhaustive work on *Lord Cairns’ Act* damages, McDermott does not cite one case where *Lord Cairns’ Act* damages

16 1977) 1 WLR 1262, 1273.

17 Gummow, above n 5, 94ff.

18 (1909) 26 WN (NSW) 137, 137.

19 See Gummow, above n 5, 94; see also Tilbury, above n 1, [6025]ff.

20 See, eg, *Federal Court of Australia Act 1976* (Cth) s 21(2); *Supreme Court Act 1935* (WA) s 25(6); *Supreme Court Act 1935* (SA) s 31; *Supreme Court Act 1970* (NSW) s 75.

21 And only really to one variety of specific relief: specific performance.

were refused because of the jurisdictional limitation.<sup>22</sup> The lack of case law on this point led Ingman and Wakefield to contend that it is impossible to distinguish ‘between those cases where the court has *no jurisdiction* to decree specific performance, and those where the order is refused on *discretionary* grounds’.<sup>23</sup>

In practice, the line between jurisdictional limitations and discretionary considerations is vague. Tilbury has observed that the courts sometimes continue to award damages under *Lord Cairns’ Act* where damages at law seem recoverable on the facts.<sup>24</sup> This fact constitutes an attack upon the adequacy requirement.

#### IV SHOULD THE ADEQUACY RULE BE COMPLETELY ABANDONED?

##### A INTRODUCTION

The partial application of the rule as evidenced in case law introduces the question of whether the adequacy test should continue as a rule that operates as a jurisdictional limitation, rather than a discretionary consideration. To answer this, five matters may be considered. They are legal history, the definitional vagueness of adequacy, the rise of general legislation, the relationship between right and remedy and the important Laycock thesis.

##### B LEGAL HISTORY

Three highly interdependent historical considerations to be analysed are the “exceptional” nature of equity, the role of the jury in the law of remedies and the preference for substitutionary over specific remedies.

###### (a) *The “exceptional” nature of equity*<sup>25</sup>

Equity was originally to supplement the common law, mitigate its harshness and provide justice where the common law could not. Equity did not exist independently. Hence Berryman posited that “the test of adequacy of common law remedies had that element of subservience necessary to show that equity was merely supplemental to the common law.”<sup>26</sup>

22 Peter M McDermott, *Equitable Damages* (Butterworths, 1994) 57–8 contains a comprehensive list of situations where the award of *Lord Cairns’ Act* damages was refused.

23 Terence Ingman and John Wakefield, ‘Equitable Damages Under Lord Cairns’ Act’ [1981] *The Conveyancer and Property Lawyer* 286 (emphasis added).

24 Patrick Parkinson (ed), *The Principles of Equity* (LBC Information Services, 2<sup>nd</sup> ed, 2003) [2220].

25 The “exceptional” nature of equity is also treated in detail later in this article when substitutionary relief versus specific relief is being discussed.

26 J Berryman, ‘The Specific Performance Damages Continuum: An Historical Perspective’ (1985) 17 *Ottawa Law Review* 295, 307.

A strong theme in equity is the relationship between common law and equity. The *Earl of Oxford's Case*<sup>27</sup> and its aftermath demonstrate an important point concerning this theme. The relationship between the Lord Chancellor, Lord Ellesmere, and the Chief Justice of the Court of Common Pleas, Coke CJ, reached a nadir when the Lord Chancellor set aside a carefully drafted common law judgment concerning a lease. Following much discussion, and showing surprisingly poor strategy, the common law lawyers referred the decision, which was representative of the entire dispute between law and equity, to James I. Fundamentally, James I found in favour of the Lord Chancellor by allowing equity to prevail in the conflict between the common law and equity. But this triumph of Equity produced a reaction.

Despite Chancery's success in establishing its supremacy over the common law by royal decree, its close association with both the monarch and with royal prerogative justice placed it under constant threat from the democratic revolutionary forces of the Commonwealth in the political upheavals of 17th century England. In 1653, the Parliament, under Cromwell, considered a number of law reform measures, including the proposed abolition of Chancery. The Parliament passed a resolution that "the High Court of Chancery of England shall be forthwith taken away" but the Bill incorporating the resolution was never enacted. After the Restoration in 1660 the immediate threat to Chancery passed away. But in 1690, a Bill to reverse the *Earl of Oxford's Case* and thereby statutorily reverse the supremacy of equity over the common law was introduced into Parliament but never enacted. Laycock explains that the reduced status of equitable remedies was an important tactic in gaining the common law's acceptance that they had a legitimate position.<sup>28</sup> Hence, the invention of this rule: common law remedies first, and only if they are inadequate can equitable remedies be used.

The outside threats to Chancery's existence influenced the transformation of the equitable jurisdiction to emulate the more politically acceptable common law. However, it would be incorrect to assume that Chancery changed purely in response to a threat of extinction. The equitable jurisdiction had begun the process of change as early as the latter half of the 16th century. The pressures of continuous litigation in Chancery had led gradually, and perhaps inevitably, to the development in the jurisprudence of that court of some settled principles and traditions of consistency in decision-making in certain areas.

After the Restoration in 1660, Chancery became much more concerned with issues involving property and proprietary rights than it had hitherto been, and the need for settled and certain principles of law to govern those issues became more apparent. Precedent increased in importance, and by the end of the century was rapidly superseding conscience as the foundation of practical equity.

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27 (1615) 1 Rep Ch 1.

28 Laycock, above n 4, 282.

The transformation of the equitable jurisdiction accelerated during the latter half of the 17th century under the Chancellorship of Lord Nottingham (1673–1682) who has since been described as the first modern Lord Chancellor and the father of systematic equity. Lord Nottingham’s systematising work was then carried on by subsequent Lord Chancellors, most notably Lord Hardwicke (1737–1756), who is credited with achieving the full development of the principles of equity. Considerations of certainty, security of property interests and the public good supplanted the earlier concern with justice on the facts of the particular case.<sup>29</sup>

Throughout the 18th and 19th centuries, the development of authoritative, positive and coherent rules, fixed in their application and founded in precedent, became the aim of one Lord Chancellor after another. As stated by Lord Eldon LC in *Davis v Duke of Marlborough*:<sup>30</sup> “[i]t is not the duty of a Judge in equity to vary rules, or to say that rules are not to be considered as fully settled here as in a court of law”; and again in *Gee v Pritchard*,<sup>31</sup> the “doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law.”

The demise of equitable decision-making based on the Chancellor’s sense of moral right and good conscience and on Chancery’s commitment to informal, pragmatic, contextual adjudication was seen by Atiyah as the “first and most striking legal development of the nineteenth century”.<sup>32</sup> However, as the traditional equitable jurisdiction declined, and probably because of that decline, there were significant developments in substantive doctrine. Not surprisingly the adequacy factor has remained.

For example, writing of the merger experience in the United States, Pound has observed four tendencies: (1) the supersession of equitable rules by legal rules, (2) the disappearance of entire equitable rules or large parts of entire equitable rules, (3) equitable rules becoming rigid in their application, and (4) the adoption of equitable rules in such a way as to confuse rather than supplement the legal rule.<sup>33</sup>

The structure of personnel contributed significantly to the “fundamental subordination of Equity to the Common Law”<sup>34</sup> caused by the Judicature Acts. Following 1873, neither the Lord Chancellor nor the House of Lords need possess any equity knowledge. This situation has been referred to as the “final triumph of common law over Equity”.<sup>35</sup> The expansion of the equity personnel later on

29 Wright, *The Remedial Constructive Trust* (Butterworths, 1998) [1.2]-[1.25].

30 (1819) 36 ER 555.

31 (1818) 36 ER 670.

32 Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Oxford University Press, 1978) 5.

33 Roscoe Pound, ‘The Decadence of Equity’ (1905) 5 *Columbia Law Review* 20.

34 P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) 672.

35 P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) 673.

indicated that equity was no longer “exceptional” as it had more officials to conduct its litigation.

But two developments reduced the dominance of substitutionary relief (damages) over specific relief. The first was the increasing awareness of the limitations of the substitutionary remedy. The second involved the reinvigoration of equitable remedies. This reinvigoration consists of two developments. The first was the increasing use of specific remedies apart from injunctions and specific performance.<sup>36</sup> The second was the rise of non-specific remedies in equity, such as equitable compensation. Moreover, another development that explains this lessening of the dominance of common law damages is found in *AG v Blake*.<sup>37</sup> This UK case was about the availability of an account of profits following a breach of contract and is important for several reasons. First, it indicated that the common law damages were inappropriate. Second, it indicated that it was inadequate to only classify equitable remedies as specific in nature. Third, it expanded equitable remedies into a domain where it had not operated previously. Finally, *AG v Blake* may be rationalized within the traditional law of remedies but a detailed reading of the case makes it clear it should not be done.

However, the search for the remedy that achieves complete justice may invite the judiciary to adopt an approach resembling “palm tree justice”. Millett has talked of the lack of enthusiasm that has been traditionally demonstrated towards equity, especially in the law of remedies, has been replaced by over-enthusiasm<sup>38</sup> as illustrated in claims for constructive trusts and equitable compensation. An approach to remedies involving such an unprincipled methodology is incorrect and will destroy a successful legal system. Particularly, the “sticky” relationship between the wrong and the remedy, which is a crucial part in determining the appropriate remedy, prevents this overenthusiastic application. The search for the remedy that will achieve complete justice does not invite judicial “creativity”. This need for a restrained operation of equity is also emphasized by Justice Gummow in ‘Equity: Too successful?’.<sup>39</sup> So a preference for damages rather than equitable remedies still makes sense, but this preference is not a jurisdictional rule.

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36        Such as the constructive trust.

37        (2001) 1 AC 268.

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

39        (2003) 77 *Australian Law Journal* 30.

(b) *Substitutionary relief versus specific relief*<sup>40</sup>

Traditionally, there has been a preference for substitutionary (common law) relief over specific (equitable) relief. But with the recent rise of substitutionary relief in equity (meaning equitable compensation and an account of profits) this neat division breaks down and challenges the traditional law.

Tilbury<sup>41</sup> has indicated two explanations for preferring substitutionary relief. The first, based on the work of Kiralfy,<sup>42</sup> relates to procedure. Most wrongs covered by the writ of case could only lead to substitutionary relief. Other actions involving specific relief did develop but Action on the Case triumphed. Therefore, substitutionary relief also triumphed over specific relief.

The second explanation was based on the work of Plucknett,<sup>43</sup> and it involved the enforcement of remedies. Originally, common law courts could only enforce their judgments by distress, not by imprisonment for contempt. This led to the dominance of substitutionary remedies in common law courts due to their lack of an independent enforcement mechanism. But the enforcement mechanism in the Chancellor's court was imprisonment for contempt and that was where specific remedies could be awarded. However, common law courts were the courts that litigants routinely had access to,<sup>44</sup> so substitutionary relief became the dominant remedy.<sup>45</sup>

During the medieval period equity was truly "exceptional". However, later equity became part of the general law.<sup>46</sup> The word "exceptional" has two meanings. The first is: being extraordinary in circumstances where the regular judicial system could not provide justice. The second is that the legal doctrines constituting equity had to be applied with restraint. This is precisely the aim of the new law of remedies. However, the justification provided by the two authors for this rule/exception duality operated only at the time of the first meaning of exceptional, not the second. The justification collapsed with the transition from the first period to the second, but the dominance of substitutionary relief over specific relief

40 This next section contains information that is extremely relevant to the "exceptional" nature of equity. An earlier section in this article dealt with this. These two sections should be read with constant reference to the other. Further, this next section should not be taken to be an argument as to why substitutionary relief should not be the remedy initially chosen in a legal dispute. It is simply to indicate that it should not be used to reinforce the remedial hierarchy. If it is still to be the predominant remedy, then this predominance must be justified upon some ground other than the remedial hierarchy.

41 Above n 1, [1012].

42 A K R Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (Sweet & Maxwell, 4<sup>th</sup> ed, 1962) 449.

43 Theodore F T Plucknett, *A Concise History of the Common Law* (Butterworth, 5<sup>th</sup> ed, 1956) 678.

44 This is shown by the fact of the very limited number of judges in Equity.

45 At the time of the Judicature Acts there were four judges in Equity, whereas there were 15 common law judges.

46 That is, at this time the law was comprised of two elements, Equity and the common law.

remained. This dominance reinforces the concept of remedial hierarchy, although the gradual reduction in importance of the substitutionary remedy indicated that the traditional law of remedies was in trouble.

(c) *The role of the jury*

The jury in common law matters played an essential role in shaping common law remedies.

Procedures had to be simple for the jury. This was the position at common law. The position was different in cases involving equity. Usually, there is no jury in matters that may be characterised as being in the sole province of equity.<sup>47</sup> Therefore, equitable remedies were developed in an environment devoid of considerations concerning the jury. The jury has also been of declining importance in civil litigation.

Generally there has been a movement away from jury trials.<sup>48</sup> Many rules of remedies, including the remedial hierarchy, are legacies of a time when the jury played a predominant role in the law of remedies. This was recognised by Lawson, who observed that “[a]lthough trials by jury in civil cases have now almost disappeared many features in the law of damages still survive.”<sup>49</sup>

The damages, which imply simplification, were given predominance in the law of remedies. However, with the decline of the jury in civil cases, damages do not need such a privileged position. The jurisdictional limitation of the adequacy rule should be downgraded to a discretionary consideration.

## C THE RISE OF THE LEGISLATIVE MODEL

The twentieth century saw the continued rise of general legislation of which the *Competition and Consumer Act 2010* (Cth) (formerly known as the *Trade Practices Act 1974*) is the best known example in Australia. With respect to such legislation the remedies are not mechanically linked to particular wrongs, although practice indicates a strong preference for damages. This provides a legislative model for the new law and what is relevant here is that such a legislative model fails to support the adequacy test as a jurisdictional limitation.<sup>50</sup>

47 Counsel in *IOL Petroleum Ltd v O'Neill* (Unreported, Supreme Court of New South Wales, Young J, 29 August 1996) argued that a court of equity had no discretion to allow a jury. This argument was rejected by Young J.

48 The great exception to this is the United States because of the Seventh Amendment to the Constitution.

49 F H Lawson, *Remedies of English Law* (Butterworth, 2<sup>nd</sup> ed, 1980) 55.

50 In his article concerning the development of common law, ‘Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36 *University of New South Wales Law Journal* 1002, Justice Leeming devotes much attention and consideration to the great impact of statutory models on developing

## D THE DEFINITIONAL INADEQUACY OF ADEQUACY

To operate properly as a jurisdictional limitation the term “adequacy” must be defined. “Adequacy” requires answers to questions such as: what is the precise definition of adequacy, who determines it and how is adequacy evaluated? The role of judicial discretion is highlighted in determining the definition of adequacy. Berryman has asserted that “any test which has as its foundation a question of ‘adequacy’ is open to subjective opinion”,<sup>51</sup> yet this is a notion that the common law dislikes. However, the personnel who determine the inadequacy of common law damages are judges in equity. Their Honours seem to adopt a conservative approach to this issue and it may be explained by three inter-related factors.<sup>52</sup> The first, observed by Baron Cooke, is that judges are bound by precedents when deciding legal problems.<sup>53</sup>

This first point is connected to the second and is illustrated by the attempt of the courts to distance themselves from the accuracy of the infamous comment by Selden concerning the Chancellor’s foot.<sup>54</sup> The third and final reason relates to the determination of Lord Eldon<sup>55</sup> to have well-settled rules in equity similar to those in the common law.<sup>56</sup>

Clearly, adequacy is a standard that is determined on a case-by-case basis, as supported by Laycock’s statement that “adequacy may imply a range of comparative standards.”<sup>57</sup> Although principles provide guidance to the determination of adequacy, ultimately it is an issue of judicial discretion, but maintaining the inadequacy as a consideration helps to limit uncertainty.

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the common law, including Equity. On this issue also note that Justice William Gummow has stated “[h]ere one should not underplay the capacity of equity to “follow the law” by drawing strength from common law (including statutory principles)”: see Justice William Gummow, ‘The Equitable Duties of Company Directors’ (2013) 87 *Australian Law Journal* 753, 757.

51 J Berryman, ‘The Specific Performance Damages Continuum: An Historical Perspective’ (1985) 17 *Ottawa Law Review* 295, 307.

52 These factors involve a detailed examination of the history of equity, which was examined earlier in this article. For more details of equity’s history during its “pre-classical” and “classical” periods, see David M Wright, *The Remedial Constructive Trust* (Butterworths, 1998) [1.24]-[1.27].

53 Baron Cooke, ‘The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A New Zealand Perspective’ in Donovan W M Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993) 29.

54 John Selden, *Table Talk* (1856).

55 His Lordship held the Great Seal for a total of 25 years, from 1801 to 1806 and again from 1807 to 1827.

56 *Gee v Pritchard* (1818) 36 ER 670, 674.

57 Laycock, above n 6, 10.

## E THE RELATIONSHIP BETWEEN RIGHT AND REMEDY

There has been a vigorous debate concerning this relationship, frequently under the heading of “discretionary remedialism”.<sup>58</sup> This debate has highlighted three main positions regarding the relationship between primary and secondary rights.

### (a) *Monist approach (extreme form)*

This extreme form makes a direct link between the primary right and remedy. Further, this direct link is applied mechanically and often subconsciously. Basically, the primary right dictates the secondary right. It is a mechanical approach to the law of remedies, and is very quick and easy to apply.

### (b) *Dualist approach (extreme form)*

At the other extreme is the extreme form of the dualistic approach.<sup>59</sup> In this, the primary right and the secondary right are completely different.

### (c) *Moderate monist/dualist approach*<sup>60</sup>

This is a compromise between the two extreme explanations of the relationship between the two rights. There is a strong, but not absolute, link between the primary right and the secondary right. The right<sup>61</sup> that has been breached does provide relevant information on the remedy that is awarded. As Barker has reminded us: “[W]e judge the nature and power of a primary right by observing the way courts react to its violation in their selection of remedy or - which is the same thing - in their allocation of secondary rights”.<sup>62</sup> In addition, Barker alerted the legal world to the fact that the process works in reverse by observing “[r]ights bear upon remedies and remedies bear upon our understanding of rights”.<sup>63</sup> There is a limited separation between right and remedy. There exists a “sticky” relationship between the primary right and the remedy.

58 Primary writings on this debate include Grant Hammond, ‘Rethinking Remedies’ in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell, 1991); Kit Barker, ‘Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right’ (1998) 57 *Cambridge Law Journal* 301; Peter Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 *University of Western Australia Law Review* 1; Simon Evans, ‘Defending Discretionary Remedialism’ (2001) 23 *Sydney Law Review* 463.

59 It would seem that in *Remedies Reclassified* (Oxford University Press, 2005), Rafal Zakrzewski suggests that there has been too much attention paid to the primary right in deciding the appropriate remedy.

60 For more details on this approach see David Wright, ‘Wrong and Remedy: A Sticky Approach’ [2001] *Singapore Journal of Legal Studies* 300.

61 Or the obligation.

62 Barker, above n 57, 323.

63 Ibid 323; see also Paul Gewirtz, ‘Remedies and Resistance’ (1983) 92 *Yale Law Journal* 585, 678–79; Daniel Friedmann, ‘Rights and Remedies’ (1997) 113 *Law Quarterly Review* 424, 425; Donovan W M Waters, ‘Liability and Remedy: An Adjustable Relationship’ (2001) 64 *Saskatchewan Law Review* 429, 444.

It is vital that the rules should be understood as provisional in nature, that is, operative only to the extent to which a defensible result is produced by their application. Briefly, what it means, in the language of Schauer, is:

There would be a presumption in favour of the result generated by the literal and largely acontextual interpretation of the most locally applicable rule. Yet that result would be presumptive only, subject to defeasibility when less applicable norms, including the purpose behind the particular norm, and including norms both within and without the decisional domain at issue, offered especially exigent reasons for avoiding the result generated by the presumptively applicable norm.<sup>64</sup>

In this approach there is a “sticky” relationship between the primary right and the secondary right. Essentially, there is a strong presumption of the remedy that will be awarded. It is essential that the available and likely remedies are known in advance. This approach recognises that the law of remedies is not mechanical, but the relationship between the primary right and the secondary right is much more subtle.

(d) ***Discretion and the moderate monist/dualist approach***

There is a fear of “discretion” and the moderate monist/dualist approach greatly limits its role. It has been stated that “discretion” does not allow judges to act on “caprice”<sup>65</sup> or in a manner that is “arbitrary or unregulated”.<sup>66</sup> Lord Mansfield wrote: “[d]iscretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful, but legal and regular”.<sup>67</sup> Cardozo noted:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life’. Wide enough in all conscience is the field of discretion that remains.<sup>68</sup>

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64 Frederick Schauer, ‘Formalism’ (1988) 97 *Yale Law Journal* 509.

65 *Beddow v Beddow* (1878) 9 Ch D 89, 99.

66 *Harris v Beauchamp Bros* [1894] 1 QB 801, 808.

67 *R v Wilkes* (1779) 4 Burr Rep 2527, 2539.

68 Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 141.

Likewise, Hart observed:

At this point judges may again make a choice which is neither arbitrary nor mechanical, and have often displayed characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity “legislative”. The virtues are: impartiality and neutrality in surveying the alternatives; consideration for the interest of who will be affected, and a concern to deploy some acceptable general principle as a reasoned basis for decision.<sup>69</sup>

Finn noted “the constraints which gird and guide such judicial discretion”.<sup>70</sup> This explains why it is frequently referred to as a fettered discretion. Galligan<sup>71</sup> noted that in the legal world law increasingly involves the statement of standards, rather than rules.<sup>72</sup>

Further on discretion and very important to the operation of remedies, Justice William Gummow has stated:

There is a notion manifested in some English academic writing (and, one fears, teaching) that the rule of law requires the dictation of remedy by the application of rules of fixed content and disfavors the treatment of right and remedy as conceptually sequential, but distinct. Hence the debate, conducted at several removes from the life of the law, respecting “discretionary remedialism”.<sup>73</sup>

This treatment of the right and the remedy being distinct is entirely consistent with the work of Professor Stephen Smith.<sup>74</sup>

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69 H L A Hart, *The Concept of Law* (Oxford University Press, 1961) 200.

70 Paul Finn, ‘Equitable Doctrine and Discretion in Remedies’ in W R Cornish, Richard Nola, J O’Sullivan and G Virgo (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998) 267.

71 D J Galligan, *Discretionary Powers* (Oxford University Press, 1990) 86–8.

72 This process has also been noted by Sir Anthony Mason, ‘The Australian Judiciary in the 1990’s’ (1994) 6 *Sydney Papers* 111 at 113; see also Murray Gleeson, ‘Individualised Justice – The Holy Grail’ (1995) 69 *Australian Law Journal* 421, 425-27, 430-32; Julius Stone, ‘From Principles to Principles’ (1981) 97 *Law Quarterly Review* 224, 238ff.

73 Justice William Gummow, ‘Equity: Too successful?’ (2003) 77 *Australian Law Journal* 30, 41.

74 Smith has developed his theory in a number of work: see, eg, ‘Rule-Based Rights and Court-Ordered Rights’ in Andrew Robertson and Donal Nolan (eds), *Rights and Private Law* (Hart Publishing, 2011); ‘Rights and Remedies: A Complex Relationship’ in Kent Roach and Robert Sharpe (eds), *Taking Remedies Seriously* (CIAJ, Ottawa, 2010); ‘The Rights of Private Law’ in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009); ‘The Law of Damages: Rules for Citizens or Rules for Courts?’ in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008), and ‘Duties, Liabilities, and Damages’ (2012) 125 *Harvard Law Review* 1727.

Smith characterizes substantive rules of law (rights) as imposing moral duties on those subject to rules by declaring what they ought to do in situations covered by the rule.<sup>75</sup> He maintains, however, that the common law does not treat damages as declarations imposing a second layer of duties on defendants. Instead and importantly, damages are awards issued by courts for reasons independent of any duty to pay. On this understanding of the nature of damages, the rules governing damages are addressed to courts rather than actors, and whatever rights they create are not rights against wrongdoers but rights to demand an appropriate response to wrongdoing from the courts. It follows that the amount of damages is a matter of judicial discretion rather than deduction from harm done. There are significant discontinuities between legal rules governing substantive rights and duties and legal rules governing damages. Smith limits his discussion to damages and leaves the status of other remedies unspecified. Yet his arguments can and should be extended from damage awards to remedies in general. Accordingly, the objective of remedies law is not to impose a derivative layer of remedial obligations on the defendant but to authorize courts to respond in appropriate ways to the defendant's wrongdoing. In this way, remedies are theoretically distinct from legal rights. Significantly, courts pay more attention to specific facts, and exercise greater discretion, in granting remedies than they do in formulating substantive rules for conduct. Consequently, the equities and exigencies of particular cases may overshadow the goals of clarity and consistency in regulation of conduct. Smith's analysis, however, suggests a principled way to defend the right/remedy distinction: rights and remedies serve different functions in the legal system. Substantive rules of law impose limitations on individual conduct. In contrast, remedial rules apply to courts, instructing them to craft an appropriate official response when individuals depart from legal norms. What counts as appropriate for this purpose is an award that will satisfy the victim of wrongdoing, and the public at large, that justice has been done.

Basically, remedies require the exercise of much discretion as compared to rights. Further, this discretion is greatest with equity. And, finally, this discretion is to be exercised by judges. The Australian approach has been to accept this discretion and to develop guidelines for its exercise. This can be contrasted to the English approach of denying remedial discretion.

Austin<sup>76</sup> contended that primary and secondary rights are not automatically linked and that obligations and remedies are separate considerations. This approach is preferable and is consistent with the dualist approach.<sup>77</sup> Separating remedies from obligations creates a 'remedial smorgasbord', enabling courts to weigh the factors

75 Stephen Smith, 'Duties, Liabilities, and Damages' (2012) 125 *Harvard Law Review* 1727, 1746.

76 Austin, *Lectures on Jurisprudence* (London: John Murray, 5<sup>th</sup> ed, 1885) vol 2, 760.

77 Hammond J in *Brown v Pourau* [1995] 1 NZLR 352, 368 held that under a dualistic approach, the "court first makes enquires as to the obligation the court is asked to uphold; it then (and only then) makes a context-specific evaluation of that remedy which will best support or advance that obligation".

and obligations unique to each case and determine the appropriate remedy. The *Competition and Consumer Act 2010* (Cth)<sup>78</sup> demonstrates the advantage of a “remedial smorgasbord”, where a range of statutory remedies, that are analogous to equitable and common law remedies is contained. It does not require the precondition of common law remedies being inadequate, although in practice there is a clear preference for damages. The judge-made law of Australia should also embrace a “remedial smorgasbord”, thereby eliminating inconsistencies with the legislation. It brings courts into disrepute when the same facts can be brought as a breach of contract or breach of the *Competition and Consumer Act* and different remedies are ordered.

## F LAYCOCK’S THESIS

Laycock posits that, generally, the adequacy rule is dead. Laycock expounded his thesis in two ways. First, he examined the various techniques by which the courts frequently escape from the rule. Second, he showed that even in those cases where the rule is referred to as the reason for preferring a common law remedy over an equitable one, the rule itself is not the real reason for this choice. The choice was determined on other grounds.

The case law seems to be consistent with the Laycock thesis. Several cases have emphasized the importance of justice in selecting remedies, regardless of their origin.<sup>79</sup> However, there are four minor but troubling points with the Laycock thesis.

Laycock rightly argued that the adequacy rule was alive only in one area, interlocutory relief. However he is wrong to suggest that the general rule *applies* in interlocutory relief. It is not the general rule that applies in this area, but simply that damages have to be shown to be inadequate before equitable remedies are granted.<sup>80</sup> A rule cannot be a general rule simply by being applied in one area.

The second point is that it seems to underplay areas where something similar to the adequacy rule does play an active role. These are cases involving sale, hire and exchange, especially the commercial context. Here a tendency to frequently rejecting all forms of equitable involvement and demanding monetary remedies has been shown.

The decision of the Privy Council in *Re Goldcorp Exchange Ltd*<sup>81</sup> stands as

78 Which is the successor to the *Trade Practices Act 1974* (Cth).

79 *Brett Wotton Properties Ltd v Cameron* [1986] BCL 1285; *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435.

80 For entirely sensible reasons, an inadequacy requirement does apply. In this area the adequacy requirement does apply but it seems to apply as a discretionary consideration, and not a rule, which does not support the remedial hierarchy. Further, Worthington, *Equity* (Oxford University Press, 2003) 38 emphasises its procedural nature.

81 [1994] 3 NZLR 385.

authority for the proposition that equitable doctrines should find no place in the rules governing the sale of goods. However this does not suggest that this position was completely disliked by equity lawyers.

More recently, Lord Goff, in *Scandinavian Trading Tanker Co A B v Flota Petrolera Ecuatoriana*<sup>82</sup> stressed the importance of certainty that parties to a contract should know of their existing rights for certain and to act on it. In this way, the remedial hierarchy is created and nourished.

Another minor point is simply a word of warning. Balancing tests are vitally important in Laycock's thesis as his proposed replacement of the adequacy rule. As Aleinikoff has pointed out, balancing tests have the ability to cloak subjective judgments with a veneer of scientific precision.<sup>83</sup> Of course, this is not to eschew balancing tests.

A final point is that it seems to downplay the individual characteristics of each remedy. It is as if Laycock's remedial smorgasbord has produced a bland range of remedies and that the remedies themselves are devoid of much individual detail. To avoid this accusation it should be explicitly recognised that individual remedies are quite different from each other. This problem can be avoided by explicitly requiring the consideration of the legal obligation that has been breached and the most appropriate way to remedy this wrong.

So the Laycock thesis supports the idea that the rule is dead, but the "troubling points" made above concerning Laycock's thesis come down to the fact that he downplays the continuing role of adequacy as a consideration.

## **V CHANGE OF ADEQUACY TEST FROM BEING A RULE REPRESENTING A JURISDICTIONAL LIMITATION TO A DISCRETIONARY FACTOR**

As has been shown, "adequacy" should not be a rule, limiting the court's choice. But inadequacy is too ingrained in the legal system simply to be completely abandoned. And it shouldn't be. The adequacy of common law remedies requirement should be treated as "[a] discretionary factor which the court takes into account in determining whether or not to grant the equitable relief prayed for."<sup>84</sup> "Adequacy" will continue to be relevant by being part of the "sticky" relationship in that the usual remedy will be often the result of the old remedial hierarchy, particularly in matters occurring in a commercial context. It needs to be recognized that the legal system has a preference for loss compensation damages.<sup>85</sup>

82 [1983] QB 529.

83 T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943.

84 Tilbury, above n 1, [6019].

85 In *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506, 536 Young JA observed

## VI CONCLUSION

This article has shown that the rule or jurisdiction limitation that common law remedies be inadequate before equitable remedies are available is incorrect in both theory and practice. Legal history best explains its existence, but does not justify it. The rule came from a time when equity was considered to be “exceptional”. Also the decline in preference for substitutionary over specific relief is relevant to evaluating the adequacy rule being a jurisdiction limitation, as is the decline of the jury in civil matters. Definitional problems also limit the usefulness of adequacy as a jurisdictional limitation. Modern legal history, which is dominated by the rise of legislation, is against its continued existence. This “rule” is only selectively applied; the law of declarations is one example where it is not applied. Further, the recent development of non-specific equitable remedies, such as *Lord Cairns’ Act* damages, indicates that this jurisdictional limitation does not have universal application. The selective application of a universal rule rightly brings it into disrepute. The modern law of remedies, which is more dualistic<sup>86</sup> in nature,<sup>87</sup> does not need to be confused by the inadequacy rule, which coincides with neither theory nor practice. The relationship between right and remedy, and the development of the subject, supports both the rejection of adequacy as rule but also argues strongly for its retention as a discretionary consideration. Laycock’s important thesis also indicates that as a jurisdiction limitation the adequacy test is deficient. Additionally, it has been argued that adequacy should no longer be a rule of jurisdictional limitation but simply a discretionary factor to be considered. Each jurisdiction is searching for the best or most appropriate remedy. What we have is remedy unity in this search.

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that the modern role of the inadequacy of damages question was found in the judgment of Sachs LJ in *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992, 1005 where his Lordship said that the question to be asked is “Is it just, in all the circumstances, that the plaintiff should be confined to his remedy in damages?”.

86 It must be emphasised that this is not advocating a pure dualistic theory, as it needs to be recognised that rights and remedies are in a symbiotic relationship.

87 As it recognises the disassociation of right from remedy.