Compensating for loss in equity: The evolution of a remedy

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Equitable compensation, founded in the inherent jurisdiction of equity, is becoming a more regularly awarded remedy in New Zealand courts. This paper examines the features of this remedy, first by a comparison between it and the statutory remedy of equitable damages, and secondly by a comparison between it and the common law remedy of compensatory damages in tort law.

I INTRODUCTION

The panoply of remedies available in equity has traditionally been thought to reflect a fundamental eschewal by that jurisdiction of any whole-hearted embrace of the notion of compensation for loss. However, this is now changing rather rapidly, particularly in New Zealand. The time is opportune, therefore, for an examination of the developments and for an assessment of some of the issues arising.[1] In seeking to do this, the paper adopts the following structure. The first section outlines the development of both equitable compensation and equitable damages, revealing that although both appear to be equitable remedies founded on the principle of compensating for loss, there are nevertheless essential differences between them. The second section examines matters relating to the scope of operation of equitable compensation. The third section takes up a major focus of present judicial and academic attention in the area, the relationship between equitable compensation and compensation in tort law. This focus has arisen as courts grapple (largely in cases dealing with claims in equity for breach of fiduciary duty and breach of confidence, where the circumstances often sustain claims in negligence or deceit as well) with the process of bringing the remedy of equitable compensation to an acceptable level of maturity. It is perhaps a trite observation that there is under way in New Zealand's law of civil obligations a movement towards increased remedial flexibility. Equitable compensation has a place in this development, but in order to be a trusted and effective remedy its parameters need to be more clearly understood.[2]

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1 See also L Aitken "Developments in Equitable Compensation: Opportunity or Danger?" (1993) 67 ALJ 596; IE Davidson "The Equitable Remedy of Compensation" (1982) 13 MULR 349.

2 See cases referred to below at n 66. See also P Finn "Fiduciary Law and the Commercial World" in E McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992) 40-41.

I EQUITABLE COMPENSATION AND EQUITABLE DAMAGES

A *Equitable Compensation in the Exclusive Jurisdiction of Equity:* Nocton *and New Zealand Dicta*

The jurisdiction of equity to make an award of equitable compensation is generally assumed to have been clearly established early in this century by *Nocton* v *Ashburton*.[3] However, *Nocton* is not quite the repository of jurisprudence on equitable compensation that it is often assumed to be,[4] for two main reasons. First, many of the comments commonly taken to have been made in support of equity's *exclusive* jurisdiction to award equitable compensation were actually made in respect of its *concurrent* jurisdiction in cases of actual fraud.[5] Secondly, the statements made regarding equitable compensation lack detail. This is due to the rather unusual result in the case. The House of Lords affirmed the quantum of the Court of Appeal's finding on damages, but held that the award should be made in respect of breach of fiduciary duty, rather than deceit. Since the quantum was merely left unaltered, any further examination of the remedy of equitable compensation was unnecessary. Viscount Haldane said: "The measure of damages may not always be the same as in an action of deceit or for negligence. But in this case the question is of form only, and is not one which it is necessary to decide."[6] Nonetheless, *Nocton* is clear authority for the existence of equitable compensation as a remedy available in the exclusive jurisdiction of equity.[7]

In New Zealand, the remedy of equitable compensation has been recognised in a string of recent Court of Appeal decisions. In *Coleman* v *Myers*[8] Cooke J cited *Nocton* as supporting the proposition "that monetary compensation or damages may ... be awarded for breach of fiduciary duty". This was followed by dicta to the same effect, in respect of actions in breach of confidence, in *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*[9] and *Attorney-General for the United Kingdom* v *Wellington Newspapers Ltd (No 2)*.[10]

A more detailed exposition came in the important decision in *Day* v *Mead*,[11] where equitable compensation was awarded for loss arising from a breach of fiduciary duty by a solicitor. Cooke P stated: "In this Court, it has been accepted that, independently of

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3 [1914] AC 932.

4 Indeed, much of what Viscount Haldane was to say in *Nocton* in 1914 had been already anticipated in Australia by Holroyd J in *Robinson* v *Abbott* (1893) 20 VLR 346.

5 It will be recalled that although the House of Lords decided the case on the basis of breach of fiduciary duty, the Court of Appeal had concentrated on the tort of deceit. See above n 3, 951-2 (per Viscount Haldane).

6 Above n 3, 958. See also at 965 (per Lord Dunedin).

7 Above n 3, 952, 956 (per Viscount Haldane).

8 [1977] 2 NZLR 225, 359.

9 [1984] 1 NZLR 354. Cooke J delivered the judgment of the Court, and stated (at 361): "At the present day it should not matter whether the award is described as damages for tort or equitable compensation for breach of duty."

10 [1988] 1 NZLR 166, 172.

11 [1987] 2 NZLR 443.

Lord Cairns' Act, damages or equitable compensation can be awarded for past breaches of a duty deriving historically from equity ..."[12] Virtually identical statements are found in *Aquaculture Corporation* v *New Zealand Green Mussel Co Ltd*[13] and *Mouat* v *Clark Boyce*.[14] It is perhaps interesting to note that statements in each of the Court of Appeal cases referred to are simply supported by dicta from cases earlier in the line of authorities. The only case that really stands alone, because it is the first in the line, is *Coleman* v *Myers*, where reference was made to *Nocton*.[15]

B Equitable Damages: the Statutory Basis

Equitable compensation is awarded pursuant to equity's inherent or exclusive jurisdiction, and may thus be appropriate only in cases of loss caused by breach of a purely equitable obligation. *Equitable damages*, on the other hand, are awarded pursuant to statute,[16] and apparently only in equity's concurrent or auxiliary jurisdictions. The jurisdiction of New Zealand courts of equity to award equitable damages is now founded on section 16A of the Judicature Act 1908, which provides:

> **Power to award damages as well as, or in substitution for, injunction or specific performance** - Where the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

One point of controversy is whether this jurisdiction (known commonly as Lord Cairns' Act) extends as far as providing a compensatory remedy for the infringement of a purely equitable right, such as an obligation of confidence or breach of fiduciary duty, where common law damages are, by definition, unavailable. Meagher, Gummow and Lehane argue that it does not.[17] In *Aquaculture Corporation* v *New Zealand Green Mussel Co Ltd*[18] Prichard J held that Lord Cairns' Act was *not* designed to give courts of equity the jurisdiction to award damages for breaches of purely equitable obligations. On appeal, the Court of Appeal did not directly address this point. The majority instead

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12 Above n 11, 450.

13 [1990] 3 NZLR 299, 301.

14 [1992] 2 NZLR 559, 566.

15 The dicta are usually those of Sir Robin Cooke, building on his own previous dicta. The exception to this generalisation is the judgment of Somers J in *Day* v *Mead*, where his Honour cited several cases pre-dating *Nocton*, as well as *Seagar* v *Copydex* [1967] 1 WLR 923 and [1969] 1 WLR 809.

16 The Chancery Amendment Act 1858 (Lord Cairns' Act) (England and Wales), and its progeny in other jurisdictions. The original reason for the Act was essentially procedural: without it a plaintiff who failed to obtain specific performance or an injunction would be forced to institute separate proceedings to obtain damages at common law. The Act was thus designed to prevent a multiplicity of suits. See generally MJ Tilbury *Civil Remedies: Vol 1: Principles of Civil Remedies* (Butterworths, Sydney, 1990) paras 3255 - 3266.

17 RP Meagher, WMC Gummow and JRF Lehane *Equity: Doctrines and Remedies* (3ed, Butterworths, Sydney, 1992) para 2321.

18 (1986) 1 NZBLC 102,567.

merely cited several of the Court's own previous decisions for the proposition that "monetary compensation (which can be labelled damages) can be awarded for breach of a duty of confidence or other duty deriving historically from equity".[19] However, the majority judgment did make what appears to be an oblique reference to Lord Cairns' Act when it stated:[20]

> For all purposes now material, equity and the 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.*

Assuming that the reference to "statute" is a reference to section 16A, the Court seems to accept that equitable damages are available in New Zealand for breach of confidence, and presumably for other purely equitable obligations. This is certainly consistent with Cooke P's general thinking on remedial flexibility, as expressed in *Aquaculture*. It would be strange to state on the one hand that *common law* remedies are available for breach of a purely equitable obligation, but then to balk at recognising (*statutory*) equitable damages as available to remedy the same infringement, particularly when the wording of the statutory provision is ambiguous on the point. Ultimately, of course, the point appears a moot one, since the availability of equitable compensation for breach of a purely equitable obligation would seem to render superfluous any serious question about the availability of equitable damages under section 16A for breach of a purely equitable obligation.

Equitable damages are available in other situations where damages cannot be awarded at common law. For example, common law damages are not available in situations where there is a breach of a contract required to be in writing. The Contracts Enforcement Act 1956 provides a complete answer in such a situation to any claim at common law. Thus, in *Ward* v *Metcalfe*[21] there was a binding oral contract, but it had not been reduced to writing as required by the statute. However, Fisher J found sufficient acts of part performance on the part of the plaintiff to deprive the defendants of their statutory defence. Specific performance was not available, since the property in question had been onsold to a third party. Equitable damages were awarded under section 16A in substitution for specific performance.

Likewise, common law damages are unavailable where the damage to the plaintiff is merely threatened or apprehended. A plaintiff can, however, obtain an award of equitable damages, in lieu of a *quia timet* injunction, notwithstanding that no damages would be available at common law.[22] The same analysis applies in a case where damage has both

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19 Above n 13.

20 Above n 13, 301 (emphasis added).

21 [1990] BCL 1422. See RD Mulholland "Part Performance and Common Law Damages" [1991] NZLJ 211.

22 *Leeds Industrial Co-operative Society Ltd* v *Slack* [1924] AC 851; *Neylon* v *Dickens* [1987] 1 NZLR 402, 407.

occurred, and may continue on into the future. Equitable damages may be awarded to cover future loss, although this is not possible at common law. Further, equitable damages may be granted where an award of common law damages is barred by limitation rules.[23]

Two prerequisites must be satisfied before a court will make an award of equitable damages under section 16A:[24] (a) the court must have, in the case at hand, jurisdiction to entertain an application for either an injunction or for specific performance; and (b) as the award is discretionary, the court must decide that the case at hand is an appropriate one for an award of equitable damages.

Apart from the question whether section 16A extends to breaches of purely equitable obligations, discussed above, the key issue in determining jurisdiction is the point in time at which the court must have had the jurisdiction to award specific performance or an injunction. Is this the time proceedings were issued, or must the court still have jurisdiction at the time of trial? In New Zealand the former view appears to have been approved. In *Ward* v *Metcalfe*,[25] neither specific performance nor injunction was available by the time the case came to trial. Fisher J, after reviewing the authorities, held that the time for considering the availability of the primary equitable remedy (specific performance or injunction) was the date of the issue of the proceedings *not* the date of the hearing.[26]

Although granted under a statutory jurisdiction, an award of equitable damages is still an equitable remedy, and is accordingly subject to the exercise of the same discretion that the court possesses in respect of any other form of equitable relief. This will be so especially in the context of the application of discretionary defences in equity. *Neylon* v *Dickens*[27] illustrates this point. The case concerned a claim for equitable damages in addition to specific performance. After the defendants failed to settle, the plaintiffs obtained specific performance of a contract for the sale and purchase of land. Three years later the plaintiffs sought damages in addition. The Court of Appeal held that the plaintiffs should have given notice that they were claiming or reserving the right to claim damages at the time they obtained specific performance. Furthermore, allowing the damages claim to proceed would prejudice the defendants because of the difficulty they would face in attempting to prove an oral agreement of indemnity with a

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23 Tilbury, above n 16, para 3258. Cf the limitation rules applicable to equitable compensation claims: see below at Part III G.

24 Tilbury, above n 16, para 3260.

25 Above n 21.

26 Meagher, Gummow and Lehane, above n 17, para 2308, further state that the "preferable view" is that a court has jurisdiction to make an award of equitable damages, notwithstanding that a claim to specific performance or injunction could be defeated by a discretionary defence. This view appears to have been accepted in *Wentworth* v *Woollahra Municipal Council* (1982) 149 CLR 672, 676. There does not appear to be any New Zealand authority directly on point.

27 Above n 22.

third party in respect of the losses claimed, and in joining that third party to the proceedings. The Court accordingly held that the claim was barred by laches.[28]

It has been held that, in general, equitable damages are to be assessed in the same manner as common law damages.[29] There is, however, an important exception to this rule. It concerns the date at which damages are to be assessed. In *Wroth* v *Tyler*[30] Megarry J held that the appropriate date for determining equitable damages was the date on which the court made an order for inquiry as to damages, as opposed to the date of breach as used in assessing common law damages. *Wroth* v *Tyler* was applied in New Zealand in *Souster* v *Epsom Plumbing Contractors Ltd*[31] and *Grocott* v *Ayson*.[32] Equitable damages might then well be a "superior" remedy in some instances.

The difficulty for *Wroth* v *Tyler*, and hence for the New Zealand cases that have followed and applied it, is the House of Lords' decision in *Johnson* v *Agnew*.[33] That case is authority for the proposition that, although damages might be awarded under Lord Cairns' Act in some cases in which they could not be recovered at common law, the Act does not permit the assessment of damages otherwise than on a common law basis. However, the House further noted that the breach-date rule is not absolute: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances. *Johnson* v *Agnew* has been followed and applied by the Court of Appeal in New Zealand, with the Court focusing however on the second statement rather than the first. In *Neylon* v *Dickens*[34] the Court, citing *Johnson* v *Agnew*, held that it had power under Lord Cairns' Act to fix such a date for the assessment of damages as may be just and reasonable.[35] This is a more flexible approach than that found in *Wroth* v *Tyler* as it does not lay down *any* prima facie date for the assessment of damages. The Court, however, made no mention of their Lordships' statement that Lord Cairns' Act did not of itself warrant assessment of damages other than on a common law basis.

This entire issue has, however, become largely academic in New Zealand, since it has been outflanked by general developments in the law of damages. Although the general rule remains that contract damages will be assessed at the date of breach, this rule will not be applied where it would not do justice.[36] Thus, in appropriate cases, common law damages can now probably be assessed at the date of hearing, rather than at

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28 See, further, Tilbury, above n 16, paras 3262-3265.
29 *Johnson* v *Agnew* [1980] AC 367, 400. See Tilbury, above n 16, para 3266.
30 [1974] Ch 30.
31 [1974] 2 NZLR 515.
32 [1975] 2 NZLR 586.
33 Above n 29.
34 Above n 22. Cf *Ansett Transport Industries* v *Halton, Interstate Parcel Express* (1979) 146 CLR 249, 267-8.
35 Above n 22, 407. See also *Stirling* v *Poulgrain* [1980] 2 NZLR 402.
36 *McElroy Milne* v *Commercial Electronics* [1993] 1 NZLR 39 (CA). See also *Madden* v *Kevereski* [1983] 1 NSWLR 305.

the date of breach. In *New Zealand Land Development Co Ltd* v *Porter*, Tipping J stated:[37]

> As a general rule damages will be assessed at the date of breach ... in the end the assessment of damages is a question of fact and should not be trammelled by rigid rules.... There will be cases in which the application of the general rule, ie the breach/date rule, will not do justice because assessment at the date of breach will not achieve the objective of contractual damages, ie to compensate the innocent party for the loss of the value of the promised performance.... If the subject-matter of the contract and the circumstances of the case are such that it is reasonable for the innocent party to seek specific performance then, if specific performance cannot be had, an alternative claim for damages may properly be assessed at the date when the contract is lost to the innocent party, usually at the date of the trial when the decree is refused.

It would seem therefore, at least in this respect, that there is now little advantage in proceeding under section 16A in order to obtain a more advantageous measure of damages.

Whether equitable damages continues to hold its place as a separate nominate equitable compensatory remedy, available only in the auxiliary or concurrent jurisdictions, depends largely upon whether the availability of equitable compensation in the inherent jurisdiction is ultimately extended to provide an all-embracing equitable compensatory remedy. It will become apparent herein that in some important respects equitable compensation is already effectively the equivalent of (legal) damages for breach of an equitable right. Were this trend to continue, what point would there be in retaining equitable damages as a separate remedy?

II THE SCOPE OF EQUITABLE COMPENSATION

As a matter of principle, equitable compensation is quite distinct from the other standard *in personam* equitable remedies of an account of profits and rescission. First, an *account of profits* appears designed to strip a defendant of any gain he or she has made through breach of an equitable obligation, irrespective of whether the plaintiff has suffered loss. Conversely, equitable compensation appears designed to indemnify the plaintiff in respect of loss he or she has incurred through that breach;[38] it is immaterial whether or not the defendant has made any gain.[39] In most cases it will be unlikely that a plaintiff can obtain both an account of profits and equitable compensation. In a case

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37 [1992] 2 NZLR 462, 466. Although this was a case where damages were sought in lieu of specific performance there was no mention of section 16A.

38 "The remedy is based on the jurisdiction of the court of equity to compel the defaulting fiduciary to make good any loss suffered by the beneficiary": per Aitken, above n 1, 597.

39 There is, nevertheless, a lingering view that equitable compensation is essentially restitutionary, based on the profit derived by the defendant: see discussion below in Part III A (i).

like *McKenzie* v *McDonald*[40], an award of both equitable compensation and an account of profits would amount to double compensation for a single wrong, as the profit made by the defendant was a subset of the loss incurred by the plaintiff (or vice versa).[41] In other situations the plaintiff may not be able to recover both equitable compensation and an account of profits simply because they are alternative remedies founded on different theories as to their effects. In *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*[42] Cooke J, to make this point, cited with approval a comment of Lord Westbury in *Neilson* v *Betts*,[43] where his Lordship stated, with reference to an inquiry as to damages and an account of profits: "The two things are hardly reconcilable, for if you take an account of profits you condone the infringement." Secondly, *rescission* is designed to return both parties to a transaction to the *status quo ante*; in other words it has a bilateral effect. Conversely, equitable compensation is a unilateral remedy, designed to return only the *plaintiff* to the *status quo ante*. Further *Coleman* v *Myers*[44] suggests that equitable compensation may be available when rescission would not result in a practically just solution.

In general terms, as already stated, equitable compensation is awarded in the exclusive jurisdiction of equity for the breach of a purely equitable obligation. It has also been suggested that equitable compensation is available in the concurrent jurisdiction of equity in cases of fraud.[45] However, this suggestion is subject to an analysis offered by Ian Davidson, in his important article.[46] Davidson points out that the range of cases in which equitable compensation could be awarded may have narrowed somewhat since that remedy's inception. In particular, equitable compensation would now seem to be *unavailable* for loss caused by misrepresentations, on the basis, it would appear, that the common law remedy of damages is both available and adequate in such cases. In this context, an initial distinction can be drawn between dishonest representations and others.

In cases of actual fraud (dishonestly made representations) it is clear that equity and common law historically exercised a concurrent jurisdiction.[47] Since *Derry* v *Peek*[48] however, there appear to have been no cases of compensatory relief awarded in the concurrent jurisdiction, notwithstanding that deceit could be established. Davidson

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40 [1927] VLR 134.

41 In *McKenzie* v *McDonald*, the defendant breached fiduciary obligations owed to the plaintiff when he purchased her farm for £4 an acre. He later resold the farm for £4.10s an acre. Dixon AJ assessed the value of the farm to be £4.5s an acre when the defendant made the purchase. If called on to account the defendant would have been liable for the difference between his resale price (£4.10s) and the initial purchasing price (£4). However, the difference between the assessed value of the property (£4.5s) and the initial sale price (£4) was used to indemnify the plaintiff for her loss.

42 Above n 9, 361.

43 (1871) LR 5 HL 1, 22.

44 Above n 8.

45 See Aitken, above n 1, 597.

46 Above n 1.

47 Above n 3.

48 (1889) 14 App Cas 337.

suggests that the reason for this lies in the adequacy of the common law remedy of damages for deceit.[49]

Cases where dishonesty was not established are analysable according to whether the concurrent or exclusive jurisdiction of equity is in focus. Before *Derry* v *Peek*, courts of equity had held that in cases where a person carelessly, though honestly, made a false representation as to matters within his or her special knowledge to another about to deal in a matter of business on the faith of the representation, the representor was liable to redress any loss suffered by the representee, notwithstanding the fact that there was no dishonesty on the part of the representor, nor any contract or fiduciary relationship between the two parties. Examples of this rule are *Burrowes* v *Lock*[50] and *Slim* v *Croucher*.[51] Both cases were decisions in the concurrent jurisdiction, as the judges in both accepted the existence of an action at law. *Derry* v *Peek* altered all this. Although Davidson convincingly argues that *Slim* v *Croucher* and *Burrowes* v *Lock* were not overruled by *Derry* v *Peek*, he concludes:[52]

> It thus has been accepted that there is no doctrine in Equity that a person who made an untrue representation could in the absence of fraud be compelled to make it good.

Davidson argues further that dicta of Viscount Haldane and Lord Dunedin in *Nocton* v *Ashburton* mean that equitable relief for careless though honest misrepresentations is not available in the exclusive jurisdiction of equity either. The result of this is that there is no recourse in equity for loss incurred due to misrepresentation. It is furthermore unlikely that there will be a resurgence of equity in this area, since the common law developments in the law of negligence flowing from the decision in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* render such resurgence unnecessary.[53]

On the other hand, it is now well-established that equitable compensation can be awarded for breach of fiduciary duty, where, of course, the remedy is clearly awarded in the exclusive jurisdiction of equity. The leading cases in New Zealand are *Coleman* v *Myers,*[54] *Day* v *Mead,*[55] and *Mouat* v *Clark Boyce*.[56] It is also well established in New Zealand that equitable compensation can be awarded for breach of confidence: see *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*,[57] *Attorney General for the United Kingdom* v *Wellington Newspapers Ltd (No 2)*,[58] and *Aquaculture Corporation* v *NZ Green Mussel Co Ltd*.[59]

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49 Above n 1, 357.
50 (1805) 10 Ves 470; 32 ER 927.
51 (1860) 1 De G F & J 518; 45 ER 462.
52 Above n 1, 368.
53 [1964] AC 465.
54 Above n 8.
55 Above n 11.
56 Above n 14.
57 Above n 9.
58 Above n 10.
59 Above n 13.

Furthermore, statements in the Court of Appeal clearly suggest that equitable compensation is now available in New Zealand to remedy a breach of *any* equitable duty. In *Aquaculture*, for example, the majority joint judgment stated:[60]

> 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 any other duty deriving historically from equity* ....

Likewise, in *Day* v *Mead* Somers J stated: "I doubt whether it is necessary or right to attempt to limit the occasions upon which a Court of equity might have awarded 'damages'."[61]

Unlike this broad New Zealand approach, however, it is likely that equitable compensation enjoys a more limited range of operation in Australia.[62] In *Catt* v *Marac Australia Ltd*[63] Rogers J, citing Dixon AJ in *McKenzie v McDonald*, described equitable compensation as a "jurisdiction to remedy breaches of fiduciary duty (which) extends to decreeing compensation to the person whose confidence has been abused." His Honour, however, had earlier cited with approval the judgment at first instance of McLelland J in *United States Surgical Corporation* v *Hospital Products International Pty Ltd*.[64] McLelland J stated that the court has "an inherent power to grant relief by way of monetary compensation for breach of a fiduciary or other equitable obligation." In the more recent case of *Hill* v *Rose*,[65] however, Tadgell J appears to have viewed the remedy as limited to redressing a breach of fiduciary duty.

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60 Above n 13, 301 (emphasis added). What remains a little unclear is whether equitable compensation (and other equitable remedies, particularly proprietary remedies) might now be available for breaches of duty deriving historically from the common law (eg breach of contract, or tort). There are some "advantages" to equitable compensation, which will be outlined in Part III herein, which may in due course cause this question to arise for decision: see below n 66. Were such an extension to be recognised, it would of course, in the context of the present discussion of equitable compensation, do away with the distinctions drawn between the exclusive and other jurisdictions of equity. See further for criticism of the "mingling" of law and equity, Aitken, above n 1, 604-605: "... it may ... be said that a basis for arguing almost anything at all can be culled from ... recent [New Zealand decisions]."

61 Above n 11, 460.

62 The recent examination of the Australian position as compared with New Zealand and Canada, by Aitken, above n 1, tends to confirm this view. Aitken suggests indeed that (at 596) "[t]he remedy is a 'manifestation' of the court's power in its equitable jurisdiction over a fiduciary ..."

63 (1986) 9 NSWLR 639, 660.

64 [1982] 2 NSWLR 766, 816. See also *Markwell Bros Pty Ltd* v *CPN Diesels Qld Pty Ltd* [1983] 2 Qd R 508; and *Fraser Edmiston Pty Ltd* v *AGT (Qld) Pty Ltd* [1988] 2 Qd R 1.

65 [1990] VR 129, 143.

III THE DIFFERENCES BETWEEN EQUITABLE COMPENSATION AND DAMAGES IN TORT

A plaintiff will often be able to found claims on a number of causes of action. A common example of this is a suit against a defendant solicitor concurrently in tort for negligence, in contract for breach of contract, and in equity for breach of fiduciary duty. Remedies available under different causes may then lead to different results.[66] In this context one question which is becoming increasingly important is whether there are any differences between the remedies of equitable compensation and tortious damages.[67] This question is important for two reasons. First, it has immediate practical consequences for parties and their legal advisers. The following discussion will be in large part an attempt to survey these practical consequences. Secondly, the question is one of three central theoretical questions which, it is suggested, are the focus of much present attention in the New Zealand law of civil obligations. The others are, first, the issue of the boundaries of tort, contract, restitution and equitable obligations, and indeed, whether such boundaries can usefully be delineated any more;[68] and, second (as another distinct aspect of the doctrine of remedial flexibility), the place of proprietary relief in the law of obligations.[69] The following discussion will reveal liberalising trends in the law of compensation in equity, which are consistent with and add further support to the liberalising trends in respect of the other two issues. A number of points of potential difference between equitable compensation and tortious damages will now be discussed in further detail.

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66 It must be noted that there are signs, some of which are referred to in this paper, of a general movement towards an "appropriateness" test for the applicability of civil remedies in the New Zealand law of obligations. Such an approach would, it appears, ignore in particular the law/equity divide, and award whichever of the full range of common law and equitable remedies is most appropriate. A clear proponent of this view is Hammond J: see *Countrywide Finance Ltd* v *State Insurance Ltd*, unreported, High Court, Auckland Registry, CP 792/91, 6 April 1993; and *Butler* v *Countrywide Finance Ltd* [1993] 3 NZLR 623. See also *New Zealand Land Development Co Ltd* v *Porter*, above n 37, at 468-469 (per Tipping J). A similar philosophy undergirds the Court of Appeal's development of remedial flexibility: see cases cited above nn-, especially (per Cooke P) *Mouat* v *Clark Boyce*, above n 14, at 566: "What is most appropriate to the particular facts may be granted ..."; and *Watson* v *Dolmark Industries Ltd* [1992] 3 NZLR 311. See discussion by Aitken, above n 1, 601-603.

67 Cf the remarks of Cooke J, above n 9. A comparison is not often expressly drawn between equitable compensation and damages for breach of contract, largely because there is a fundamental distinction between consensually undertaken obligations and obligations imposed by law: see further the judgments of Tipping J referred to below n 68.

68 See, as contributions to this discussion, cases referred to above n 66; *Sinclair Horder O'Malley & Co* v *National Insurance Co of NZ Ltd* [1992] 2 NZLR 706 (HC); *Simms Jones Ltd* v *Protochem Trading NZ Ltd* [1993] 3 NZLR 369; DW McLauchlan "The 'New' Law of Contract" [1992] NZ Recent LR 436.

69 See *Liggett* v *Kensington* [1993] 1 NZLR 257.

A *The Nature of the Remedy*

1 *Equitable compensation - hints of restitution*

It has been suggested that the nature of equitable compensation is "compensatory", ie directed at compensating the plaintiff's loss rather than disgorging the defendant's gain. Most case law authority points to this understanding.[70] In contrast, in the important Canadian Supreme Court decision in *Canson Enterprises Ltd* v *Boughton & Co*[71] La Forest J saw the function of equitable compensation as "restoratory", ie to return the plaintiff to his or her position prior to the breach, whether by compelling the defendant to disgorge a gain, or by indemnifying the plaintiff for any loss suffered.[72] With respect, it is unclear why compensation is required to relieve a defendant of his or her gain derived from the breach of equitable duty. One would have thought that calling the defendant to account would provide an adequate *personal* monetary remedy,[73] so that equitable compensation could then properly be reserved for those cases where the plaintiff has actually sustained loss from the relevant breach. A number of difficult issues arise if equitable compensation is to be used in a restitutionary manner akin to an account of profits.[74] Will it be subject to any remoteness test? Can exemplary damages, on the basis that such can be awarded in equity,[75] be awarded in addition to the basic award? In this latter context, for example, in *Estate Realties Ltd* v *Wignall (No 2)*,[76] Tipping J appeared to deny the availability of a separate punitive component within an account of profits. Such an analysis might make proceeding under equitable compensation, to obtain what is more correctly an account of profits, an attractive proposition for any plaintiff who thinks there is hope of an additional exemplary damages award. A clear distinction between loss and gain needs to be maintained to avoid these conundrums.

In New Zealand, the President of the Court of Appeal, in one judgment at least, appears to have viewed equitable compensation in a manner similar to La Forest J. In *Day* v *Mead* Cooke P stated: "Compensation or damages in equity were traditionally said to aim at restoration or restitution, whereas common law tort damages are intended to compensate for harm done; but in many cases, the present being one, that is a

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70 See above n 3, 932; above n 64, 816; and above n 65, 143.

71 (1992) 85 DLR (4th) 129.

72 Above n 71, 146. See also *Re Dawson (dec'd)* [1966] 2 NSWR 211 and *Commonwealth Bank of Australia* v *Smith* (1991) 102 ALR 453, 479-480.

73 The proprietary remedy usually used to disgorge a defendant's gain is, of course, the constructive trust. There is a useful discussion of the nature of restitutionary remedies in Sir Peter Millett "Bribes and Secret Commissions" [1993] RLR 7. Millett is opposed to any concept of "damages for breach of fiduciary duty", since in his view "[equity's] object is not compensatory" (at 21).

74 See also Aitken, above n 1, 598-599.

75 See *Aquaculture*, above n 13, and discussion below in Part III E.

76 [1992] 2 NZLR 615, 629.

difference without a distinction."[77] In the same case, however, Casey and Somers JJ adopted the view that the remedy is compensatory (in the generic sense).[78]

In contrast, delivering judgment on behalf of himself, Richardson, Bisson and Hardie Boys JJ in *Aquaculture*, Cooke P 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 ... "[79] This hints at a more limited (compensatory) role for equitable compensation than that his Honour expressed in *Day* v *Mead*. In *Mouat* v *Clark Boyce*, Cooke P appears to have moved even further away from the position of La Forest J, when he distinguished compensation from restitution:[80] "For breach of these duties, now that common law and equity are mingled, the Court has available the full range of remedies, including *damages or compensation* and *restitutionary remedies such as an account of profits*."

The point is thus far somewhat academic, since the New Zealand cases involving equitable compensation have invariably dealt with plaintiffs who have suffered loss. Claims for restitution in equity in New Zealand are properly met by an account of profits or a proprietary remedy.[81]

In Australia, the decision of Rogers J in *Catt* v *Marac Australia Ltd*[82] supports the proposition that the measure of equitable compensation is the loss to the plaintiff rather than the gain to the defendant. In the latter situation, an account of profits is the appropriate remedy. In the more recent Victorian case of *Hill* v *Rose*, however, Tadgell J clearly envisaged the measure of equitable compensation as being directed *either* to the plaintiff's loss *or* the defendant's gain, although the latter was not essential.[83]

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77 Above n 11, 451.

78 Above n 11, 460-1, 468.

79 Above n 13, 301.

80 Above n 14, 566 (emphasis added).

81 Aitken, above n 1, 598, cites *Cook* v *Evatt (No 2)* [1992] 1 NZLR 676 as an example of a case where both approaches - compensation and restitution - were available and would lead to different results. Fisher J adopted the restitutionary approach. This, it is suggested, was the correct approach. Once restitution of the defendant's gain is effected, it cannot be said that loss is of further relevance (see above text at nn 37-43). If restitution is not at issue, there having been no gain, loss is the relevant benchmark. If gain and loss are kept differentiated, there should be no difficulty. If they impinge upon each other (see, for example, Cooke P's comment in *Day* v *Mead*, as cited above n 77), problems will ensue. Further, if gain and loss arise on the same facts (as in *Cook* v *Evatt (No 2)*), what is the objection in permitting the defendant to sue for the greater amount, with a clear understanding that double recovery will not be available (see Aitken, above n 1, 605)? See also *Attorney-General for Hong Kong* v *Reid* [1993] 3 WLR 1143, 1146, per Lord Templeman:

> " ... [I]t is said that if the fiduciary is in equity a debtor to the person injured, he cannot also be a trustee of the bribe. But there is no reason why equity should not provide two remedies, so long as they do not result in double recovery."

82 Above n 63, 659 citing McLelland J in *United States Surgical Corporation* v *Hospital Products International Pty Ltd*, above n 64.

83 Above n 65.

2 Tort law damages - purely compensatory

The purpose of damages in tort law is to award such a sum of money as will as nearly as possible put the person who has been injured, or otherwise suffered a loss, in the same situation as he or she would have been in if the wrong had not been committed. As such, it is entirely compensatory. As Cooke P pointed out in *Day* v *Mead*, in practice the difference between tort law damages and equitable compensation will often be one without a distinction.[84] This does not mean, however, that there are no points of difference, as will be revealed herein.

B The Date of Assessment

1 Equitable compensation

In Canada equitable compensation is assessed at the time of trial, with the full benefit of hindsight.[85] There is no reason to think this test will not also be adopted in New Zealand, particularly since equitable damages are clearly assessed at time of trial.[86]

2 Tort law damages

The general rule for tort damages is that they are assessed at the date the tort is committed.[87]

C The Relevance of Causation and Remoteness

The common law is concerned with whether on a particular occasion a particular act or omission *contributed* to the occurrence of a particular event (causation) and, if so, with whether *responsibility* should attach to that act or omission (remoteness).[88] Both causation and remoteness act as restraints in awarding relief. By way of contrast, the traditional view has been that issues of causation and remoteness are not relevant in awarding equitable compensation.[89] This is a view which is now strongly challenged in New Zealand law.

1 Causation and contributory fault - tort analogy or equity based?

In *Re Dawson* Street J stated that "[c]onsiderations of causation ... do not readily enter into [equitable compensation].... Rather the inquiry in each instance would appear

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84 Above n 11, 451.
85 *R* v *Guerin* [1984] 2 SCR 335.
86 Above text to n 29 ff.
87 *Miliangos* v *George Frank (Textiles) Ltd* [1976] AC 443, 468.
88 *Alexander* v *Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 348 (per McHugh JA).
89 *Re Dawson*, above n 72.

to be whether the loss would have happened had there been no breach".[90] This dictum was cited with approval by Somers J in *Day* v *Mead*.[91] Street J's statement appears to require some link between the plaintiff's loss and the defendant's breach of duty. In fact, it is apparent that his dictum is semantically, and substantively, similar to the "but for" test of causation found in tort law. The words "had there been no breach" appear indistinguishable from the phrase "*but for* the breach". If there must be some connection of the loss to the breach of equitable duty, and it is to be found in this "but for" link, this is equivalent to the *sine qua non* causation test found in tort law. The real question can only therefore be whether the test in tort is more limited.

One possibility for testing this issue lies in *the effect of contributory fault*. In tort, a plaintiff's contributory negligence limits the extent of a defendant's liability. However, if Street J's view in *Re Dawson* is taken literally, then perhaps, for the purposes of equitable compensation, even contributory fault on the part of the plaintiff will not prevent the defendant's breach of duty from being the *causa sine qua non* of the plaintiff's loss. The leading appellate decision to touch on causation in equitable compensation in New Zealand dealt with the issue of contributory fault. This is *Day* v *Mead*.[92] That case is authority for the proposition that a defendant's liability to make compensation in equity will not extend to losses incurred when it can be said that the plaintiff, rather than the defendant, was the author of the misfortune. In other words, it is clear that contributory fault on the part of the plaintiff will be taken into account in assessing the quantum of equitable compensation. The central controversy here is the *basis* on which such fault on the part of the plaintiff should be taken into account. An answer to this question may provide further insight into the range of considerations of causation in equitable compensation cases.

The first approach taken in *Day* v *Mead* was a simple tort analogy approach. Cooke P was of the opinion that, assuming that the Contributory Negligence Act 1947 did not apply to equitable compensation, it was nonetheless helpful as an analogy. His Honour suggested that, in equity, damages should only be awarded against a defendant to the extent that he or she was responsible for any loss suffered by the plaintiff. Furthermore, taking the full loss suffered by the plaintiff and reducing it by reason of

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90 Above n 72, 215. Approved by the Federal Court of Australia in *Commonwealth Bank of Australia* v *Smith*, above n 72, 480.

91 Above n 11, 461. See also *Marriott* v *Dowd Thomason Strachan & Moultrie*, unreported, High Court, Tauranga Registry, CP 81/91, 19 March 1993, Tompkins J.

92 Above n 11. See also *Mouat* v *Clark Boyce*, above n 14; *Lankshear* v *ANZ Banking Group (New Zealand) Ltd* [1993] 1 NZLR 481 (discussed by CEF Rickett "Banks as 'Stranger' Constructive Trustees: Two High Court Decisions" [1992] NZLJ 366, 366-370); and *Simperingham* v *Skeates*, unreported, High Court, Auckland Registry, CP 292/89, 3 June 1993, Thorp J. See for further discussion on matters of apportionment in equity, JD Davies "Compensation in Equity for Losses", Paper presented at Second International Symposium on Trusts, Equity and Fiduciary Relationships, University of Victoria, British Columbia, Canada, 20-23 January 1993; and JK Maxton "Equity" [1993] NZ Recent LR 141.

the plaintiff's "contributory negligence" was a convenient way of doing this.[93] Hillyer J[94] appeared to approach the question on the same basis as the President.[95]

Cooke P did recognise, however, that, in cases of breach of fiduciary duty, before a court reduces an award on the ground that a claimant has partly been the author of his or her own loss, the court should give weight to the well-established principle that, largely for exemplary purposes, high standards are expected of fiduciaries. The practical impact of this observation is unclear.[96]

Somers J, on the other hand, eschewed the tort analogy approach of Cooke P. His Honour preferred to place his own decision entirely within equity, stating that any assessment of equitable compensation would reflect whatever was required by the justice of the case, according to considerations of conscience, fairness and hardship, and other equitable features such as laches and acquiescence.[97] His Honour concluded, on the facts, that it would be "unfair and unjust" to impose total liability on the defendant as the want of care for his own property on the part of the plaintiff went beyond reliance on the defendant, and approached acquiescence.

Casey J also adopted an equity-based approach, stating that the basic ideal of controlling unconscionable conduct underlying the jurisdiction in equity justified an approach aimed at awarding a party no more than the loss fairly attributable to the defendant, or no more than the property or expectation of which he had been deprived.[98]

Generally, therefore, it seems that even if an equity-based approach is adopted, causation for equitable compensation is not markedly different from causation in tort. There is a recognition in New Zealand that "equitable" considerations may well limit the range of loss which can realistically be said to be caused by a defendant.

One situation where there could still be a difference, however, is the case of loss caused by a *breach of fiduciary duty arising from non-disclosure of a conflict of duty or a*

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93 Above n 11, 469.

94 In *Mouat* v *Clarke Boyce*, above n 14, 568, Cooke P suggested that Hillyer J's approach was to "deal with omissions by the plaintiff as going to causation".

95 Cooke P repeated this "tort analogy" argument in *Mouat* v *Clarke Boyce*, above n 14, 566; and it appears to have been the basis upon which Thorp J recognised abatement in *Simperingham* v *Skeates*, above n 92: "... the principles underlying the abatement of equitable compensation are the same as those which govern assessment of contributory negligence, so that the amount of any reduction should be such an amount as is found by the Court to be just and equitable, having regard to the claimant's share in the responsibility for the loss, and that this involves consideration not only of the causative potency of a particular factor but also of its blameworthiness ..."

96 In *Simperingham* v *Skeates*, above n 92, Thorp J said that this factor caused him to apportion responsibility equally between the parties, rather than to hold (as he would otherwise) that the major responsibility lay with the plaintiff. See also below n 99.

97 Above n 11, 462.

98 Above n 11, 468. Cooke P regards this as a causation test: see above n 94.

significant likelihood of such a conflict. Brickenden v *London Loan & Savings Co*[99] is Privy Council authority for the proposition that, once the court has determined the materiality of the non-disclosure, speculation as to what course the aggrieved party, on disclosure, would have taken is not material. This case was not mentioned in the various judgments in *Day* v *Mead* or *Mouat* v *Clark Boyce*, but was cited with approval by McMullin J in the Court of Appeal in *Farrington* v *Rowe McBride & Partners*.[100] In this *particular* instance, therefore (ie equitable compensation for breach of fiduciary duty arising from material non-disclosure), a strict "but-for" causation test may well apply without more. This is possibly much stricter than common law causation, since contributory negligence and consideration of supervening events would both appear to be deemed irrelevant.[101]

2 *Remoteness*

In the law of torts, the defendant is not liable for damage unless it is of a class or kind which is reasonably foreseeable as the result of the wrongful act or omission.[102]

In light of this, it is intuitively unreasonable to suggest that the dictum of Street J in *Re Dawson* quoted above should be taken literally, as suggesting that equitable compensation requires that the liability of a person who has breached an equitable obligation should be unfettered by any considerations as to remoteness of damage. This would result in a rule of equity harsher in its application than the common law rule. As Derek Davies puts it, in respect of defaulting fiduciaries, "[a] fiduciary should not be treated as a guarantor even if he is in breach."[103]

There is, however, a firmer basis for the rejection of a literal interpretation of Street J's proposition. If his Honour is correct, then there will be no concept of *novus actus interveniens* within equitable compensation. Two points can be made in respect of this proposition. First, as Michael Tilbury notes,[104] in light of the inherent flexibility of equity and the wide variety of situations in which equitable compensation is likely to be awarded, it is surely too inflexible to say that considerations of justice will *always*

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99 [1934] 3 DLR 465. See also *Commonwealth Bank of Australia* v *Smith*, above n 72. In *Lankshear* v *ANZ Banking Group (New Zealand) Ltd*, above n 92, Wallace J indicated that, as had Cooke P in *Day* v *Mead*, apportionment would not readily be found as appropriate in cases where a plaintiff was a beneficiary of a fiduciary expectation as in those cases where the plaintiff was not a beneficiary of such expectation. See also *Simperingham* v *Skeates*, discussed above n 96.

100 [1985] 1 NZLR 83, 99.

101 *Brickenden* was cited in *Simperingham* v *Skeates*, above n 92, by counsel for the plaintiff, but Thorp J, while refusing to reconsider the basic proposition that case (with others) established, nevertheless did not see any problem in then applying an apportionment of responsibility.

102 See *Overseas Tankship (UK) Ltd* v *Morts Dock & Engineering Co Ltd (The Wagon Mound) (No 1)* [1961] AC 388, 426 and *Overseas Tankship (UK) Ltd* v *Miller Steamship Co Pty (The Wagon Mound) (No 2)* [1967] AC 617, 636.

103 Above n 92, 29.

104 Above n 16, para 3250.

require the exclusion of concepts of remoteness and *novus actus interveniens*. Secondly, following the decisions of the New Zealand Court of Appeal in *Day* v *Mead* and *Mouat* v *Clark Boyce*, and the Supreme Court of Canada in *Canson Enterprises*, this statement is almost certainly not accurate under existing law. *Day* v *Mead* admitted contributory fault into the consideration of equitable compensation in New Zealand. It is simply unthinkable that the Court of Appeal would be prepared to hold that the link between a defendant's breach of duty and the plaintiff's loss can be broken by the actions of the plaintiff (contributory negligence) but cannot be broken by the actions of a third party (*novus actus interveniens*).

Canson Enterprises is even more directly on point. The Supreme Court held that the necessary link between the defendant's breach of fiduciary duty and the plaintiff's loss was broken by the actions of third parties hired by the plaintiffs.[105] *Canson Enterprises* approaches a factual example of *novus actus interveniens* in the consideration of equitable compensation, and is the one of the few cases to deal directly with the issue of remoteness in equitable compensation. A solicitor acted for the plaintiffs in a purchase of land. The solicitor did not disclose the existence of an intermediate vendor between the purchasers and the party they thought was the vendor. The intermediate party was making a secret profit. Following the purchase, a warehouse the plaintiffs had had constructed on the land subsided due to the negligence of the engineers and pile drivers, who were then unable to meet the full damages awards against them. It was accepted that the plaintiffs never would have purchased the land had they been aware of the secret profit. It was clear that the defendant firm of solicitors were liable for the secret profit by virtue of their breach of fiduciary duty. In addition, however, the plaintiffs sought to recover from the solicitors the shortfall in the damages award for the warehouse subsidence.

The Supreme Court held unanimously that the additional damages claimed were not recoverable. In reaching that decision, however, the majority (La Forest J, with whom Sopinka, Gonthier and Cory JJ concurred)[106] and the minority (McLachlin J, with whom Lamer CJC and L'Hereux-Dub* J concurred) adopted quite different approaches to the problem.

The majority adopted a pragmatic approach which is very similar to the tort analogy approach used by Cooke P in *Day* v *Mead* in the context of contributory negligence.

The first point made by the majority is purely descriptive: the common law has a ready-made structure in place for determining issues such as remoteness and mitigation. Consequently, given the paucity of equity cases that deal with these issues, it is hardly surprising that when they *do* arise in a case of equitable compensation, the courts will deal with the case as if it were a common law matter or as justifying the use of the common law's mode of analysis.

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105 Above n 71, 164. See Aitken, above n 1, 603-604.

106 Stevenson J delivered a separate judgment in which his Lordship agreed with the judgment of La Forest J and substantially agreed with his reasoning.

The real thrust of the majority judgment is, however, *prescriptive*: not only *do* courts of equity utilise the common law method, but they *should*. Barring different policy considerations underlying one action or the other there is no reason why the same basic claim, whether framed in terms of a common law action or an equitable suit, should give rise to different types of redress.[107] Since similar policy considerations underlie most cases of breach of fiduciary duty and negligent misstatement, equitable compensation modelled on tort damages would appear to be the optimum remedy for loss caused in most cases of breach of fiduciary duty. If, however, there are different policy considerations underlying the actions brought, then the remedy must be found in the more appropriate system for those actions. This will often be in equity, because of its greater flexibility.

In *Mouat* v *Clark Boyce* Cooke P cited the judgment of La Forest J in *Canson Enterprises* with approval. His Honour stated that he preferred the approach of La Forest J to that of the minority because it seemed "more direct and natural".[108]

As a matter of common sense the majority's general approach seems irresistible. The common law's technique of keeping the issues of causation, remoteness and measure distinct must surely aid the question of remoteness within the framework of equitable compensation to be decided with the least risk of confusion.[109]

That said, the majority judgment in *Canson Enterprises* does not offer much assistance in the way of a concrete rule for remoteness. Stevenson J, in his supporting judgment, stated that the subsidence losses were "too remote, not in the sense of failing the 'but for' test but in being so unrelated and independent that they should not, in fairness, be attributed to the defendant's breach of duty".[110] This, likewise, is somewhat ambiguous.

Unlike the majority, the minority preferred to base their decision, that the subsidence losses were too remote, primarily on equity's roots in the law of trusts.

The minority view is that foreseeability does *not* enter into the calculation of compensation for equitable compensation for breach of fiduciary duty, but that nonetheless liability is not unlimited. In the area of breach of fiduciary duty, equitable compensation is limited to the loss flowing from the trustee's acts in relation to the interests he or she undertook to protect. While the loss must flow from the breach of fiduciary duty, it need not be reasonably foreseeable at the time of breach. In *Canson Enterprises* itself, according to the minority, the loss was the result, not of the solicitor's breach of duty, but of decisions made by the plaintiffs and those they chose to hire.[111]

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107 Above n 71, 148, 152.
108 Above n 14, 568.
109 Above n 92, 13.
110 Above n 71, 165.
111 Above n 71, 164.

Davies argues that the difficulty with the minority's appeal to trust law is that it is too uncertain; only a strict "but for" test would provide real clarity.[112] Furthermore, the minority's statement that the result in the case is to be reached by applying a "common sense view of causation" is not particularly helpful.[113]

Nothing in the majority judgment in *Canson Enterprises* is inconsistent with the tort rule vis-à-vis remoteness, ie that the defendant is only liable for injury or damage caused to the plaintiff that is reasonably foreseeable.[114] The subsidence losses suffered by the plaintiff in *Canson Enterprises* were not a reasonably foreseeable result of the defendant's breach of fiduciary duty. Thus, as in the case of tort (or contract) damages, equitable compensation does not compensate a plaintiff for *any* loss: the loss must have been caused by the defendant's breach of duty, and it must not be too remote.

Interestingly, remoteness is one aspect of the New Zealand law of civil obligations where there may well be convergence in respect of the entirety of tort, contract and equity in the not too distant future. The Court of Appeal has recently indicated a move away from a hard and fast rule as to remoteness in the area of damages for breach of contract, to an approach which appears flexible enough to be applied in tort and equity. In *McElroy Milne v Commercial Electronics*, Cooke P observed:[115]

> [R]easonable foresight or contemplation ... are always an important consideration. I doubt whether they are the only consideration. Factors including directness, "naturalness" as distinct from freak combinations of foreseeable circumstances, even perhaps the magnitude of the claim and the degree of the defendant's culpability, are not necessarily to be ignored in seeking to establish a just balance between the parties ... In the end it may be best, and may achieve more practical certainty in the New Zealand jurisdiction, to accept that remoteness is a question of fact to be answered after taking into account the range of relevant considerations, among which the degree of foreseeability is usually the most important.

Possibly Scarman LJ hinted at this [when he said]: "At the end of a long and complex dispute the judge allowed common sense to prevail."[116]

3 *The Australian position on remoteness, and a special approach to fiduciaries?*

In *Hill* v *Rose*,[117] Tadgell J followed *Re Dawson*, stating that equitable compensation was not limited or influenced by common law principles governing remoteness of damage, foreseeability or causation. His Honour appears to have supported the adoption of a strict "but for" test of remoteness. He stated:[118]

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112 Above n 92, 24-25.
113 Above n 71, 164. See, for Davies' own suggestion, text below at n 122.
114 Above n 102.
115 Above n 36, 43.
116 The appeal to common sense was used by McLachlin J in *Canson Enterprises*: above n 71, 164. See also above n 113.
117 Above n 65.
118 Above n 65, 144.

> The question for consideration is not whether the loss was caused by or flowed from the breach. Rather ... the enquiry in each case would appear to be whether the loss would have happened if there had been no breach.

Whether or not his Honour would actually have applied this test in the face of facts such as those in *Day* v *Mead* is unclear. In *Day* v *Mead* Somers J also purported to follow Street J's view in *Re Dawson*, and yet declined to impose total liability on the defendant for the loss suffered by the plaintiff. It would thus seem to be misleading to suggest, as Michael Evans does,[119] that *Hill* v *Rose* is authority for the proposition that equitable compensation in Australia is not limited or influenced by such matters as remoteness of damage. In practice, there are likely to be limits, although they may masquerade under a different description.

The New South Wales case of *Catt* v *Marac Australia Ltd*[120] appears to support a remoteness rule in equitable compensation. A firm of air charterers, "Jet", advertised for the acquisition of aircraft through partnership syndicates. Rogers J held that Marac, the financier in the venture, was a promoter and therefore owed a fiduciary obligation of disclosure to the plaintiffs (members of a syndicate). This obligation was breached. Rogers J held that the plaintiffs could recover *all* outgoings in connection with the partnership (ie including monies they had paid to another promoter, Jet) rather than simply the money they had paid to Marac. This is arguably akin to a strict "but for" test of remoteness. However, it is also possible to analyse the holding in the context of his Honour's characterisation of the particular fiduciary obligation owed by Marac ("the obligation to ensure that the [plaintiffs] were not damaged by the conduit established between them and Marac, by Marac"[121]), and Marac's breach of this. In other words, the approach of Rogers J to the issue of remoteness is consistent with a limited remoteness rule in respect of equitable compensation for breach of fiduciary duty. This is support for an argument presented by Davies.[122] Davies suggests that fiduciary law can provide its own remoteness rule without resort to either tort or trust analogies. He suggests that remoteness should be assessed by considering the nature and scope of the fiduciary's undertaking, and the *way* in which this undertaking was breached. This approach clarifies considerably a case such as *Canson Enterprises*. The undertaking of the solicitor in that case was presumably to serve the interests of his clients, the purchasers, with the utmost loyalty in the transaction for which he was employed, the sale and purchase of land. This naturally required him to disclose any conflict, or significant possibility of a conflict, between his *duty* to his clients, and his own self-interest or the interests of others. By not disclosing the secret profit in the transaction, the solicitor breached this particular duty of loyalty. However, this was the fiduciary's only breach, and he should therefore not be required to indemnify the plaintiffs against the subsidence losses. There is some support for this approach in the minority opinion in *Canson Enterprises*. McLachlin J stated that "equitable compensation must be limited to loss

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119 M Evans *Outline of Equity and Trusts* (2ed, Butterworths, Sydney, 1993) para 2504.
120 Above n 63.
121 Above n 63, 655.
122 Above n 92, 28. Cf observations at above n 99.

flowing from the trustee's acts in relation to the interest he undertook to protect".[123] One weakness of this approach is that, since it requires a consideration of the defendant's range of undertakings, it will not provide clear guidelines for dealing with the issue of remoteness in other *non-consensual contexts*, as in some cases of mandatory fiduciary duties. Here the court will need to provide an interpretation of a defendant's range of understandings. Further, if equitable compensation is available beyond breaches of fiduciary duties,[124] many of the circumstances in which a claim might arise are likely to be cases where it would be unrealistic to talk about a defendant's undertaking. The court will need, therefore, to make a unilateral determination on issues of remoteness. The "common sense" approach may be the best we can do. Any undertaking by the fiduciary becomes but one of the factors to be taken into account.

4 Measure

If equitable compensation is properly restricted to cases where the plaintiff has suffered loss,[125] the *measure* of such compensation will often coincide with that available under tort (or contract) law, as applicable. In *Day* v *Mead* Cooke P noted that the difference between equitable compensation, even with its restoratory function (as Cooke P there suggested was its nature), and common law damages, with its compensatory function, is often "a difference without a distinction."[126] When the function of equitable compensation is properly understood to be compensatory, the point is even stronger. Similarly, in *Bartlett* v *Barclays Bank Trust Co (No 2)*, a case dealing with a defaulting trustee's obligation to make restitution to the trust estate, Brightman LJ stated:[127]

> The so-called restitution which the defendant must now make to the plaintiffs, ... is in reality compensation for loss suffered by the plaintiffs and the settled shares, not readily distinguishable from damages except with the aid of a powerful legal microscope.

In *Canson Enterprises*, La Forest J (whose judgment Cooke P cited with approval in *Mouat* v *Clark Boyce*) stated that where the measure of the duty is the same, ie where equity and law have the same policy objectives, the result should be the same.[128]

In *Catt* v *Marac Australia Ltd*,[129] Rogers J suggested, however, that, "unlike Common Law damages, there is no call made by Equity of great exactitude in the

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123 Above n 71, 160. See also the observations of Cooke P in *Watson* v *Dolmark Industries Ltd*, above n 66, 316.

124 See text above at nn 60-61.

125 See text above at n 71 ff.

126 Above n 11, 451. See also *Commonwealth Bank of Australia* v *Smith*, above n 72, 480.

127 [1980] 1 Ch 515, 545.

128 Above n 71, 152. La Forest J cited the judgment of Somers J in *Day* v *Mead* in support of this proposition. However, his Honour was there only addressing concurrent liability in tort and contract, and not in equity and law.

129 Above n 63, 661.

determination of quantum of equitable compensation". This statement was probably directed, however, at the compensatory liability in *Catt* of the co-defendants *inter se*, rather than to the issue of the total quantum of compensation.[130]

D *Compensation for Emotional Distress*

Damages for mental distress are clearly available as a component of general damages at common law.[131] There are clear signs that such damages may be available in equity as well.

In *Mouat* v *Clark Boyce* the Court of Appeal upheld a decision of Holland J awarding the plaintiff, inter alia, $25,000 for mental stress. Cooke P noted the many tort, contract and statutory cases in New Zealand in which foreseeable distress had been an ingredient of the damages award. His Honour stated:[132] "There appears to be no solid ground for denying that equitable compensation can likewise extend so far. It would be anachronistic to draw distinctions in this respect between the various sources of liability, dictated as they are by the same considerations of policy." It appears, furthermore, that his Honour would limit this head of recovery within the framework of equitable compensation not only to those cases where it is foreseeable, but also where it is not excluded by any considerations of policy. He opined:[133]

> The Courts have stopped short of giving stress damages for breach of ordinary commercial contracts. Such damages may be foreseeable, but I think that the restriction may be seen as justified by policy. Stress is an ordinary incident of commercial or professional life. Ordinary commercial contracts are not intended to shelter parties from anxiety. By contrast one of the very purposes of imposing duties on professional persons to take reasonable care the safeguard the interests of their clients is to enable the clints to have justified faith in them. In my view an award of

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130 In those cases where a plaintiff recovers damages for loss of earnings, *British Transport Commission* v *Gourley* [1956] AC 185 (HL) requires the quantum to be reduced to take account of tax liability. This principle has been accorded a restricted scope in New Zealand: see *Smith* v *Wellington Woollen Manufacturing Co Ltd* [1956] NZLR 491 (CA) - but cf now Accident Compensation legislation; *North Island Wholesale Groceries* v *Heurin* [1982] 2 NZLR 176 (CA); *Drower* v *Minister of Works and Development* [1984] 1 NZLR (CA). In *Aquaculture* (see (1986) 1 NZIPR 678, 686 (HC)) the plaintiff obtained $1.5 million in equitable compensation for, inter alia, loss of profits; on the assumption that profits would have been taxable, it is instructive to note that the *Gourley* principle was *not* applied. It is likely that the same restricted approach applies in both tortious damages and equitable compensation awards.

131 See *Steiler* v *Porirua City Council* [1986] 1 NZLR 84 (CA); *Hamlin* v *Bruce Stirling Ltd* [1993] 1 NZLR 374 (HC).

132 Above n 14, 569. Richardson J preferred to rest his decision in *Mouat* entirely on tort, and required emotional distress to be "a reasonably foreseeable consequence of the particular breaches of duty ..." (at 573). See also *McKaskell* v *Benseman* [1989] 3 NZLR 75 (HC). Gault J merely accepted Holland J's award "whether considered as arising in contract or tort" (at 575).

133 Above n 14, 569.

> stress damages to the present [plaintiff - the elderly widow client of a solicitor] was well warranted, whether in tort or contract or as equitable compensation. This does not mean that a commercial client could necessarily recover such damages ...

This development is not surprising in light of the general trend towards apparent simplification in respect of both bases of liability and remedial responses in the New Zealand law of civil obligations.[134]

E Exemplary damages

The House of Lords in *Rookes* v *Barnard*[135] held that exemplary damages were available in tort only in exceptional circumstances. This limited approach was rejected by the New Zealand Court of Appeal in *Taylor* v *Beere*.[136] Since *Taylor*, "[e]xemplary damages are available in a wide range of circumstances, at least where malice is involved".[137] Notwithstanding this, the fact remains that the typical situations where concurrent actions are available to a plaintiff are unlikely to be sources of exemplary damages for the plaintiff, for the simple reason that malice or recklessness[138] is often lacking in such cases.

The availability of exemplary damages at common law is, of course, particularly useful in a situation where compensatory damages are barred by the Accident Rehabilitation and Compensation Insurance Act 1992.[139] In some circumstances all remedies in tort might be unavailable, but if the case can be pleaded in equity both compensatory and exemplary damages may be granted. One example of such a case is provided by the Canadian case of *K M* v *H M*.[140] The defendant sexually molested the plaintiff as a young girl. The plaintiff brought an action some years later alleging breach of fiduciary duty (to avoid limitation rules). The Supreme Court found a breach of fiduciary duty by the defendant and awarded the plaintiff both compensatory and exemplary damages in equity.

It was accepted by the Court of Appeal in *Aquaculture*[141] that exemplary damages are available in equity in New Zealand. Exemplary damages are awarded only so far as compensatory damages do not adequately punish the defendant for outrageous

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134 One commentator has picturesquely suggested that Cooke P "appears to contemplate confectioning a potpourri of claims and remedies from which, according to the tribunal's taste, an appropriate selection can be made": see Aitken, above n 1, 601.

135 [1964] AC 1129. See also *Broome* v *Cassell & Co Ltd* [1972] AC 1027.

136 [1982] 1 NZLR 81.

137 S Todd et al *The Law of Torts in New Zealand* (Law Book Co Ltd, Sydney, 1991) 871.

138 See *SSC&B Lintas NZ Ltd* v *Murphy* [1986] 2 NZLR 436.

139 See *Matheson* v *Green* [1989] 3 NZLR 564 (CA).

140 [1992] 3 SCR 6. See also *Norberg* v *Wynrib* [1992] 2 SCR 226.

141 Above n 13. See also *Watson* v *Dolmark Industries Ltd*, above n 66, 316.

conduct.[142] Although *Aquaculture* itself concerned a breach of confidence, it is clear that Cooke P (delivering judgment on behalf of the majority of the Court) envisaged the availability of exemplary damages wherever equitable compensation was available, ie for breach of a duty of confidence or any other duty deriving historically from equity.[143]

The view has been expressed in Australia that exemplary damages are not and ought not to be available in equity.[144] This view is based largely upon the policy of the courts to award interest (on equitable compensation payable) only so far as is necessary to truly compensate the plaintiff, and not as a penalty.[145] This approach, however, appears indistinguishable from the New Zealand view that interest on equitable compensation is compensatory.[146] Consequently, the interest argument no more supports the proposition that exemplary damages are not available in equity in Australia than it supports the same proposition in New Zealand.

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142 Above n 13. In *Cook* v *Evatt (No 2)*, above n 81, Fisher J stated that three elements must be satisfied before exemplary damages in equity will be awarded: (a) the defendant's conduct must have been so outrageous that punishment is called for as an end in itself; (b) such other remedies as the defendant will have to bear in any event must fall short of being adequate punishment; (c) exemplary damages should be awarded only in "serious and exceptional" cases. To these requirements might be added the observation, drawn from the comments of Cooke P in *Mouat* v *Clark Boyce*, quoted in the text to n 133 above, that in a commercial case, awards of exemplary damages either where the defendant's conduct is outrageous because basically it has resulted in injury to feelings, or where perhaps it cannot be regarded as far enough removed from the expectations of commercial practice so as to be characterised as outrageous, may be inappropriate. See also *Norberg* v *Wynrib*, above n 140.

143 Exemplary damages were awarded in *Collier v Creighton*, unreported, High Court, Christchurch Registry, CP 13/89, 7 May 1991, Roper J (there was no discussion of exemplary damages in the decision of the Court of Appeal in the case, see *Official Assignee of Collier* v *Creighton* [1993] 2 NZLR 534, where the claim was held to be time-barred); *Cook* v *Evatt (No 2)*, above n 81; *British Markitex Ltd* v *Johnston*, unreported, High Court, Christchurch Registry, CP 693/88, 1 November 1991, Fraser J. Cf *Estate Realties Ltd* v *Wignall (No 2)*, above n 76, where Tipping J (at 629) appeared to deny the availability of a separate punitive component in equitable compensation awards. He suggested that "to introduce a penal or punitive element is in my respectful view unsound in principle and not supported by any authority." In light of *Aquaculture* the latter part of this statement is clearly incorrect.

144 See Evans, above n 119, para 2504; and Aitken, above n 1, 599-600.

145 *Hagan* v *Waterhouse*, unreported, NSW Supreme Court, Kearney J, 28 November 1991, 457-461; *Southern Cross Commodities Pty Ltd (in liq)* v *Ewing* (1987) 11 ACLR 818, 848; *Hungerfords* v *Walker* (1989) 63 ALJR 210, 217. See also Aitken, above n 1, 599.

146 *Day* v *Mead*, above n 11, 464 (per Somers J). The Court of Appeal unanimously held that section 87(1) of the Judicature Act 1908 applies to equitable compensation. That provision confers a discretion - "the Court may if it thinks fit, order ... interest as it thinks fit" - which discretion applies to both equitable compensation and common law damages.

One Australian commentator has suggested that exemplary damages "ignores the *compensatory* element which lies at the heart of the equitable intervention."[147] The key point here is a desire to maintain a clear substantive distinction between equity and common law. It is perhaps not surprising in view of the flexible approach now evident in the New Zealand law of civil obligations and remedies that the compensatory jurisdiction of equity should be practised so as to mirror the compensatory jurisdiction in tort law, where a punitive element is well established. It has, further, been suggested that awards of exemplary damages *against* defendants in equity are inconsistent with awards of allowances *in favour of* defendants in equity.[148] However, this view is unsound, failing as it does to recognise two distinct types of defendant. Exemplary damages are reserved for particularly undeserving defendants; allowances awards are made to defendants who are essentially only in technical breach.

F Mitigation of Loss

At common law a duty exists to take all reasonable steps to mitigate the loss consequent on the relevant breach. Failure to do so bars the plaintiff from claiming any part of the loss which is due to his or her neglect to take such steps.[149]

Mr Justice Gummow has suggested, extra-judicially, that equity has no need to import common law doctrines of mitigation into equitable compensation:[150] equity is quite capable of dealing with the matter by holding that a plaintiff who allows his or her losses to continue unchecked is guilty of laches or acquiescence.

In Canada, a different approach to mitigation in equity was offered by McLachlin J in *Canson Enterprises*. Her Ladyship stated that while a plaintiff will not be required to act in as reasonable and prudent a manner as might be required in negligence or contract situations, losses stemming from the plaintiff's *unreasonable* actions will be barred. What, however, is "unreasonable " in this context? It seems that if a plaintiff after (i) due notice, *and* (ii) opportunity, fails to take the most obvious steps to alleviate his or her losses, the defendant's liability duly ceases. Until that point however, mitigation is not required.[151]

In New Zealand, it is likely, in light of the positive approach taken to the concepts of causation and remoteness in the law of equitable compensation, that a mitigation standard will be recognised as applicable. Further, in accord with the synchronisation of

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147 Aitken, above n 1, 600 (emphasis added).

148 Aitken, above n 1, 600. Allowances in equity are discussed below in the text to n 169.

149 *British Westinghouse Electric & Manufacturing Co Ltd* v *Underground Electric Rail Co of London Ltd* [1912] AC 673, 689 per Viscount Haldane LC.

150 WMC Gummow "Compensation for Breach of Fiduciary Duty" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) 75.

151 Above n 71, 161-162.

equity and tort in those respects, this may well be more like the common law standard than McLachlin J's standard.[152]

The principal difference is that, at common law, the plaintiff must take *all reasonable steps*, whereas in equity he or she need only take the *most obvious steps*. Not all steps that are reasonable are necessarily the "most obvious steps". McLachlin J's standard is likely therefore to give a plaintiff more leeway, but the difference may be fine in practice.

G Limitation of Actions

In *Day* v *Mead*, Somers J noted that there might be differences between common law damages and equitable compensation arising under the Limitation Act 1950.[153] Section 4(9) of the Act expressly states that it does not apply to claims for equitable relief, except, it appears, where the particular equitable claim falls within equity's *concurrent* jurisdiction.[154]

Equitable compensation is awarded within the *exclusive* jurisdiction of equity, and aside from the express exclusion of such cases by section 4(9), there is no *need* to resort to statutory limitation, as any dilatory claims within this jurisdiction will be subject to the pure equitable doctrines concerning delay. These are usefully summarised by Trevelyan:[155]

> There are two sets of rules under which lapse of time may operate as a defence to a suit in equity, and hence which comprise the law as to the effect of lapse of time; the first is the rules of laches, the second is the rules of acquiescence. There is a conceptual difference between these two sets of rules; in the former, lapse of time operates as a defence of itself, in the latter, lapse of time forms only one element of the defence.

"Laches" is expressly preserved by section 31 of the Limitation Act. Presumably the term "laches" as used in the Act is a generic term, encompassing "... all the rules under which lapse of time before a suit is brought can operate as a defence ...",[156] so that acquiescence is expressly preserved as well.

It is clear from the cases that these equitable doctrines apply to claims for equitable compensation. In *Nocton* v *Ashburton*, for example, Viscount Haldane made it clear that one of the plaintiff's claims to equitable compensation for breach of fiduciary duty was barred by the acquiescence of the plaintiff.[157] Similarly, in *Day* v *Mead*, Somers J stated that any assessment of equitable compensation would reflect whatever was

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152 See, for example, the comments of Cooke P quoted in text to n 115 above.

153 Above n 11, 461.

154 *Knox* v *Gye* (1872) LR 5 HL 656, 674. Such cases are dealt with by analogy to the rules in the Act; hence the phrase in section 4(9), "except in so far as any provision thereof may be applied by the Court by analogy".

155 LM Trevelyan "Limitations in the Law of Express Trusts" (1992) 22 VUWLR 51, 52.

156 J Brunyate *Limitation of Actions in Equity* (Stevens & Sons Ltd, London, 1932) 189.

157 Above n 3, 958.

required by the justice of the case, according to considerations of conscience, fairness and hardship and other equitable features such as laches and acquiescence.[158]

The important practical question, therefore, is whether, in situations where a plaintiff is able to claim both equitable compensation and damages in tort, different limitation rules might give rise to different results. This issue arose in *Matai Industries Ltd* v *Jensen*.[159] Matai went into receivership, which began in 1974 and ended in 1981. In 1984, Matai issued a proceeding against Jensen (its former receiver). It alleged (i) that the receiver owed the company a duty of care and that he had been negligent in breach that duty; and (ii) that the receiver stood in a fiduciary relationship with Matai, and that fiduciary duties had been breached. The defendant argued that some or all of the causes of action were time barred by statute. Tipping J held, inter alia, that Matai's cause of action against the receiver based on breach of fiduciary duty was exactly coincident with part of its first cause of action at common law against the receiver in negligence. In substance, Matai was endeavouring to put the same allegation on two different bases, one at law, and the other in equity. Applying the equitable maxim that one who seeks equity must do equity, Tipping J held that it would be inequitable that Matai should, in equity, circumvent the time barring of its cause of action at law.[160] Consequently, by analogy with the statutory bar to the legal cause of action, the equitable cause of action was also barred and should be struck out.

Tipping J's "analogy" approach is also very similar to Cooke P's approach in *Day* v *Mead*. Cooke P applied the Contributory Negligence Act 1947, by analogy, to a claim for equitable compensation.[161] Faced with a scenario where both equitable compensation and tortious damages are available, it is therefore probable that his Honour would be prepared likewise to apply the Limitation Act by analogy. Cooke P's philosophy[162] that law and equity are now "mingled" only reinforce this conclusion. Indeed, in *Day* v *Mead* itself, Cooke P suggested a uniform limitation period for tort and contract.[163] One can only reasonably expect a similar response vis-à-vis an equitable obligation.[164]

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158 Above n 13, 462.

159 [1989] 1 NZLR 525.

160 Tipping J had earlier held that the cause of action at law was barred. In *Official Assignee of Collier* v *Creighton*, above n 143, an action for breach of fiduciary duty was held to be time-barred, on the basis that (citing *Matai Industries*) a six-year limitation period was to be applied by analogy under s 4(9) of the 1950 Act. There was no discussion of this point, which is an unfortunate feature of the decision.

161 Above n 11. Hillyer J appears to have adopted a similar approach.

162 See cases cited above nn 8-14.

163 Above n 11, 450.

164 See also *Official Assignee of Collier* v *Creighton*, above n 143. In *Day* v *Mead*, both Somers and Casey JJ, while basing their analyses in equity alone, nevertheless reached the same *result* as Cooke P. Somers J, above n 11, 462, referred, in so doing, to acquiescence.

A different position appears to have been taken in Canada,[165] although the matter must be a little uncertain in light of La Forest J's comment in *Canson Enterprises* that, unless different policy considerations exist, the same basic claim, whether framed in common law or equitable terms, should not give rise to different levels of redress.[166]

H Equitable Discretions

Common law damages aim to vindicate the infraction of legal rights. Equitable remedies, on the other hand, are qualified in character. As Cooke P noted in *Day* v *Mead*, there is a significant historical difference in that courts of equity were regarded as having wider discretions than common law courts:[167]

> Equitable relief was said to be always discretionary. Its grant or refusal was influenced by ideas expressed in sundry maxims. He who seeks equity must do equity. He who seeks equity must come with clean hands. Delay defeats equity. These are merely examples. Further, relief could be granted on terms or conditions.

The type of discretion referred to in the last sentence quoted was exercised, for example, in *McKenzie* v *McDonald*.[168] The defendant induced the plaintiff to buy a shop which he valued at £2,000, but which was worth only £1,500. The court decreed that the defendant pay the plaintiff a specified sum in compensation, but obliged the plaintiff to allow the defendant to take back the shop, on terms as to value, if the defendant so elected.

Equitable discretion may be exercised in favour of the defendant in other ways. In particular, a court of equity is at liberty to grant a defaulting trustee or fiduciary, who is guilty of some technical breach of duty, but who has otherwise acted in good faith, some allowance for his or her efforts.[169] The basis for allowances in equity would appear to be one of the maxims cited by Cooke P - that he who seeks equity must do equity.

Mr Justice Gummow[170] argues that these equitable discretions provide a system of checks and balances that do not exist to the same degree at common law. He suggests that any attempt to import common law concepts must be considered against this background. In particular, he notes that the basis of the common law remedial system is that "in a court of law we cannot impose terms on the party suing; if he be entitled to a verdict, the law must take its course."[171]

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165 See *K M* v *H M*, above n 140; *Norberg* v *Wynrib*, above n 140.

166 Above n 71, 153.

167 Above n 11, 451.

168 Above n 40.

169 *Phipps* v *Boardman* [1967] 2 AC 46. Cp *Guinness Plc* v *Saunders* [1990] 2 WLR 324, 336-337, per Lord Templeman, where no allowance by way of remuneration was allowed. In New Zealand, see *Buckell* v *Stormont*, unreported, second judgment, High Court, Wellington Registry, CP 736/87, 12 December 1989, Eichelbaum J.

170 Above n 150.

171 *Deeks* v *Strutt* (1794) 5 Term Rep 690, 693; 101 ER 384, 385.

It seems, therefore, that, in situations where both law and equity have the same policy objectives, the only distinction which *must* still exist between equitable compensation and damages is that equitable remedies are hedged about by discretions. The maxims of equity will come very much into their own in this context. As Tilbury suggests, "it is difficult to imagine any other general differences which *must* exist between compensation and damages, whose rules are, after all, designed to effect compensation in the most appropriate and just way in a wide variety of circumstances."[172]

I Conclusion: the Differences Between Equitable Compensation and Damages in Tort

It is apparent that in many respects, for example, compensation for emotional distress and limitation rules, there is little real difference between equitable compensation and damages in tort.[173]

In the areas of causation and remoteness, it is arguable that the courts are in the process of adopting standards for equitable compensation equivalent to those applied in the common law of damages for tort. Although the case law suggests in theory a different time of assessment for tortious damages and equitable compensation, this is unlikely to be recognised in situations where a plaintiff proceeds in concurrent causes of action in tort and equity. Rather, the approach taken is likely to be that of La Forest J in *Canson Enterprises*; barring different policy considerations, the same basic claim, whether framed in terms of a common law action or an equitable suit (or both) will not give rise to different levels of redress. This rationalisation approach may put some pressure on the law of negligence to admit exemplary damages in situations where they are available to a plaintiff in a concurrent suit in equity. The most obvious possibility of divergence may exist in the final stage of assessment, where the court might turn to consider the relative equities of the parties. Here it is possible that the discretions available to a court of equity may maintain an underlying flexibility for equitable compensation which is simply not available at common law.

IV THE FUTURE?

In conclusion, some comment about La Forest J's general policy assessment approach might perhaps be permitted, since this approach has not only found favour with Cooke P, but has been mentioned in this paper as a potentially useful benchmark in circumstances where other clearer guidance is lacking. While the Court of Appeal may be able to distinguish those situations where the policy considerations are the same in tort as in equity from those where they are not, trial courts may not be able to do so quite so readily. Trial courts are usually inundated with masses of factual material, and a range of pleaded causes of action. Trial judges must make their way through these factual and procedural jungles without often having the time or relevant material to allow them to examine and decide on policy considerations. "Equity" and "common law"

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172 Above n 16, para 3249.

173 Also the case in respect of awards of interest and possible deductions for tax liability.

are terms which tend to operate as triggers for what is an essentially mechanical application of received and supposed established wisdom. The historical distinction between equity and common law is dominant, and the serious questioning now under way in academic literature and in appellate court judgments of the sustainability of that distinction on a jurisprudential level is very much a distraction at the outer edge. By the time a case reaches the appellate level, the facts are usually already sorted out, the fringe causes of action have been disposed of, and the focus is thus much sharper. One can therefore more justifiably expect the type of analysis which La Forest J's approach requires, and, consequently, justifiably be more critical if that analysis is not forthcoming. It is likely, therefore, that a much firmer equity/common law divide will continue to operate at the trial level for some time, until the jurisprudence of mingling "trickles down" from the Court of Appeal.[174]

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174 These observations are not intended to ignore the fact that there are trial judges in New Zealand just as concerned to promote the mingling thesis and the jurisprudence of remedial flexibility as are their appellate level colleagues!