

PART I — A HISTORY OF EQUITY

I Background

A Definition

‘Equity’ describes a body of law whose doctrines share a historical pedigree and possess particular normative and remedial characteristics. What follows is an attempt to elaborate upon these attributes — primarily through the vehicle of an historical analysis — so as to better understand the nature and rationale of equitable doctrines and remedies.

The historical component features prominently in traditional definitions of equity:

Equity can be described but not defined. It is the body of law developed by the Court of Chancery in England before 1873.¹

Contemporary definitions stress the dynamic nature of this body of law, which has undergone significant extension and reformulation in the years since 1873:

By ‘Equity’ I mean the distinctive concepts, doctrines, principles and remedies which were developed and applied by the old Court of Chancery, as they have been refined and elaborated since.²

By contrast, the common law developed through judicial pronouncements in common law courts. Besides this historical basis, equity is also distinguished by its peculiar moral and discretionary attributes:

the ecclesiastical natural law foundations of equity, its concern with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law...³

Equity, then, is the body of law having its foundations in the Court of Chancery and evincing, in general, a concern with issues of conscience and natural justice, and imposing flexible remedies on a discretionary basis. Thus, equity is:

- Informed by ‘*conscience*’ (on this more later);
- In large part, *discretionary* and *remedial*; and
- The result of a long *historical* process.

However, as Meagher, Heydon and Leeming observed above, any more precise definition of equity is bound to fail, being either too inclusive or too narrow.

¹ R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4th ed, 2002) 3.

² Sir Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *Law Quarterly Review* 238, 239.

³ *Ibid.*

B *Relevance*

One initial objection to a study of equity history is its relevance to modern legal practice. However, as will be seen, even doctrines as antiquarian as trusts, fiduciary relationships and estoppel are of continuing importance to contemporary commercial and domestic transactions — indeed, are singularly relevant to these environments.

For example, equitable estoppel is commonly pleaded as an alternative (or primary) cause of action in many disputes. Similarly, the existence of an equitable proprietary interest is often crucial to the outcome of a conveyance of land. More generally, the values and principles underlying equitable doctrines strongly influence resolution of these disputes.

In practice, equitable issues are most relevant to pre-litigation advisory work. The structure of a company or undertaking, and the obligations to which this gives rise, will often be extremely relevant to issues of taxation, liability, and other rights and duties.

C *What is 'Conscience'?*

Conscience is a personal moral guide. Conscience, as it purports to be applied by judges exercising equitable jurisdiction, is a value system that reflects broad moral claims about the world. The content and scope of those claims shifts across time and with cultural and socio-political setting, but certain themes remain (or, at least, ought to remain) constant.

Some argue that equity is dangerous because it appeals to personal moral sentiment in determining whether to grant relief. It is true that concepts of 'conscience' may allow judges to apply their own personal moral views dressed up as objective doctrine. Such detractors argue that this is undesirable because these moral views occupy a narrow spectrum of community values (largely related to judicial pedigree).

Critics of equity point to the remedial discretions afforded to judges as evidence of its unstable and indeterminate nature. However, this does little to distinguish equity from the common law, which — if this argument is to be accepted — suffers from the same problems.

D *What is 'Discretion'?*

Discretion is the ability of a court to dispense remedies (and determine rights and liabilities) in a manner suited to the specific case at bar. Some broad themes can, with relatively little difficulty, be ascribed to the idea of discretion in equity:

1 **Flexibility**

Remedies are flexible and able to be moulded by the presiding judge (though minds [and courts] often differ);

2 **Particularity**

Discretion enables outcomes to be crafted for and tailored to the case at bar; courts consider issues of justice and conscience by looking specifically at the parties, and shape a remedy that does justice in the particular case; and

3 **Moral evaluation**

Discretion aids equity's deontological focus by enabling the seriousness of a breach to be assessed based on the degree to which the party tried to avoid it, rather than on the basis of general and inflexible rules.

D Narratives about Equity

In large part, debates about the proper normative foundation of equity stem from disagreement about the correct approach to legal interpretation. Formalists assume that judges are infallible in their assessment of equitable principles, and therefore accept their moral judgment. Post-structuralist and other like perspectives question the objectivity of this interpretive process, and identify themes in judicial morality that they argue are undesirable.

In a sense, both these views are correct — yet neither wholly so. Judicial constructions of ‘conscience’ are indeed (generally) constrained very narrowly by the tightly interwoven history of equitable principles, so that, in any practical sense, assessing the normative content of many equitable principles is (at least where the law is certain) relatively uncontroversial. Undoubtedly, however, this process is highly subjective. Nevertheless (and notwithstanding some judicial aberrations of law), the resulting moral perspective comes sufficiently close to a socially permissive, practically workable moral system, to be accepted in most cases.

Q: Is there a Right answer to case *X v Y*?

A: If not, it hardly matters what Z J’s view of equitable conscience is, for his answer is inherently unverifiable. (So, either there must be such an answer or it doesn’t matter either way.)

Q: Assuming, then, that there is a Right answer, can we not evaluate any given answer against that objective?

A: Yes, but this is a task of considerable complexity.

Q: So, then, the real question is not whether the process of judicial ‘conscience’ is legitimate, but rather, whether the resulting system favours the Correct outcome.

A: That must be so.

Traditional stories told of equity are romantic tales of objectivity, fairness and justice. Equity is said to supplement the common law, improve fairness and ensure the just outcome is reached in cases where the common law would reach a different and perhaps unjust result.

Contemporary counter-stories, on the other hand, emphasise the complex and multifaceted influences upon judicial assessments of the Right outcome — many legitimate, some not so. They depict the consequences of judicial dabbling in morality, often observing that many judicial consciences do not always correspond to a morally justifiable basis for intervention. (However, what these contemporary stories do *not* do is negate the idea that there can, in fact, be any such Justifiable basis, or that equity is a legitimate vehicle for ensuring the outcomes delivered by a largely fixed, rule-based system of law are sufficiently adaptable to that basis.)

II A History of Equity

A Introduction

Understanding the history of equity is an important guide to analysing its application in case law. History illustrates the values that shape equity's application and future development. History shows how equity's doctrines and remedies have evolved, revealing broad trends and overarching issues in the jurisprudence. History further reveals equity's 'self-justifications' and allows us to assess how successful it has been in achieving what it purports to do.

Even a cursory examination of equity's history reveals significant changes in its fundamental nature and attributes. Similarly, changes in the social and political environments that shaped its developments have left its creations operating in a markedly different environment. For example, trusts developed in mediaeval times to avoid payment of feudal dues. Today, the doctrine of tenure has a radically smaller field of operation, but trusts continue to exist. Interestingly, they continue to be used for similar purposes (minimising taxation).

Patricia Loughlan describes the history of equity in a linear fashion.⁴ She identifies equity's

transformation from a jurisdiction of fluid, pragmatic, conscience-based decision-making to one founded primarily upon the application of authoritative rules, maxims, principles and precedents.⁵

In doing so, she describes equity as 'a vision of judge-made justice which was profoundly anti-formal' — a contextual and flexible body of principles and moral standards, rather than the rules and procedures familiar to the common law.⁶

Sir Anthony Mason also draws a contrast between equity and the common law:

the ecclesiastical natural law foundations of equity, its concerns with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century.⁷

A brief history of this transformation is now given, beginning with the medieval era Lord Chancellor and culminating in fusion of the common law and equitable jurisdictions.

B Mediaeval Equity

Prior to 1863, the Lord Chancellor was the head of the King's council. This was an ecclesiastical position performing a function similar to prime minister. The Lord Chancellor was responsible for keeping the Great Seal of the Realm, using it to issue writs on the King's behalf.

⁴ See Patricia Loughlan, 'The Historical Role of the Equitable Jurisdiction' in Patrick Parkinson (ed) *The Principles of Equity* (1993) 3, 3.

⁵ Ibid 4 (citations omitted).

⁶ Ibid.

⁷ Sir Anthony Mason, above n 2, 244.

Writs were issued in response to petitions by subjects. Initially, they were addressed to the King (though later, the Lord Chancellor himself). They frequently complained of injustice or unfairness. For example:

may it please your most gracious lordship, for the honour of God and the cause of righteousness, to grant writs summoning the said ... to appear before you in the King's Chancery, which is a Court of Conscience, there to make answer in this matter, as is demanded by reason and conscience; otherwise the said petitioner is and shall be without remedy — which God forbend!

The Chancellor heard and responded to these requests (as, by granting or overturning a remedy) on his Majesty's behalf. In this way, the Lord Chancellor used the King's judicial power to undermine the authority of common law courts.

The rationale of Chancery was normative: the common law would sometimes produce harsh or unjust results, which should be capable of rectification. 'Equyte' provided this correcting mechanism. This was a broadly Aristotelian conception of equity: 'a rectification of law where the law falls short by reason of its universality'.⁸

Gradually, the number of petitions and consequent writs grew. By the mid 1300s, the Lord Chancellor was issuing many writs. This is thought to be because the common law was becoming too strict, technical and rule-bound. The body administering this process became described as the Court of Chancery, and the Chancellor as minister of state was said to be administering equity through that Court.

Examples of equity administered by the Chancellor since around 1400 AD:

- Recognising interests in land other than legal interests;
- Creating and inferring the existence of trustee–beneficiary relationships;
- Enforcing binding agreements despite non-compliance with some of the common law formalities;
- Fraud, duress and forgery as bases for vitiating contracts; and
- Granting remedies unavailable at common law, such as specific performance.

In short, Chancery was willing to be more flexible and creative in assessing legal entitlements, interests and obligations than the common law. During this period, the common law insisted on adjudication *rigor juris* and the two streams of law began to diverge.

C *Enlightenment Equity*

Although law and equity continued to diverge throughout the 15th and 16th centuries, by the 17th century, Chancellors were increasingly drawn from the ranks of practising lawyers. This had a significant effect upon the nature of the equities that they pronounced. It signalled a trend towards systematisation: principles were consolidated into doctrines, maxims articulated, and reasoning became less *ad hoc*.

Although the wheels of systematisation were definitely in motion by the time of Henry VIII, adjudication in Chancery remained a pragmatic and typically unprincipled process. This was largely because equity lacked a doctrine of *stare decisis*. The reason for this was that a source of binding precedent was thought to diminish the Chancellor's capacity to do justice in individual cases: if the decision would be binding on later courts, acceding too much to conscience or discretion may distort the principles applied in future cases, thereby producing greater injustice.

⁸ Aristotle, *Nicomachean Ethics*, book V, ch 10.

Because of this, decisions in equity were seldom recorded authoritatively, which further contributed to the unstable and contextual nature of adjudication. An analogy might well be drawn with modern tribunals and commissions: factors relevant to equitable remedies were *sui generis* in many cases.

During the 1600s, there was also competition between equitable Chancery and common law jurisdictions. The issue was highly political, with Lords Coke and Ellesmere arguing at some length in the House of Lords. Lord Coke accused Lord Ellesmere of pandering to royal absolutism and weakening the rule of law. Lord Ellesmere, in turn, claimed that Lord Coke was attempting to undermine the equitable jurisdiction and contribute to an unjust rule of law. This conflict culminated in the *Earl of Oxford's Case* (1615), followed by the issue of a decree by King James I: in the event of a different outcome being reached between common law and equity, equity prevails.

***Earl of Oxford's Case* (1615) 1 Ch Rep 1:**

Facts

- A plaintiff is successful at common law and seeks to execute the judgment he obtains
- However, Lord Ellesmere, a judge of Chancery, thinks this would be against conscience, and seeks to prevent the plaintiff from asserting his common law rights
- Sir Edward Coke, Lord Chief Justice, challenges this decision

Issue

- Should a result reached in equity displace (that is, take priority over) the common law position?

Reasoning

- Lord Ellesmere:
 - The existence of 'equity' was thus a concession to the inevitability of injustice, while its dominance a reflection of prioritising justice in the individual case over universality of laws
 - 'The cause why there is a Chancery is for that men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular act and not fail in some circumstance.' (at 6)
 - The role of equity is to temper and mitigate the law — 'to soften and mollify the extremity of the law'
 - 'The office of the Chancellor is to correct men's consciences for frauds, breach of trust, wrongs and oppressions of what nature soever they be...'
 - This reflects a view of conscience that is corrective of the attitudes of individual litigants

Decision

- A decree is issued by James I to the effect that the King's subjects ought not be left 'to perish under the rigor and extremity of our law'

See today: s 29(1) of the *Supreme Court Act 1986* (Vic). Essentially, the 'King's discretion' approach continues to take precedence.

There was, however, one fundamental requirement before the equitable jurisdiction could be invoked: the application of common law rules must lead to an unjust or unconscionable outcome. Otherwise, the Lord Chancellor had no jurisdiction to interfere.⁹

Once a case was brought to a court of equity, the Chancellor became the trier of both fact and law.

The *Earl of Oxford's Case* demonstrates how fragile the enlightenment form of equity was to political upheaval within the United Kingdom. Because equity was dependent for its authority upon the King's prerogative during this period, it was seriously jeopardised by events such as the overthrow of Charles I, the rule of Cromwell during the interregnum (who even proposed to abolish Chancery, which he described 'the greatest grievance in the nation') and the Glorious Revolution in 1689.

Although the restoration partially signalled equity's return to favour, it remained on unstable territory throughout the 17th century. For example, in 1690, a Bill was introduced to reverse the *Earl of Oxford's Case* (though never passed).

D Romantic Equity

As equity grew during the 18th and 19th centuries, it became increasingly like the common law. There were several reasons for this. First, the previously mentioned political pressures encouraged self-legitimacy through systemisation. Second, internal doctrinal shifts — such as increased involvement in the determination of proprietary rights — which demanded certainty and uniform principles. Third, several very influential Lord Chancellors (most notably Lord Eldon) made significant contributions to the development of a stable equitable taxonomy.

The effect of these changes was profound. Sources of untrammelled discretion were replaced with limited express considerations; conscience became 'objectified, made public and tamed',¹⁰ doctrines uniform and well settled. *Ex tempore* whims became principles; interests were classified; practices became doctrines.

One early example of this is given in the judgment of Lord Nottingham in *Cook v Fountain* (1676):

With such a conscience as is only *naturalis et interna* [natural and internal] this Court has nothing to do: the conscience by which I am to proceed is merely *civilis et politica* [civil and political] and it is infinitely better for the public that a trust, security or agreement should miscarry than that men should lose their estates by the mere fancy and imagination of a Chancellor.¹¹

However, alongside this process of systematic refinement, as the body of equitable doctrines grew in scope and stature, their conceptual basis was further diverging from the common law. Whereas common law was said to exist since time immemorial, the law of equity was 'established from time to time, altered, improved and refined from time to time'.¹²

Despite these differences, equity remained a complementary jurisdiction and could not have existed without the common law. As Maitland observes:

⁹ Loughlan, above n 4, 8.

¹⁰ Ibid 13–14.

¹¹ (1676) 3 Swanst 585, 600; 36 ER 984 (Lord Nottingham).

¹² *Re Hallett* (1879) 13 Ch D 696, 710 (Jessell MR).

We ought not to think of common law and equity as two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short Act saying 'Equity is hereby abolished', we might have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights ..., the rights of ownership and of possession would have been decently protected ... On the other hand, had the legislature said, 'Common law is hereby abolished', this decree if obeyed would have meant anarchy.¹³

During this period, a second usage of 'conscience' became evident. Equity was the embodiment of the conscience of the state — comprising the King and 'the realm' — and Chancery was the mechanism for articulating and enforcing this conscience upon its subjects.

Unlike the 17th century, when the requirement that a plaintiff be in poverty was very strictly enforced, Chancellors of the pre-industrial and industrial eras relaxed this requirement considerably.

E Fusion

1 The pre-Judicature Acts situation

Until 1873, equity was administered in England by a different set of courts to the common law. So too, in Victoria, equity was an institutionally separate jurisdiction: appeals on equitable grounds were initially heard in the Sydney courts of equity, until in 1850 a Court of Judicature was created by Letters–Patent. This Court could exercise both common law and equitable jurisdictions, but did so separately. In equity, it had powers equivalent to the Lord High Chancellor in equity. At common law, it had the jurisdiction of Her Majesty's Courts at Westminster.

Throughout this period, law and equity were also substantively isolated. Equitable rights and interests could not entitle a person to common law relief: see *Doe d Coore v Clare* (1788), which considered a right of ejectment; *Westerdell v Dale* (1797), which considered amounts owing to a mortgagee under a lease. These cases stand for the proposition that equity does not effect any modification of purely common law doctrines (eg, ejectment and actions in debt, respectively, for the preceding cases).

However, the separation between law and equity was not absolute:

- Some equitable doctrines, such as estoppel, were gradually imported into the common law, but these were always treated as wholly common law doctrines (estoppel by representation);
- The common law also accepted that equitable interests could be devised (*Pawlett v Attorney–General* (1667));
- Trustees were entitled to damages for loss suffered by the beneficiary in actions on a contract (*Robertson v Wait* (1853));
- Whether a plaintiff's copyright is held on trust for another was taken into account when determining their rights (*Sims v Marryat* (1851)); and

¹³ F W Maitland, *Equity* (2nd ed, 1936) 18–19.

- Leases invalid in equity were also recognised as invalid at common law (*Phillips v Clagett* (1843)).

As these examples illustrate, equitable interests were frequently recognised by common law courts in the context of an action in tort or on a contract. The effect of this recognition was either to modify (eg, diminish) common law entitlements, or (more often) to be referred to when contextualising the claim.

However, these exceptions notwithstanding, equity and common law were conceptually distinct:

- (a) Rights in equity could not found a basis for actions in courts of common law (unless the action was founded on a common law right in tort or under a contract);
- (b) Rights in equity could not be relied on to defend a common law action;
- (c) Legal rights could not be decided by a court of equity unless they were admitted by a party or a judgment had previously been obtained in a common law court;
- (d) Legal damages could not be awarded in equity (subject to *Lord Cairns' Act 1858* (UK), which enabled damages to be awarded by a court of equity either in addition to or instead of specific performance); and
- (e) Common law courts could not award equitable remedies or make declarations.

Although (as is discussed below) the institutions of law and equity are now fused, this conceptual distinction continues to apply even today. Its most recent reaffirmation took place in 1998, when the English Court of Appeal confirmed that an equitable property right could not give rise to a common law action in conversion.¹⁴

2 Shortcomings of institutional separation

As each jurisdiction continued to grow, it became more inefficient and duplicitous to institute proceedings in each, with separate courts, counsel and argument.

Particularly frustrating for litigants was the fact that common law courts would not recognise equitable rights. Consequently, breach of an equitable obligation gave rise to no corresponding legal action. (Equity would only intervene if this was against conscience.) Similarly, defendants in common law trials could not plead an equitable defence. (Equity would only alter the result if it was against conscience.) Further, even in an equitable action, the existence of a disputed common law right or obligation could not be determined: this had to be settled by the parties in a separate, common law action (or by agreement). Additionally, where a plaintiff fails to obtain a remedy in one jurisdiction, his action cannot be transferred to the other — even if he stands a good chance of being successful in that other jurisdiction notwithstanding failure in the other.

These artificial and impractical annoyances reflect the fact that parallel proceedings were considerably inefficient.

3 The Judicature Acts

In view of these frustrations, several changes were made to English civil procedure throughout the 19th century, as a result of which equity was granted some powers to determine legal titles

¹⁴ *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675.

and grant legal remedies, and common law courts had the ability to admit equitable defences and grant equitable relief. However, the parallel systems of judicial administration remained.

Eventually, on 13 February 1873, the jurisdictions were con-fused, meaning simply that the institutional separation was removed, allowing equitable causes to be litigated in common law courts. This change was effected by the *Judicature Act 1873* (UK). It also imposed a uniform code of procedure, and established a new High Court in which may hear appeals from both equitable and common law jurisdictions.

However, fusion does not entail blending the substance of the jurisdictions ('the fusion fallacy'). Indeed, as then Attorney-General Sir John Coleridge said:

To talk of the fusion of Law and Equity was to talk ignorantly. Law and Equity were two things inherently distinct. ... All they could do was to secure that the suitor who went to one Court for his remedy should not be sent about his business without the relief he could have got in another Court.¹⁵

This suggests that the reforms were largely procedural, rather than substantive. Fusion did not entail 'con-fusion' in the sense of unifying their substance. Common law principles cannot be transposed with equitable ones. The two streams of law were simply being administered side-by-side, simultaneously, by the same court. Thus, a plaintiff no longer needed to go to two separate courts in order to enforce a contract that the common law treats as breached but over which only equity is capable of granting specific performance.

The relationship between law and equity continues to consist of the following components:

- (a) Equity recognises rights and duties that the common law does not;
- (b) Common law and equity courts offer different remedies to litigants; and
- (c) Where equity and the common law are in conflict, equity prevails.

However, what the *Judicature Act* says is that, notwithstanding any substantive differences between legal and equitable rights and remedies, a single institution is capable of recognising both equitable and legal rights and duties, and issuing both equitable and legal remedies.

Effect (a) may be summarised as follows:

Whatever names we choose to use, the distinction between [equitable and legal] rights is an obviously convenient one, and will certainly be permanent; and [their] adjustment ... requires the aid of a staff of officers which it is not necessary that every court should possess, and which may therefore be usefully assigned to a particular court. This is all that is meant by any sensible man who says that you cannot fuse law and equity.

What can be done and ought to be done is to secure that every court shall recognise every kind of right, and, as occasion arises, either deal with it itself or hand it over to some more convenient tribunal; and this is exactly what the *Judicature Act* provides.¹⁶

Sir Arthur Wilson provides the following example to illustrate effect (b):

If you are content with damages because your neighbour refuses to sell you the house he agreed to sell, or sickens you by burning bricks before your door, you may bring an action at law; but if you want to compel him to give you the house, or prevent his beginning to burn bricks, you must go into chancery.

¹⁵ *Hansard*, 3rd series, vol 216, 1601.

¹⁶ Letter by Sir Arthur Wilson (1875) 19 *Sol Journal* 633–4.

What is reasonable is that each court should apply any remedy which the circumstances of the case may require; and so says the Act.¹⁷

In short, then, the establishment of the judicature system did nothing other than assimilate the procedure of actions in equity with the conduct of common law actions. The bodies of law remained separate:

the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters.¹⁸

3 Fusion in Australia

Fusion did not occur in most Australian jurisdictions until 1876. For example, in 1883, Victoria passed the *Supreme Court (Judicature) Act 1883* (Vic). The effect of this legislation was to implement — more or less identically — the English *Judicature Act 1873* (UK). As a result, the judicature system was established, fusing the two institutions.

New South Wales did not enact its *Judicature Act* until as late as 1972.¹⁹

4 The fusion fallacy

The term ‘fusion fallacy’ is a somewhat aggrandised alliteration, denoting simply the (incorrect) supposition that the *Judicature Acts* effected a substantive fusion of legal and equitable principles. As applied by judges, it

involves the administration of a remedy, for example, common law damages for breach of fiduciary duty, not previously available either at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign, for example, by holding that the existence of a duty of care in tort may be tested by asking whether the parties concerned are in fiduciary relations.²⁰

F Modern and Future Equity

Today the doctrines of equity are distinguishable from the common law only because they have always been viewed as such — not because of any substantive difference between the two jurisdictions. Some doctrines, such as trusts, are exclusively equitable. Others, such as estoppel, can be used in aid of legal rights. Some equitable remedies, such as specific performance, are unknown to the common law; they remain largely discretionary. The interaction between these jurisdictions is discussed below.

Further progressed is the transformation from conscience *naturalis et interna* to conscience *civilis et politica*. ‘Conscience’ is held out as an ideal of objective justice — a judicial value system codified in the equitable institution. This view is best expressed by *National City Bank v Gelfert*:

The ‘conscience’ which is an element of the equitable jurisdiction is not the private opinion of an individual court, but is rather to be regarded as a metaphorical term, designating the common

¹⁷ Ibid.

¹⁸ W Ashburner, *Principles of Equity* (2nd ed, 1933) 18; cited in *Felton v Mulligan* (1971) 124 CLR 367, 392 (Windeyer J).

¹⁹ See *Law Reform (Law and Equity) Act 1972* (NSW).

²⁰ R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1993) 47.

standard of civil right and expedience combined, based upon general principles and limited by established doctrines, to which the Court appeals and by which it tests the conduct and rights of suitors — a *judicial and not a personal conscience*.²¹

Conscience is thus a judicial, rather than personal affectation — a metaphor rather than bald morality. As Loughlan notes, “[c]onscience is not moral but metaphorical, and a metaphor for expediency at that. Conscience is public and objective and impersonal.”²²

This transformation has been encapsulated in statements made by Young J in *National Westminster Bank v Morgan*:

many situations which previously were dealt with according to the rule of the Chancellor’s foot are now dealt with by settled principles as a result of the work of Lord Eldon and others. However, ... [t]his Court still continues both in private and commercial disputes to function as a court of conscience.²³

It is now more fashionable for the ethical foundation of ‘conscience’ to be expressed in terms of unconscionability — as took place in *Legione v Hately*, where the Court identified

the fundamental principle according to which equity acts, namely that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct.

In this way, equitable remedies are designed to obviate or prevent unconscionable conduct: see, eg, *Baumgartner v Baumgartner*; *Waltons Stores (Interstate) Ltd v Maher*. However, the precise content of ‘unconscionability’ is not formally defined, and is instead shaped by the values broadly underlying equitable doctrines and institutions.

The result is a ‘seamless web’ of equitable doctrines,²⁴ each with common origins, and each broadly shaped by the idea of (metaphorical) justice. However, whereas this web was once dominated by overt considerations of fairness and the Aristotelian rectification of injustice, it is now determined by internal consistency and doctrinal uniformity. Future expansion and strengthening of the web will be increasingly determined by what has come before, but will continue to display concern for ethical standards of behaviour through the adoption of standards predicated upon judicial assessments of unconscionability.

G Classification of Equitable Jurisdiction

The equitable jurisdiction can be invoked in aid of common law rights. However, common law rights cannot be used to aid equitable rights. This is a one-way use of equity.

In general, the pre-*Judicature Act* equity jurisdiction was (somewhat artificially) said to comprise three sub-jurisdictions:

- **Exclusive jurisdiction**
Matters in which only a court of equity could deal (trusts, fiduciary duties, and related causes of action);

²¹ 29 NE (2d) 449, 452 (emphasis added).

²² Loughlan, above n 4, 18.

²³ [1985] AC 686, 709 (Young J).

²⁴ J D Heydon, W M C Gummow and R P Austin, *Cases and Materials on Equity and Trusts* (3rd ed, 1989) vii.

- **Concurrent jurisdiction**
Matters wherein equity is invoked in aid of legal rights (specific performance, discovery of documents); and
- **Auxiliary jurisdiction**
Matters in which assertion of a legal right was effective in equity (right of termination for duress, mistake, *et cetera*; injunction restraining unconscionable use of common law judgment).

However, it is now widely accepted that the auxiliary jurisdiction is of historical interest only. The only distinction of use is between exclusive and concurrent matters.

H *Alternative Histories*

Legal historians are quick to classify equity as a jurisdiction which helped women, the poor, and other historically disadvantaged groups. Historians emphasise the development of more principled, gender- and class-neutral doctrines, and point to its systematisation as evidence of increasing legitimacy and moral objectivity.

Although largely correct, several inaccuracies may be identified in this view.

1 *Materialism*

Equity is very materialistic: it remedies financial, rather than emotional or bodily harm. For this reason, it is an imperfect mechanism for assisting parties whose primary loss is non-financial.

2 *Inefficiency; lack of public confidence*

Equity has, at various points in its history (though perhaps less so today), been viewed as a slow, inefficient and unjust jurisdiction. It commanded little (recorded) respect from the public until relatively recent times, despite its apparent benefits. The cause of the jurisdiction's inefficiencies was in part a product of its extremely rapid growth, from a simple issue of a writ by a Chancellor to an established court with all the attendant processes.

The extent of equity's denigration as laborious, corrupt and unfair is illustrated by the following extract from Charles Dickens' *Bleak House*:

This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of everyman's acquaintance; which gives to moneyed might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give — who does not often give — the warning 'Suffer any wrong that can be done you, rather than come here'.²⁵

The *Judicature Acts* were partially directed at alleviating these problems, and (*inter alia*) instituted a number of secondary procedural reforms designed to improve the jurisdiction's efficiency.

²⁵ Charles Dickens, *Bleak House* (1977) 3.

3 Access to justice

Equity, like other jurisdictions, suffers from much the same issues preventing access to justice. Although historically equity favoured the poor by permitting free access to the Court of Chancery, today the cost of litigating in equity is similar to the (high) cost of a common law action, which is increasingly prohibitive to financially disadvantaged groups.

4 Assisting the rich

Fourth, equity did not always offer aid to disadvantaged groups, especially when to do so would come at the expense of the ruling class. One example of this counter-treatment is provided by the *Catching Bargain Cases*, which explicitly advantaged the rich. Heirs of rich (usually peered) fathers would loan money on the basis of their future inheritance from unofficial lenders at very high interest rates.

When the lenders later commenced enforcement proceedings for the amount (often comprising almost all of the heir's inheritance), equity came to the aid not of the party attempting to enforce a loan agreement made voluntarily and with full knowledge of the consequences, but of the rich, young men. In fact, these cases were the precursors to the modern doctrine of unconscionable dealing, since enshrined by *Bridgewater v Leahy* and more recently *Commonwealth Bank of Australia v Amadio*. Chancery either set aside the loan agreements completely or imposed a reduced interest rate: the parties were painted as foolish, vulnerable young men (construction of them as the weaker party). Ironically, much the same consequence follows today for the especially vulnerable mortgagors, only with the opposite effect on the power relationship.

5 The Court of Star Chamber

Until its abolition in August 1641 by the Long Parliament, the Court of Star Chamber administered the criminal arm of the equitable jurisdiction.

The Chamber emerged during mediaeval England and was initially constituted by Privy Councillors. Its rise in power paralleled the rise of absolutist monarchism in renaissance England, and its decline paralleled the corresponding ascension of the Westminster system. So, then, the Chamber was at its height in 1487 when, during the reign of Henry VII, it became a distinct judicial body and was granted a mandate to hear petitions of redress by private parties. So too, in 1641 its abolition took place as part of a series of statutes enacted to curb the absolutist reign of Charles I.

It is rumoured (though to the author's knowledge unconfirmed) that the name 'Star Chamber' derives from the bestudded ceiling in the Court's main chamber, which apparently created the appearance of an open window to the (nocturnal) heavens.

At first, the sessions of the Court of Star Chamber were open to the public, and the Court was highly regarded for its speed and comparative flexibility. However, by the sixteenth century it had developed into a political weapon used to punish dissenters and Puritans. The Court grew in power under the leadership of Lord Chancellor Thomas Wolsey and Archbishop of Canterbury Thomas Cranmer, but developed a reputation for enforcing the will of the sovereign.

Synonymous with this reputation was a growing association with whim, torture and authoritarian rule. Under Charles I, for example, the Chamber was used as a form of surrogate Parliament during Personal Rule, the eleven-year period in which it was prorogued by order of the sovereign. The Chamber's sessions became held in secret, and criminal defendants had none but the most illusory of rights — there were no indictments, appeals and, eventually, no juries or even witnesses (evidence was only admitted in writing, which naturally had the effect of limiting the

class of persons able to give it). In effect, criminal accused were subject only to the whims of the Councillors.

The trial process was somewhat of a farce. Witchcraft ‘trials’ were often conducted with little or no testimony, and various tortures administered. For example, on 17 October 1632, the Court of Star Chamber issued a decree banning all ‘news books’ on the basis that English coverage of the Thirty Years’ War was unfair to Spain and Austria. As a result of the ban, the entire English media industry relocated to Amsterdam, and the local production and distribution of newspapers became an underground enterprise for some six years. Charles I also used the Court of Star Chamber to prosecute dissenters, especially Puritans.

Some modern scholars, looking back on this relatively violent period in England’s history through the comfortable visage of retrospection, have remarked that — whatever its ‘historical’ failings — the Court of Star Chamber did assist equity in the development of a vocabulary for dealing with private disputes, catalysing their later application to assist other, more disadvantaged groups.

Edgar Masters, an American poet, has since commented of the Chamber:

In the Star Chamber the council could inflict any punishment short of death, and frequently sentenced objects of its wrath to the pillory, to whipping and to the cutting off of ears. ... With each embarrassment to arbitrary power the Star Chamber became emboldened to undertake further usurpation. ... The Star Chamber finally summoned juries before it for verdicts disagreeable to the government, and fined and imprisoned them. It spread terrorism among those who were called to do constitutional acts. It imposed ruinous fines. It became the chief defence of Charles against assaults upon those usurpations which cost him his life.

III **Maxims of Equity**

A **Introduction**

The maxims of equity consist of a series of aphorisms describing traits allegedly common to equitable doctrines. These statements can be misleading. They have their origins in historical principles of equity, and have developed as broad generalisations expressing its doctrines and remedies, but will not always be applied.

Although there are probably others, the following list encompasses the twelve maxims most commonly invoked by judges in equity throughout the history of Chancery:

- Equity will not suffer a wrong to be without a remedy;
- Equity follows the law;
- Where the equities are equal, the law prevails (*qui prior est tempore, potior est jure*);
- He who seeks equity must do equity;
- He who comes into equity must come with clean hands;
- Equity assists the diligent, not the tardy (*vigilantibus, non dormientibus, aequitas subvenit*);
- Equity will not allow a statute to be used as an instrument of fraud;
- Equity is equality (*aequitas est aequalitas*);
- Equity looks to the intent, rather than to the form;
- Equity looks on as done that which ought to be done;
- Equity imputes an intention to fulfil an obligation; and
- Equity acts *in personam*.

The *vigilantibus* maxim operates in the following way. Parties slow to assert their rights may receive a lesser or no remedy. Thus, where — as in some jurisdictions — no limitation of actions applies to equitable causes, the equitable doctrine of delay (*laches*) will apply to penalise delay in bringing or litigating the action. There is some scope for parties to make excuses for delaying an action — an upcoming High Court case on this issue concerns sexual assault. (One approach, adopted in Canada, is to treat sexual assault in privileged positions of trust as a breach of fiduciary duties, so that — delay notwithstanding — the wrong is actionable.)

B **Significance**

Hanbury describes the maxims as

the fruit of observation of developed equitable doctrine, or, if they can be in any way regarded as the architects of it, they were inarticulate architects. The ideas embodied in them are far older than their articulate expression. But their practical value in a scheme of arrangement is immense.²⁶

Sir Edward Coke viewed the maxims in a more justificatory sense:

A maxime is a proposition to be of all men confessed and granted without prooffe, argument or discourse.²⁷

²⁶ H G Hanbury, *Modern Equity* (6th ed) 45.

²⁷ Sir Edward Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628) vol 1, 57a.

In *Corin v Paton* (1990), the High Court of Australia identified that a maxim is not a rule (or even principle) of law, but is rather

a summary statement of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill-defined and somewhat uncertain.

However, as broad generalisations they will sometimes (and, in the case of certain maxims, often) prove incorrect.

For example, the maxim that 'equity follows the law' is contradicted by s 29(1) of the *Supreme Court Act 1980* (Vic), which describes equity as actually prevailing over 'the law'. What this maxim is conventionally understood as describing is the rule in property law that the legal interest prevails over its equitable counterpart.

The maxim that 'equity acts *in personam*' traditionally meant that equity acts against the bad conscience of the defendant (ie, against their person). However, it can also create proprietary interests and impose remedies binding on third parties (for example, remedies against the defendant's property).

Perhaps most questionable of all is the maxim that 'equity will not allow a wrong to be without a remedy'. There are many instances in the case law where a moral wrong goes unpunished, or where a less than honourable defendant escapes liability for the wrong they cause to a plaintiff.

In light of these anomalies, perhaps the most that can be said of these maxims is that they are short hand expressions given to more complex (and perhaps unstated) patterns of normative reasoning. In equity, therefore, judicial assessments of conscience are what largely determine the scope of the maxims, which explains their indeterminate nature and inconsistent application.

IV Doctrines of Equity

A A Taxonomy of Proprietary Interests

- Interests under a trust
 - Express
 - Resulting
 - Constructive
 - Common intention
 - Unconscionability or joint enterprise
- Equitable rights
 - Possession
 - Leases
 - Mortgages
 - Easements
 - Restrictive covenants
 - Profits-à-prendre

B Contractual Interests and Remedies

- Equitable estoppel
- Equitable rescission
 - Unconscionable dealing
 - Undue influence
 - Wives' equity
 - Mistake
 - Misrepresentation
- Equitable relief
 - Against penalties and forfeitures
- (Mere) equities
 - Eg, of rescission

C Fiduciary Relationships

- Fiduciary relationships
 - Partnerships and joint ventures
 - Advisers
 - Transactional relationships
 - Accessories
- Remedies for breach of a fiduciary obligation
 - Equitable compensation
 - Account of profits
 - Rescission
 - Constructive trust

- Secondary liability for breach of a fiduciary obligation
 - Those who 'knowingly' receive property from the breach
 - Those who 'knowingly' assist in the breach
- Tracing
 - Beneficiary and fiduciary
 - Where money has been spent
 - Where property has appreciated in value
 - Beneficiary and beneficiary
 - Where money has wrongfully been paid to another beneficiary
 - Volunteer recipients from the fiduciary
 - Defences
 - Good faith purchaser for value without notice
 - Dissipation
 - Use of beneficiary money to pay debt
 - Inequitable to grant proprietary remedy
 - Remedies
 - Election to take property
 - Equitable lien
 - Account of profits (secured by lien)
 - Constructive trust
 - Resulting trust

D Trusts

- Express trusts
 - Certainty of intention
 - Certainty of subject matter
 - Certainty of objects
 - Charitable trusts
- Trustees' duties
 - To become acquainted with the terms of the trust
 - To carry out the terms of the trust
 - Not to be placed in a position of conflict between interest and duty
 - Not to make an unauthorised profit from the trust
 - *Et cetera*
- Resulting trusts
 - Presumption of advancement
- Constructive trusts
 - Common intention
 - Unconscionability or joint endeavour

E Confidential Information

- Trade secrets
- Breach of confidence

F *Equitable Remedies*

- Personal
 - Specific performance
 - Injunction
 - Equitable compensation
 - Account of profits
 - Rescission
 - Rectification
 - Knowing receipt of trust property
 - Knowing assistance in breach of trust

- Proprietary
 - Equitable lien
 - Constructive trust
 - Tracing
 - Estoppel (?)

V Modern Equity

A General Observations

Unconscionability is easier to define in the negative. It is not a vague notion of what is fair and just. However, it is difficult to define positively. Some commentators observe that the precise meaning might be dependent on context.

B Commonwealth Bank of Australia Ltd v Amadio (1983) 151 CLR 447

Facts: This case concerned a guarantor's misapprehension as to extent of their liability. This occurred in conjunction with ignorance as to the viability of their son's business, over which their guarantee was made. There was some suggestion of impropriety by the bank manager, who failed to ensure that independent legal advice was obtained, knew about the financial trouble of the son's business, and knew that the guarantors were old and could not read. Additionally, the son deceived his parents as to his business' financial status by hosting a lavish Christmas party.

Result: The contract of mortgage and guarantee of the parents were set aside on the equitable basis of unconscionable dealing.

Analysis: Here, equity was responding to a perceived special vulnerability, where the victims were not to blame for that vulnerability, by making it harder for others to take advantage of it.

- Equity imposed standards upon the bargaining process by focusing on procedural unconscionability
- Rectifying power imbalance between the parties: relation between big bank (knowledge, money, power) and illiterate migrants (weak, ignorant). But need more: knowledge of disability
- Conscience is about a conscionable process. Substantive outcomes less important (but note *Bridgewater v Leahy*)
- Why didn't the Court exercise its discretion to make the Amadios liable to the extent of their expectation? (\$50 000 which they thought.) However, on the facts, the deception of the son and the impropriety of the bank so shaped the transaction that it should be set aside.

The role of equity is to make sure the stronger party takes as little advantage as possible of weaker parties.

Should equity be playing a bigger role in achieving social justice? Is equity stifling business by interfering with the free choice of contracting parties (is the choice truly 'free')? Is judge-made equity the appropriate forum in which to pursue social justice issues?

C Bridgewater v Leahy (1998) 194 CLR 457

Facts: *Bridgewater* concerned a gift of land made by a dying uncle to his nephew. The transfer took place by way of a 'deed of forgiveness', the effect of which was to give the nephew some \$750 000 worth of land for only \$150 000.

Result: The transaction was void for unconscionable dealing on the part of the nephew. The uncle had strong emotional attachment and dependence on his nephew, and the nephew knew of

this. In these circumstances, passive acceptance of the gift was sufficient to constitute taking advantage — even though the nephew didn't even encourage the gift.

Analysis: The Court appears to accept substantive unconscionability as a basis for relief. The Court thought Mr York was ungenerous to his wife and daughter. His gift was dismissive of their interest and effectively disinherited them. The property was gifted on a basis that vastly undervalued it (it was essentially free).

The transaction was only partially set aside. Using its discretion, the Court granted an allowance to the nephew. The Supreme Court was to determine the issue of quantum separately. Equity would give a solution to do practical justice between the parties.

Here it seems that practical justice was not a formulaic legal result, but a flexible outcome that was practical and fair having regard to the circumstances. Is practical justice merely a court-imposed mediation outcome? Is 'just' merely what the Court thinks is 'fair', rather than 'unfair'?

D Louthe v Diprose (1992) 175 CLR 621

Note distinction between *Bridgewater* and *Louthe* views of accepting a gift: passive acceptance sufficient in the former, but only defendant's conscience relevant in the latter.

E Waltons Stores Pty Ltd v Maher (1988) 164 CLR 387

Facts: A lease agreement was sent to but not executed by Waltons Stores. Maher, in reliance on an assumption that the agreement had been executed and that Waltons Stores would become the lessee, demolishes a building and proceeds to build another to Waltons Stores' requirements. However, when building is almost half way, Waltons Stores declines to proceed, citing the reason that they had not signed the agreement and therefore were not bound.

Result: Waltons Stores estopped from resiling from its representation that it would lease the premises. Maher awarded damages equal to what they would have obtained if there had been a lease agreement that was breach (expectation loss).

Analysis: should equity be involved in commercial contexts? On the one hand, it might well be asked, 'why not? Surely the system of ethics embodied in equitable doctrines is just as applicable to commercial environments as it is to domestic ones.' On the other hand, a detractor of equity's role in commerce might argue that western capitalism and economic efficiency depend on parties being able to conduct themselves to within an inch of the letter of the law (but no further). Equity's role here might be seen as paternalistic. However, are the parties in a position of inequality? Should Maher have been entitled to rely on Waltons Stores' representation?

What if one party is in commerce, and the other is a domestic party? (As in *Amadio*.) In such a case, there would be extreme inequality and equity applies without controversy. Similarly, in all commercial transactions, a party may never use their legal rights unconscionably — regardless of what those rights are (commercial or otherwise).

F Baumgartner v Baumgartner (1987) 164 CLR 137

Result: constructive trust imposed to prevent the husband from denying his ex-partner's interest.

Analysis: this looks like a substantive unconscionability case. The Court looks at the result (loss of hard work, property) and says ‘this should be remedied’. On the other hand, passive acceptance by the husband of the partner’s contributions in an environment that encouraged the assumption that she would be compensated in some way for her efforts is a form of procedural unconscionability: the problem simply culminated in his denial of her proprietary interest. Or is the distinction between the two unjustified? Process feeds into substance (ie, the ultimate consequence of the procedural anomaly is the denial of the partner’s proprietary rights).

G *Other Analyses*

Patrick Parkinson observes that ‘conscience in equity’ has two themes:

- 1 **Vulnerability**
Equity protects what it perceives to be the vulnerable party; and

- 2 **Reasonable expectations**
Equity protects parties’ reasonable expectations.

Also of interest is the work of Anthony Duggin, who argues that equity and conscience are ‘efficient’ in a law and economics sense.