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DISCRETION WITH COMMON LAW REMEDIES

ABSTRACT

The law of remedies has been characterised by a flawed remedial hierarchy. This flawed remedial hierarchy privileges common law remedies over equitable remedies.

Two elements create the remedial hierarchy. The first element, the requirement of the inadequacy of common law remedies, has been examined by prominent academics who have convincingly destroyed the support provided by this first element. This article scrutinises the second element permitting the construction of a hierarchy of remedies. The second element involves the idea of discretion. This second element is that equitable remedies are discretionary, whereas common law remedies are non-discretionary. This element is extremely difficult to examine. Essentially, it involves the contention that courts have been somewhat reluctant to employ equitable remedies as they explicitly involve discretion. There has been a constant attempt to downplay the role of equitable remedies and to privilege common law remedies, as well as to hide any discretion in common law remedies. There has been a tendency to rely upon and reinforce the flawed remedial hierarchy. However, contrary to this second element, the common law, particularly common law remedies, does involve some discretion and this second element is not accurate.

I INTRODUCTION

Traditionally, the law of remedies has been characterised by a remedial hierarchy.[1] This remedial hierarchy privileges common law remedies over equitable remedies.

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1 The focus of this work will be on the areas of torts and contracts. Possibly they are the areas where the remedial hierarchy is at its strongest. The remedial hierarchy does not exercise the same power in all areas of law. For example, the remedial hierarchy does not seem to have much of a role in public law. In the mid-1970s, Chayes, in discussing the injunction's role in constitutional and particularly civil rights litigation has observed in 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1292 that '[i]t is perhaps too soon to reverse the traditional maxim to read that money damages will be awarded only when no suitable form of specific relief can be devised. But surely, the old sense of equitable remedies as 'extraordinary' has faded'.

As Tilbury has observed, '[i]n a situation where both legal and equitable remedies are available to protect the plaintiff's primary right, the availability of the equitable remedy is theoretically dependent on the inadequacy of the remedy at law'.[2] The position is directly put by Dal Pont and Chalmers when they clearly state, in their introduction to the section concerning equitable personal remedies, that '[e]quitable relief will not be awarded if there is an adequate remedy at law'.[3] Kercher and Noone concur — 'equitable remedies are available only when the remedy at law is inadequate'.[4] As Carter has observed,[5]

> [o]ne reason why it is still helpful to speak in terms of common law and equity, notwithstanding the fusion of the two systems of law, is that the remedies derived from equity are governed by discretion.

Further, in their introduction to the discussion of equitable remedies Vermeesch and Lindgren have observed that '[e]quitable remedies are discretionary'.[6] Traditionally it has been said that equitable remedies are only available when common law remedies (generally damages[7]) are inadequate. This observation represents the traditional remedial hierarchy.

Likewise, Fiss has documented how the injunction in the United States challenged the primacy of monetary relief in that country in the civil rights arena; see *The Civil Rights Injunction* (1978).

2 M Tilbury, *Civil Remedies* Vol I (1990) [1021].

3 G Dal Pont and D Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed, 2000) 801. The authors cite the judgment of the Appeal Division of the Victorian Supreme Court of Victoria in *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386, 544–6 to support this statement.

4 B Kercher and M Noone, *Remedies* (2nd ed, 1990) 3. This requirement of common law damages being inadequate has an international dimension; for example, see G Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies' in Jeffery Berryman (ed), *Remedies: Issues And Perspectives* (1991) 93–6, and G Hammond, 'The Place of Damages in the Scheme of Remedies' in P Finn (ed), *Essays on Damages* (1992).

5 J Carter, *Outline of Contract Law in Australia* (2nd ed, 1994) [1405].

6 R Vermeesch and R Lindgren, *Business Law of Australia*, (10th ed, 2001) [16.36].

7 The complete dominance of Common Law damages is extremely problematic as it makes it appear that the Common Law only has that one remedy. This impression is understandable but wrong. The Common Law developed other remedies, such as Common Law rescission. However, it must be acknowledged that damages has come to assume such importance in Common Law and this article will primarily focus upon the discretion within Common Law damages. The question of discretion relating to the varieties of Common Law remedies has

Fundamentally, there are two main problems with this remedial hierarchy. The first is that it constructs a hierarchy with common law remedies being the norm or rule, and equitable remedies being the abnorm or exception. The problem with this is that it establishes and entrenches an extremely poor way to conceptualise the law of remedies. It confuses thought, and diverts attention from identifying the appropriate remedy, which should be the true aim of legal remedies. As Hammond has noted,[8] the remedial hierarchy is still the single greatest constraint on a more responsive system of judicial remedies.

As Pound observed,[9] [the remedial hierarchy] colours our whole administration of justice.

The remedial hierarchy is also inconsistent with the approach of much modern legislation.[10] It can be explained, but not justified, on the basis of history, in that it constitutes part of the 'peace deal' between the Common Law and Equity.[11]

The other problem associated with the traditional position involves the complex issue of discretion.[12] The role of discretion in the legal system is extremely complicated. Much of the work on discretion has been inspired by the American legal realism movement. Two excellent books on discretion and the law in Anglo-Australian legal settings are by Robertson[13] and Hawkins[14].

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not been examined because of the dominance of damages. However, it would appear that the plaintiff in an action has also total discretion as to the Common Law remedy which they select. This is another facet of the discretion of Common Law remedies.

8 G Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies' in Jeffery Berryman (ed), above n 4, 93.

9 R Pound, 'The Theory of Judicial Decision' (1923) 36 *Harvard Law Review* 641, 650.

10 For example, see Part VI of the *Trade Practices Act* 1974 (Cth), which contains that Act's remedial provisions.

11 See J Getzler, 'Patterns of Fusion' in Peter Birks (ed), *The Classification of Obligations* (1997) for a discussion of the early relationship between Common Law and Equity.

12 One reason why discretion is a complex issue is that it both a cause and effect of the remedial hierarchy. It is a cause of the remedial hierarchy in that the allegedly non-discretionary remedy of damages has a primary role in the remedial universe, whereas the discretionary equitable remedies are relegated to secondly roles. It is an effect of the remedial hierarchy in that damages is the preferred remedy of the remedial hierarchy

13 A Robertson, *Judicial Discretion in the House of Lords* (1998).

There is intellectual pressure being exerted by Birks,[15] amongst many others, for a decrease in the role of discretion and an increase in the role of rules. Common Law remedies, particularly damages, are frequently assumed to be non-discretionary, whereas equitable remedies are explicitly stated to be discretionary. In a remedial setting, what that means is that Common Law remedies, which are supposedly simply the application of rules, are given legitimacy while equitable remedies, which are supposedly constructed as revolving around discretions, are de-legitimised. Fortunately this traditional requirement of common law remedies being inadequate is not only theoretically outdated, it is factually incorrect.

There are two elements creating the remedial hierarchy. These two elements are frequently inter-related. While it is difficult to untangle them, the effort to partially[16] disengage them is rewarded by a clearer understanding of the law of remedies. The first element creating a hierarchy of remedies — the requirement of the inadequacy of common law remedies — is an extremely complex idea and it has been examined critically by Laycock.[17] Laycock has examined a large number of cases and concluded not only that the 'inadequacy' rule[18]

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14 K Hawkins, *The Uses of Discretion* (1992).

15 See, for example, P Birks, 'Proprietary Rights as Remedies' in Peter Birks (ed), *The Frontiers of Liability* Volume 2 (1994). Indeed, the dispute over discretionary remedialism is part of this debate over the use of discretion. Justice Hammond in 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies' in Jeffery Berryman (ed), above n 4; Justice Finn in 'Equitable Doctrine and Discretion in Remedies' in William Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo (eds) *Restitution Past, Present and Future* (1998) and D Wright, *The Remedial Constructive Trust* (1998) have been perceived as advocating a discretionary remedialist approach, while Birks, in articles such as 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *Western Australian Law Review* 1 and 'Rights, Wrongs, and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1, has constituted the opposing view.

16 It would be difficult, if not impossible, to fully separate these two elements.

17 D Laycock, *The Death of the Irreparable Injury Rule* (1991) has two major functions. The first major function of the Laycock book was to indicate that the rule has no explanatory power, cases are not decided by its application. The second major function was to indicate that whether or not there should be a presumption in favour of non monetary relief, particular coercive relief, such as the injunction. Most of the comments on this work, for example, D Rendleman, 'Irreparability Irreparably Damaged' (1992) 90 *Michigan Law Review* 1642, have focussed on this second major function. However, a review which attempts to refute the first major function is J Shreve, 'Book Review – The Premature Burial of the Irreparable Injury Rule' (1992) 70 *Texas Law Review* 1063.

18 Laycock refers to the 'inadequacy' rule as the 'irreparable injury' rule.

should not operate to prevent the selection of the appropriate remedy,[19] it *did* not operate to prevent the selection of the appropriate remedy.[20] Although he recognised that the rule was frequently invoked by the courts, Laycock concluded that it was always irrelevant. According to Laycock, the rule was employed simply to buttress the court's decision to grant or refuse equitable relief which had been made upon other traditional equitable considerations. Laycock has convincingly dealt with this first element which allows the construction of the traditional remedial hierarchy.

This article scrutinises the second element permitting the construction of a hierarchy of remedies. The second element involves the idea of discretion. Once again, discretion is important to the law of remedies. This second element is much more difficult to ascertain as it involves looking at subjective factors. At bottom is the contention that courts have been reluctant to employ equitable remedies as they explicitly involve discretion. In this way, the remedial hierarchy is created. This second element is that equitable remedies are discretionary, whereas common law remedies are non-discretionary. This element contains the implicit claim that the common law is certain, whereas equity is not. This implicit claim will be examined. Courts are much more comfortable with the idea that they merely apply rules in a purely mechanical way, than they are with the idea that they possess some leeway in decision making. For this reason, there has been a constant attempt to downplay the role of equitable remedies and to privilege common law remedies. Therefore there has been a tendency to rely upon and reinforce a remedial hierarchy. However, contrary to this second element, the common law, particularly common law remedies, does involve some discretion. This article will attempt to prove exactly that fact and so loosen the iron grip of the obsolete ideas which support the remedial hierarchy.[21]

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19 According to a commentator, this prescriptive statement by Laycock is a descriptive statement of the position in Canada and New Zealand; see C Rickett, 'Book Review' (1991) 50 *Cambridge Law Review* 536, 537–8.

20 D Laycock, above n 17. This work was first published as a long article, 'The Death of the Irreparable Injury Rule' (1990) 103 *Harvard Law Review* 687.

21 This is not to suggest that the law of remedies cannot have a preference for damages, it is simply to argue that the remedial hierarchy can not support this preference.

II CERTAINTY AND THE COMMON LAW

A *Introduction*

The concept of a right to a common law remedy is constituted by a couple of parts. The first relates to the idea that when there is a breach of a Common Law obligation that there will be a remedy. The second is that Common Law remedies must not involve any discretion. The Common Law has several very distinct points of flexibility. This is relevant to both the idea of the breach of a common law obligation, as well to the illusion of the certainty of common law remedies. This concept of certainty may be referred to as 'surface linguistic behaviour'.[22] By this examination it will become apparent that the surface linguistic behaviour partly disguises the reality of the law of remedies. However, before embarking on these two issues it is appropriate to first briefly examine how the common law is perceived as certain, whereas equity is viewed as uncertain. The stress on the common law being certain and equity being uncertain is most apparent in the commercial context.

B *The Common Law and Certainty – The Dislike of Discretion*

The role of equity in a commercial context has not always been well received. *Royal Brunei v Tan*[23] demonstrates this point.

> The proper role of equity in commercial transactions is a topical question. Increasingly plaintiffs have recourse to equity for an effective remedy when the person in default, typically a company, is insolvent. Plaintiffs seek to obtain relief from others who were involved in the transaction, such as directors of the company, or its bankers, or its legal or other advisers. They seek to fasten fiduciary obligations directly onto the company's officers or agents or advisers, or to have them held personally liable for assisting the company in breaches of trust or fiduciary obligations.

The same 'topical' question was articulated in much earlier judgments, such as *New Zealand & Australian Land Co. v Watson,*[24] *Barnes v Addy*[25] and

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22 This term was employed by R Dworkin, 'No Right Answer' in Jeffery Hacker and Joseph Raz (eds), *Law, Morality and Society* (1977), 59 and 71. He used the term to describe how lawyers and judges ordinarily speak and think about a particular area.

23 [1995] 3 WLR 64, 66.

24 (1881) 7 QBD 374, 382 (Bramwell LJ). This quote was cited, with approval, by Dawson J in *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41, 149–50 and Wilson J, 119.

Manchester Trust v Furness.[26]

The complex nature of commercial transactions appeared to generate a feeling that the certain rules of the common law were the only way to maintain order in this complex environment. Discretion and equity appeared to be thought of as making complex situations even more complex by introducing uncertainty into them. It was constantly asserted that equitable doctrine should find no place in the rules governing the sale of goods. The decision of the Privy Council in *Re Goldcorp Exchange Ltd*[27] stands as authority for this proposition. This reflects earlier jurisprudence. It was observed by Sir Frederick Pollock that[28]

> [r]eading the majority judgements [in *Re Wait*[29]], a modern equity lawyer cannot but feel that he is walking in a shadow of archaic superstition. Old-fashioned common law pleaders, on the principle of *omne ignatum pro nigromantico,* deemed all equitable notions a kind of unholy juggling, to be tolerated at need, but if possible discouraged. Their Chancery rivals rather liked a screen of mystery and were at no pains to undeceive them. Selden, indeed, might plausibly call equity a roguish thing when the Chancellor's court had no settled rules and the Chancellor or Lord Keeper was not sure to be impartial or even learned.

The traditional law of remedies rested on such ideas.

Also of a contemporary nature is the observation by Professor Sealy that:[30]

> Now in the 1880s, when the judges of the chancery courts were not dealing with partnerships and companies, they were handling questions to do with trusts and settlements, deceased estates, conveyances of real property, mortgages and leases and deeds. Nobody would claim that the approach of these judges to their cases in those days were brisk: even after the worst excesses immortalized by Dickens in *Bleak House* had been eliminated by much-needed reforms, chancery matters were dealt with thoroughly, cautiously and elaborately. And our chancery judges are still very much concerned with trusts and settlements, with deeds and conveyances, with rights and interests in land; all of it a world away from the cut and thrust of commerce and the risks and rapid fluctuations of the market-place.

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25 (1874) 9 Ch App 244, 251 (Lord Selborne LC).

26 [1895] 2 QB 539, 54 (Lindley LJ).

27 [1994] 3 NZLR 385.

28 (1927) 43 *Law Quarterly Review* 293, 295.

29 [1927] 1 Ch 606.

30 L Sealy, *Company Law and Commercial Reality* (1984), 37. However, the line between property law and the market is sometimes hard to define.

Sealy's points are perfectly consistent with the article by Goodhart and Jones, entitled 'The Infiltration of Equitable Doctrines into English Common Law'.[31] In addition, Dawson J, in *Hospital Products v United States Surgical Corporation*[32], held that

> the [common] law provides remedies for such behaviour which are capable of a precise application. To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principle upon which those remedies are based. It would be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the [common] law now imposes upon them.

These examples, which could be multiplied many times, represent an indication of how courts and leading academics are opposing the intervention of equitable concepts, which must include equitable remedies. In this way, the remedial hierarchy is created and nourished.

III DISCRETION AND COMMON LAW REMEDIES

Most discretion in the Common Law is found in Common Law remedies, which are primarily damages. Lord Upjohn once observed that 'the assessment of damages is not an exact science'.[33] This comment is reflected in the practice of the courts. However, this reality is frequently disguised by the invocation of terms such as 'rules'. The less than precise operation of the remedial rules is a necessity demanded in every jurisdiction so that unjust results may be avoided. Corbin[34] notes that '[t]he rules of law governing the recovery of damages for breach of contract are very flexible'. However the 'surface linguistic behaviour'[35] of certainty fails to recognise this flexibility. It would be relatively easy to show that the most important concepts such as remoteness, mitigation and contributory negligence, embrace unrecognised discretion. However, not only do the major rules and concepts exhibit flexibility in operation, but the myriad of minor rules and concepts demonstrate a degree of flexibility that is not present in the rhetoric of common law remedies. Although the flexibility of

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31 (1980) 43 *Modern Law Review* 489.

32 (1984) 156 CLR 41, 149.

33 *The Heron II, Koufs v C. Czarnikow Ltd* [1969] 1 AC 350, 425.

34 W Corbin, *On Contracts* (1963), ¤1002, as quoted by G Treitel, *Remedies for Breach of Contract* (1988), para 143.

35 See above n 1 for an explanation of this term.

the major rules and concepts will be touched upon, it is present in many other aspects of common law remedies.[36]

A *The Once and For All Rule*

The issue of the 'once and for all' rule, which applies to the award of common law damages, has its greatest consequences in the area of torts, particularly regarding personal injuries. The 'once and for all' rule precludes the possibility of later actions being brought by the plaintiff. Therefore, there is no possibility of changing the quantum of the remedy in the light of subsequent developments. The rule means that a claim for damages is barred if there is a previous judicial determination upon this cause of action. Perhaps the most important deficiency of the 'once and for all' rule[37] results in the plaintiff receiving a remedy which is either too generous or insufficiently generous; rarely does it result in the right remedy in the area of personal injuries. The court may take variables into account when applying the 'once and for all' rule but, in reality, the award can never be more than imprecise. Various alternatives

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36 Of course, it is not possible to demonstrate all the points of flexibility relevant to common law remedies. The ones that are discussed should provide some evidence that the surface linguistic behaviour of the legal profession regarding common law remedies is not an accurate reflection of practice. This is in no way constitutes an exhaustive list of ways that discretion fits can be found in common law remedies. For example, causation is not dealt with in this treatment but causation obviously involves discretion. For example, Dixon CJ, Fullagar and Kitto JJ observed in *Fitzgerald v Penn* (1954) 91 CLR 268, 278 that causation 'is all ultimately a matter of common sense'. Mason CJ in *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 518–9 favoured a test of causation which relied upon 'common sense'. In the same case at 524 Deane J was of a like view. In *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 413 Mason CJ, Deane and Toohey JJ held that causation a question of fact, to be resolved as a matter of common sense. In the same case, at 418-9, Gaudron J held 'questions of causation are questions of fact to be answered as a matter of common sense and experience'. To similar effect, see also the decision in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 6 (Deane, Dawson, Toohey and Gaudron JJ). If 'common sense' was not uncertain enough, McHugh J in *March* (1991) 171 CLR 506, 532 doubted whether there was 'any consistent common sense notion of what constitutes a 'cause'' and said that the application of 'common sense' notions of causation allows a tribunal of fact to make a 'policy choice' based on 'broad grounds of moral responsibility' (531). At 532 his Honour referred to the 'unfettered discretion' that a court exercises when 'common sense' is applied to the test of causation.

37 A Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed, 1990), [1.2.9]–[1.2.17] details the many criticisms of the rule.

have been suggested. These include periodic payments, [38] annuities, [39] provisional awards,[40] interim damages,[41] structured settlements,[42] conditional awards[43] as well as a host of statutory initiatives in areas such workers' compensation. All these undermine the absoluteness of the 'once and for all' rule and indicate that common law remedies do exhibit a limited degree of discretion.

B *A Breach of Contract or a Tort, Producing Different Remedies as of Right*[44]

The High Court explicitly indicated in *Astley v Austrust*[45] you can have a tort or breach of contract for the same wrong. It seems a nonsense to say that the different remedies accorded to breach of contract and a tort should follow as of a right. If *Astley* has settled the law on concurrent liability in Australia, it is clear that it has not solved the problem of conflicting remedial results from one set of facts. In *Astley* the High Court took a stand against the merger of tort and contract — not only insisting that tort and contract are quite different parts of the common law, but also that these differences must be preserved at every level, including the remedial level.

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38 However it should be noted that this power is rarely used in the two Australian States which permit it.

39 This comment is based upon the dicta in *Lim Poh Choo v Camden and Islington AHA* [1980] AC 174, 182, where it was stated that at common law an annuity can awarded with the consent of the parties.

40 See Part 41 of *The Civil Procedure Rules* 1999 (UK).

41 Interim damages are allowed in South Australia, see s 30b of the *Supreme Court Act* 1935. Interim payments are allowed in New South Wales, see Pt 5, Division 2 of the *Supreme Court Act* 1970.

42 Section 81 of the *New South Wales Motor Accidents Act 1988* provides structured settlement if both parties consent. Structured settlements are popular in the United States. For their use in the United Kingdom, see A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed, 1994) 103–4.

43 It would seem that the case of *Banbury v Bank of Montreal* [1918] AC 626 constitutes a rule prohibiting conditional awards. However, after examining this decision, M Tilbury, above n 2, [3015] states that 'no such rule exists'. Cases such as *Schneider v Eisovitch* [1960] 2 QB 430 have used conditional awards in the area of personal injuries and third parties.

44 Also known as concurrent liability. When this section is being examined the reader should also refer to the later section on contributory negligence. This is particular true when the case of *Astley v Austrust* (1999) 161 ALR 155 is being considered as important legislation have occurred in the wake of *Astley*.

45 (1999) 161 ALR 155.

This area of concurrent liability requires further attention. The basis of tort and contract liability can be cited at such a level of generality that there is unity. At this general level it can be said that both are concerned with compensation by aiming to put the plaintiff into a position as if no breach of contract or tort had occurred. But this level of generality hides the fact that a breach of contract involves primarily nonfeasance,[46] while tort involves primarily misfeasance.[47] Weir has observed that[48]

> [h]uman good, for which the law exists, depends on the maintenance and development of human goods-life, health, property, and wealth ... To ensure their maintenance we have the law of tort, and to promote their development we have the law of contract. Contract is productive, tort law is protective. In other words, tortfeasors are typically liable for making things worse, contractors for not making them better.

There are fundamentally three reasons[49] why a plaintiff may select tort law over contract law. They are that: i) the plaintiff may be entitled to a longer limitation period for commencing one cause of action rather than the other; ii) the plaintiff may be entitled to a greater quantum of recovery because the principles limiting damages apply differently between contract and tort; and iii) the plaintiff may receive a greater quantum of damages because the principle remedial aim of each differs. Based upon the decision of *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*,[50] Carter and Harland[51] have suggested that whether the plaintiff frames the action in contract or tort, damages will be assessed on the more favourable test. This appears to be consistent with the decision of Lord Goff in *Henderson v Merrett Syndicates Ltd*[52], which was applied in Australia by *Astley v Austrust.*[53]

The decision of *Henderson v Merrett* is examined by Burrows in his essay upon concurrent liability.[54] Burrows' overall theoretical approach places great importance upon individual autonomy, and so it is no surprise that he suggests

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46 Which means that the defendant has failed to benefit the plaintiff.

47 Which means that the defendant has harmfully interfered with the plaintiff.

48 *International Encyclopedia of Comparative Law* Vol XI, ch 12, *Complex Litigation,* para 6.

49 R Balkin and J Davis, *Law of Torts* (2nd ed, 1996) 792–4, list eight reasons one may select to sue in torts rather than contract.

50 [1978] QB 791.

51 J Carter and D Harland, *Contract Law in Australia* (3rd ed, 1996) [2126].

52 [1994] 3 All ER 506, 533.

53 (1999) 161 ALR 155.

54 A Burrows, *Understanding the Law of Obligations* (1998) 26–33.

that the plaintiff should be free to select to sue in tort or contract[55] subject to only three restrictions.[56] As one of these three does not apply to *Henderson v Merrett*,[57] it would appear that Burrows' task should be relatively easy. However, the decision of Lord Goff does not neatly fit Burrows' scheme.[58]

The confused background to the area of concurrent liability prior to *Henderson v Merrett* can be seen from the comment by Lord Scarman in *Tai Hing Cotton Mill v Liu Chong Hing Bank*,[59] that

> [t]heir Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.

This should be contrasted with the opposite position, represented by the judgment of Oliver J in *Midland Bank Trust Co v Hett Stubbs and Kemp*,[60] where the court held that where there was concurrent liability, the plaintiff was free to select between the causes of action. *Henderson v Merrett* resolved this dispute in favour of *Midland Bank*, allowing the plaintiff the freedom to select between the causes of action. Although Burrows found this decision as supportable as complying with his exclusion principle, he was unable to claim *Henderson v Merrett* in support of his independence principle. He concludes

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55 He also includes restitution, as is consistent with his entire view of the law of obligations.

56 These three are the independence principles, the exclusion principle and the anti-circularity principle.

57 The one that does not apply is the anti-circularity principle.

58 It is interesting to note that D Heydon, 'The Negligent Fiduciary' (1994) 110 *Law Quarterly Review* 328, discussed the Court of Appeal decision with regard to the intersection of tort and fiduciary law. The position regarding concurrent liability where there is a breach of fiduciary duty, as well as a tort, is a fascinating and unsettled area of law.

59 [1986] AC 80, 107. The position that prevails in Australia is, most likely, very different. For example, Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 generally favoured tortious liability being imposed in cases of concurrent liability. This is in contrast to the views expressed by Lord Scarman in *Tai Hing Cotton Mill.* In *Bryan v Maloney* (1995) 182 CLR 609, 622 the High Court held that the plaintiff can 'assert the cause of action that appears to be the most advantageous'. Further, the High Court in *Astley v Austrust* (1999) 161 ALR 155 mounted a strong defence of the view that a plaintiff should have the choice of suing in either tort or contract in cases of concurrent liability. Similar comments were made by Lord Reid in *Koufos v Czarnikow Ltd* [1969] 1 AC 360. However, *Astley* has come under strong attack and the result has now been altered by legislation, so the status of the comments in it is unclear.

60 [1979] Ch 384.

that '[o]ne is driven to the conclusion, therefore, that applying the strict logic of the independence principle, the decision in *Henderson* may be found wanting'.[61] But he continues: 'Nevertheless it seems that the decision is correct and that the lords were right to accept concurrent liability'.[62] Burrows justified *Henderson v Merrett* upon the basis of pragmatism. Therefore at the base of Burrows' decision concerning concurrent liability is a discretion about when the plaintiff should be allowed to select which cause of action to sue under. The certainty of common law remedies is again shown to be illusory.[63]

C *Date of Assessment of Damages*

In Australia, the general rule relating to the date of assessment of damages[64] is at the date of breach or at the date on which the cause of action arose.[65] The fact that there are two dates upon which the courts can select from, indicates that common law damages do possess some degree of flexibility. If there is a conflict between these two dates, then generally[66] it is considered that the relevant date is the date on which the cause of action arose.

However, this general rule relating to the date of the assessment of common law damages does not apply if the interests of justice dictate the use of another date.[67] Mason CJ in *Johnson v Perez* noted that[68]

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61 Burrows, above n 54, 31.

62 Ibid.

63 The way that concurrent liability may be dealt with is by a clearly understanding of the law of obligations.

64 There are two meanings of the date of assessment. The first asks whether a court assessing damages is forbidden from taking into account events that have occurred between the date of the wrong and the trial. The second meaning, which is the most common usage of the term and will be examined here, poses the question, upon what date are damages evaluated.

65 *Johnson v Perez* (1988) 166 CLR 351 is the most recent High Court authority for this proposition.

66 The qualification to this proposition relates to the Sale of Goods legislation which indicates that the date for assessment purposes is the date of breach where there has been non delivery or non acceptance of goods where there is an available market. See ACT: *Sale of Goods Act* ss 53(3), 54(3); *NSW Sale of Goods Act* 1923 ss52(3), 53(3); NT: *Sale of Goods Ordinance* 1972 ss52(3), 53(3); Qld: *Sale of Goods Act* 1896 ss51(3), 52(3); SA: *Sale of Goods Act* 1895 ss49(3), 50 (3); Tas: *Sale of Goods Act* 1896 ss54(3), 55(3); Vic: *Goods Act* 1958 ss56(3), 57(3); WA: *Sale of Goods Act* 1895 ss49(3), 50(3).

67 For support for this conclusion regarding a tort, *Johnson v Perez* (1988) 166 CLR 351, 360 (Mason CJ) and 371 (Brennan J). Support for this proposition regarding breach of contract is provided by the House of Lords in *Johnson v*

> [t]here is a general rule that damages for torts or breach of contract are assessed as at the date of breach or when the cause of action arises. But this rule is not universal; it must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered.

A case by case flexibility is allowed for by the Chief Justice. Discretionary considerations are relevant to common law damages. Likewise, in the same case Brennan J indicated the flexibility inherent in the date for the assessment of damages. His Honour noted:

> The general rule as to the date at which damages are to be assessed is subject to the principle governing the measure of damages. A plaintiff who has suffered damage as a result of a defendant's tort or breach of contract is entitled to such a sum as will, so far as possible, put him in the same position as he would have been in but for the tort or breach of contract: *Wenham v Ella* (1972) 127 CLR 454, 466; *Todorovic v Waller* (1981) 150 CLR 402, 412, 442 and 463; *Livingstone v Rawyards Coal Co.*(1880) 5 App. Cas. 25, 39. The time at which damages are assessed must be so fixed as to give effect to the governing principle. In giving effect to that principle, matters occurring after the tort or breach may be excluded from consideration by selecting the date of the tort or breach of contract as the date of assessment; conversely, such matters may be included by selecting the date of the trial as the date of assessment. In either case, it is the governing principle rather than the temporal rule which determines what is to be taken into consideration and what is not.

The flexibility of a guiding principle appears to be favoured over the inflexibility of a rule. It is important to note that his Honour referred to the classic decision of *Livingstone v Rawyards Coal Co*[69] as authority to support his decision. In *Target Holdings Ltd v Redferns*,[70] Lord Browne-Wilkinson also referred to *Livingstone* and held that:[71]

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put 'in the same position

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Agnew [1980] AC 367, 400–1. Also see Lord Wilberforce in *Miliangos v Frank (Textiles) Ltd* [1976] AC 443, 468. In New Zealand, see *Stirling v Poulgrain* [1980] 2 NZLR 402 and *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39.

68 (1988) 166 CLR 351, 355–6.

69 (1880) 5 App. Cas. 25.

70 [1995] 3 WLR 352.

71 Ibid 359.

> as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation: *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas. 25, 39, *per* Lord Blackburn. Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law.

This decision, which can be criticised upon other bases, reveals the application of common principles to both common law and equitable remedies. Lord Browne-Wilkinson's comment indicates that there is not much substantive difference between equitable and common law remedies.[72] Once again the easy dichotomy between equitable and common law remedies, the former embodying discretion, the latter representing certainty, has been shown to be inaccurate. It must be noted that departures from the general rule are exceptions,[73] and Tilbury has listed the factors which might indicate the need from a departure from the general rule.[74] However the structured nature of this flexibility is perfectly consistent with the discretion with equitable remedies. This discretion is not 'at large' and this discretion is heavily circumscribed. The consequence of all this is that common law damages are much less certain than is constantly being suggested.

D *Impossibility and Difficulty of Assessment of Common Law Damages*

In some cases, the assessment of damages is extremely problematic. This is particularly so where a chance is lost by the breach of a common law obligation, that is, by breach of contract or by tort. Therefore, where damages are difficult to assess upon one basis, damages may be awarded upon another basis. It is appropriate to divide the cases into two parts. The first is where it is impossible to assess the damages. For example, in *McRae v Commonwealth Disposals Commission*,[75] as a consequence of the difficulty of assessment for compensation upon an expectation basis (the usual basis for contractual damages), compensatory damages were awarded upon a reliance basis. This High Court case, which indicated the flexibility of valuing common law

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72 It should be noted that S Waddams, in 'The Date for the Assessment of Damages' (1981) 97 *Law Quarterly Review* 445 and *The Law of Damages* (2nd ed, 1991), [1.650]–[1.1100], criticises this flexibility. However Burrows in *Remedies for Torts and Breach of Contract* (2nd ed, 1994) 112–3 points out the shortcomings of these comments.

73 McHugh J observed in *The Commonwealth v Amann Aviation* (1991) 174 CLR 64, 161–2 that the court would depart from the general rule concerning the date of the assessment of damages only 'in very special circumstances'.

74 M Tilbury, above n 2, [3225].

75 (1951) 84 CLR 377.

damages, clearly indicates that the entire idea of a right to a remedy is concept largely devoid of content. Justice McHugh in *Commonwealth v Amann Aviation*[76] justified the rule in *McRae*'s case on the basis of

> the broad principle of justice that, if the breach of the defendant has made it impossible to ascertain whether or not the plaintiff would have made a profit from the performance of the contract, it is only fair that the defendant should reimburse the plaintiff for expenditure which it has wasted as the result of the breach.

The *Amann* case introduces the second division in this area, that of the difficulty valuation of damages. In that case the value of the prospects of renewal, which constituted the chance, could not be assessed with accuracy because of five reasons. The majority of the High Court held that the chance of gaining a renewal of the contract at the end of the contract was within the contemplation of the parties at the time the original contract was entered into and that the value of this chance must be taken into account in assessing damages. Similar reasoning to that adopted later in *Amann* was applied by the High Court to the earlier tort case of *Malec v JC Hutton Pty Ltd.*[77] Justice Deane looked at the situation where precise proof of damage is not possible. His Honour illustrated this by referring to a plaintiff who, by reason the defendant's breach, loses a

> less than 50 per cent but nonetheless real and valuable chance of winning some contest or prize, of being the successful tender for some commercial undertaking or of deriving some other advantage, in circumstances where a court can decide that a proportionate figure precisely or approximately reflects the chance of success but can do no more than speculate whether, but for the defendant's wrongful act, the plaintiff would have actually won the contest, prize or derived the advantage.

To further generate uncertainty, the High Court in *Amann* has reduced the level of proof of the quantum of the loss of chance below the balance of probability test but have not clearly indicated what the test should be to determine the loss of a chance. The issue was discussed by the High Court in *Malec.*[78] Justices Deane, Gaudron and McHugh held that:

> If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high – 99.9 per cent – or very low – 0.1 per cent. But unless the chance is so low as to be regarded

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76 (1991) 174 CLR 64, 165.

77 (1990) 169 CLR 638.

78 (1990) 169 CLR 638, 643.

> as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.

This fact was further articulated in *Sellars v Adelaide Petroleum NL*,[79] where Mason CJ, Dawson, Toohey and Gaudron JJ held that

> ... the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. However, in a case such as the present, the applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.

Within the new test of proving the quantum of damages of loss of a chance flowing from the breach, there is much uncertainty.

Another difficulty involving common law damages relates to the award of contractual damages for disappointment. In *Jarvis v Swan Tours Ltd*,[80] a decision that was explicitly approved and applied by the High Court in *Baltic Shipping Co v Dillon*,[81] damages were allowed for disappointment and distress. The issue which is of note here is how were the damages for the disappointment and distress determined? According to Lord Denning, the damages were determined by looking at the matter 'quite broadly'.[82] However, these problems of uncertainty pale into insignificance with those encountered in torts, particularly claims for common law damages for personal injuries. For example, how exactly do you measure the loss of earning capacity of a child? It is quite acceptable to acknowledge that the Courts must have some limited

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79 (1994) 179 CLR 332, 355.

80 [1973] 1 QB 233.

81 (1993) 176 CLR 344.

82 [1973] 1 QB 233, 238.

discretion to select between different figures. However, these problems are not simply limited claims for personal injuries but also regarding suits for injury for loss of reputation. In *Canson v John Fairfax & Sons Ltd*,[83] the majority proposed that it is proper for an appellant court to disturb a verdict if it considers it 'so high or so low that it is out of the range of what could reasonably be regarded as appropriate to the circumstances of the case'.[84] Some permissible and completely appropriate element of discretion is introduced into the common law damages allowable in such a case by the concept of 'the range' of awards.

It is frequently said that difficulty of assessment of damages will not constitute a bar to receiving a remedy. That seems intuitively correct. Unfortunately, this concept is frequently misunderstood to mean that difficulty in assessing common law damages is no bar to receiving common law damages. Difficulty of the assessment of damages may well be another factor that necessitates the award of some other remedy. This was shown clearly by Wilson J of the Supreme Court of Canada in *LAC Minerals Ltd v International Corona Resources Ltd*,[85] with the award of a constructive trust rather than damages.[86] His Lordship gave three reasons for this remedial choice. One reason was the 'virtual impossibility of accurately valuing the property'.[87] This same approach was demonstrated by Kearney J in *Wight v Haberdan Pty Ltd.*[88] These cases are perfectly consistent with the idea of selecting the most appropriate remedy available.[89]

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83 (1993) 178 CLR 44.

84 (1993) 178 CLR 44, 62.

85 (1989) 61 DLR (4th) 14. Although this was a case of a breach of an equitable obligation, the court was considering awarding damages following the decision in *Seager v Copydex (No 2)* [1969] 1 WLR 809.

86 The Victorian Supreme Court in *ANZ Executors and Trustees Ltd v Humes Ltd* [1990] VR 615.has also held that common law damages may be inadequate, and another remedy ordered, where it the plaintiff's losses are difficult to prove or quantify.

87 (1989) 61 DLR (4th) 14, 52.

88 [1984] 2 NSWLR 280, 290.

89 Another factor which might determine that common law damages are inadequate is the insolvency of the defendant, which would render meaningless any damages award. See, for example, *Associated Portland Cement Manufacturers Ltd v Tigland Shipping A/S (The Oakworth)* [1975] 1 Lloyd's Rep 581. Perhaps it is the evolution of legal principles to a broader interpretation of the circumstances in which Common Law remedies are found to be inadequate that possesses the greatest potential to destroy the remedial hierarchy. However, it needs to be recognised that the realisation that Common Law remedies involve

E *Exemplary Damages*

Exemplary damages are damages whose purpose is to punish the defendant for his wrongful conduct. Connected to this is the deterrence effect that such awards may possess. Obviously, exemplary damages are not compensatory in nature. Although exemplary damages are not awarded in contract cases,[90] they are awarded in tortious matters. In *Lamb v Cotogno*[91] the High Court held that the award of exemplary damages is appropriate where the defendant's conduct involves 'fraud, malice, violence, cruelty, insolence or the like, or (the defendant) acts in contumelious disregard of the plaintiff's rights'.[92] In England, *Rookes v Barnard*[93] has limited the scope of the award of exemplary damages. This limitation does not apply in Australia.[94]

Although the continued use of exemplary damages has been questioned[95] the courts continue to award such damages. This introduces the important issue of how courts assess exemplary damages. The assessment procedure highlights just how uncertain common law damages can be.

As Burrows has stated 'there is almost total discretion to award whatever sum is felt necessary to punish the defendant and to set an example to others'.[96] A clearer statement highlighting the flexible nature of the common law remedy can hardly be proposed. Further, as Lord Delvin indicated in *Rookes v Barnard*,[97] the court, when awarding exemplary damages, should take into account all mitigating circumstances. Flexibility is emerging as a significant factor.[98]

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discretion also plays an important role in the overthrow of the remedial hierarchy.

90 *Addis v Gramophone Co Ltd* [1909] AC 488, *Bulter v Fairclough* (1917) 23 CLR 78 at 89, *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 80, *Moss v Sun Alliance Australia Ltd* (1990) FLR 77.

91 (1987) 164 CLR 1, 8.

92 See also *Trend Management Ltd v Borg* (1996) 40 NSWLR 500.

93 [1964] AC 1129.

94 Not only does it not apply in Australia, it has been criticised in England. For example, see the Law Commission Report on *Aggravated, Exemplary and Restitutionary Damages* (Law Commission, 247, 1997).

95 For example, A Burrows, above n 72, 282–5 and M Tilbury, above n 2, [5017]–[5020].

96 A Burrows, above n 72, 281.

97 [1964] AC 1129, 1228.

98 D Dobbs, *Law of Remedies* Volume I (2nd ed, 1993), 3.11(14) indicates that the purposes of exemplary damages, for example deterrence and punishment, may

In Australia, the High Court in *Gray v Motor Accident Commission*[99] had to examine the use of exemplary damages. The majority, after stating that exemplary damages constitutes an 'exceptional remedy', noted that there is not a 'sharp cleavage' between criminal law and private law.[100] One important aspect of criminal law is that the remedies are, to some extent, discretionary. In *Gray*, the majority was at pains to indicate that where there has been substantial criminal punishment, exemplary damages are not available. However, the majority did not indicate that once this factor was not relevant, that exemplary damages were not discretionary. Indeed, the majority still referred to the existence of discretion with regard to exemplary damages. Gleeson CJ, McHugh, Gummow, and Hayne JJ held that[101]

> Nor is the problem [of when to award exemplary damages] resolved by attempting to analyse the question in terms of "rights" or "claims" rather than discretionary powers. To do so may do little more than provoke an unproductive debate about jurisdictional classifications. What is important is to consider what it is that entitles a plaintiff to an award of exemplary damages or (to put it in the language of power or discretion) permits or requires the making of an award.

In separate judgments both Kirby and Callinan JJ accepted that exemplary damages are properly described as discretionary. In a comment consistent with the majority, Kirby J held that:[102]

> The notion that a plaintiff's entitlement to a component of damages at common law is a matter of discretion is exceptional. Damages are ordinarily the plaintiff's right, being the remedy devised by the common law to effect its purposes ... If one of the reasons for awarding exemplary damages is the punishment of the wrongdoer in an emphatic and public way, it is obviously relevant to take into account the fact that this may already have been done or is likely to follow. Once exemplary damages are seen as supplementary to compensatory damages ... the fact that a plaintiff may lose them (or have them reduced by reference to the actions of others in the criminal courts) does no offence to reason.

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conflict and so, the award of exemplary damages may not serve completely either purpose.

99 (1998) 196 CLR 1. With regard to the position in England reference should be made to the House of Lords decision in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122.

100 (1998) 196 CLR 1, [16].

101 (1998) 196 CLR 1, [30].

102 (1998) 196 CLR 1, [96]–[97].

F *Variability in Common Law Damages*

Compensation is the general remedial principle.[103] As Tilbury has pointed out, there are well-established situations where the award of damages is not related to the compensation principle.[104] However, there are cases which fall outside of these exceptions and are not included within the compensatory principle.

With regard to torts and restitutionary damages,[105] there has been a long tradition of granting restitutionary damages in the form of an account of profits for intellectual property torts.[106] There has also been restitutionary damages allowed for the tort of trespass to land. Hoffmann LJ[107] has stated that

> [a] person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two different bases. The first is for the loss which he has suffered in consequence of the defendant's trespass. This is the normal measure of damages in the law of tort. The second is the value of the benefit which the occupier has received. This is a claim for restitution. The two bases of claim are mutually exclusive and the plaintiff must elect before judgment which of them he wishes to pursue. These principles are not only fair but ... also well established by authority ... Nowadays I do not see why we should not call a spade a spade. In this case the Ministry of Defence elected for the restitutionary remedy.

In cases where there is no 'waiver of tort' there has been most support for the employment of restitutionary damages in torts which have a proprietary nature.[108] Indeed, it is with regard to so-called proprietary torts that restitutionary damages have been most strongly related. However, proprietary torts are not the sum total of where restitutionary damages may be awarded. Frequently such restitutionary damages have been treated as part of exemplary

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103 The classic article to support this proposition is C Wright, 'The Law of Remedies as a Social Institution' (1955) 18 *University of Detroit Law Journal* 376.

104 M Tilbury, above n 2, [3059].

105 In this section, restitutionary damages refers to damages based upon the gain that the wrongdoer has received, as compared to focussing upon loss which compensation pays attention to.

106 One very important area where restitutionary damages may be awarded involves 'waiver of tort'.

107 *Ministry of Defence v Ashman* (1993) 66 P & CR 195, 200–01.

108 However, the unstable nature of property must be noted; see D Wright, *The Remedial Constructive Trust* (1998), particularly para [4.7].

damages.[109] But it must be recognised that not all exemplary damages can be explained upon the basis of restitution. Birks has argued that restitutionary damages should be awarded for any tort, especially where the tort is deliberately committed.[110] The case of *Halifax Building Society v Thomas*,[111] which seems to represent a barrier to the award of restitutionary damages for a deliberately committed tort, can be explained on the basis that the availability of a criminal confiscation order made the restitutionary remedy unnecessary and a different result would most likely have been achieved if the criminal confiscation order was not available. There is a difficulty in discovering why only compensatory damages are available for some torts but that restitutionary damages are available for other torts. Where there has been damage done by a trespass to land, it sometimes is said that the plaintiff has a choice of remedies.[112] This statement is inaccurate. Where the cost of restoration is 'entirely disproportionate'[113] to the diminished value of the property or is 'unreasonable',[114] damages based upon restoration will not be ordered.[115] This process[116] is extremely similar to that undertaken with the discretionary remedy of mandatory injunction.[117]

Surprising as it might seem, the position of restitutionary damages rather than compensatory damages for torts is straightforward compared to the position regarding restitutionary damages for breach of contract. Burrows has referred to the issue of the availability of restitutionary damages for breach of contract as 'a devilishly difficult topic'.[118] Little judicial support can be found for permitting restitutionary damages for a breach of contract that does not involve a breach of fiduciary duty or a breach of a property right. The approach of Steyn LJ in *Surrey County Council v Bredero Homes Ltd*,[119], which Burrows

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109 For example, see *Rookes v Barnard* [1964] AC 1129, 1226–27 (Lord Delvin) and *Cassell & Co v Broome* [1972] AC 1027, 1130 (Lord Diplock).

110 P Birks, *Civil Wrongs: A New World* (1990-91) but A Burrows, above n 72, 311 points out some of the difficulty with the Birksian solution.

111 [1996] 2 WLR 63.

112 *Public Trustee v Hermann* (1968) 88 WN (NSW) 442, 447.

113 *Hansen v Gloucester Developments Pty Ltd* (1991) Aust Torts Reports 81–067.

114 *Perry v Sidney Phillips & Son* [1982] 3 All ER 705.

115 *Jones v Shire of Perth* [1971] WAR 56 is a good example when restorative damages will be refused.

116 M Tilbury, *Civil Remedies* Volume II (1993), para [12103] lists six factors which indicate the reasonableness of the measures of damages.

117 For example, *Redland Bricks Ltd v Morris* [1970] AC 652.

118 A Burrows, 'No Restitutionary Damages For Breach of Contract' [1993] *Lloyds Maritime and Commercial Law Quarterly* 453.

119 [1993] 3 All ER 705.

very tentatively approves of,[120] that the court will award restitutionary damages rather than simply limiting the party to compensatory damages where the tort or breach of contract constitutes a proprietary wrong, does have attraction but there are problems with it.[121] It is absolutely essential to it that there be a clear division between ownership (that is, property) and obligation. However, this is an invalid distinction, particularly regarding equitable property.[122] Also, the recent comments of the House of Lords in *Attorney-General v Blake*[123] are consistent with increased remedial flexibility.[124]

G *Nominal Damages*

This is really at the heart of the claim that common law remedies are a right. Without the availability of nominal damages this claim would be obviously incorrect. For this reason, it is surprising that nominal damages have not been the subject of closer examination.

One of the prime difficulties with the concept of nominal damages is that the expression actually encompasses two separate ideas. The first is that nominal damages are what the plaintiff receives if they prove the breach of a common law obligation, such as a tort[125] or breach of contract, but do not show any loss. The second idea encompassed within the concept of nominal damages is the remedy which a plaintiff may obtain without the proof of any loss for the breach of a tort actionable *per se*. The damages for the breach of such an obligation may be substantial. Therefore, under this second idea within the concept of nominal damages the plaintiff may receive substantial damages, which will be called nominal damages.

The first idea, that nominal damages are what the plaintiff receives if they only prove the breach of a common law obligation but do not show any loss, will be

120 A Burrows, above n 118, 456–7.

121 Ibid 457 identifies several problems with it.

122 See D Wright, above n 108.

123 [2000] 3 WLR 625. With regard to this entire issue the refusal of the Full Court of the Federal Court in *Hospitality Group Pty Ltd v ARU* (2001) 110 FCR 157, 196 to adopt *Blake* because it is inconsistent with the principles laid down by the High Court should be noted.

124 See the article by J Doyle and D Wright, 'Restitutionary Damages – The Unnecessary Remedy?' (2001) 25 *Melbourne University Law Review* 1, which deals with this case.

125 All torts are included in this idea, because for many torts, such as negligence, the breach is not proved without the plaintiff showing loss.

examined in this section.[126] However, the limited discretionary nature of nominal damages as understood by this first idea is slightly complex and the reasons for awarding nominal damages need to be investigated. Nominal damages with regard to this first idea are awarded for two reasons. The first reason is related to costs. It is very important to note that, according to McGregor,[127] this has been considered the main reason for the award of nominal damages. In many cases the plaintiff only seeks nominal damages because this would entitle the winner to have their costs paid. The general rule is that costs follow the event. However, the general rule is not absolute. For example, in *Anglo-Cyprian Agencies v Paphos Industries*[128] in the exercise of the court's discretion, it denied the plaintiff a costs order after the plaintiff had been awarded nominal damages. This was because Lord Delvin held the plaintiff had no good reason for suing:[129]

> No doubt the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a 'successful' plaintiff. In certain cases he may be, *e.g.* where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained. To that extent a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff, but it is necessary to examine the facts of each particular case.

This is confirmed in Part 44 of the *Civil Procedure Rules* 1999 (UK). In *Bank of Credit and Commerce International SA (in liquidation) v Ali (No 4)*,[130] Mr Justice Lightman indicated that the relevant principles governing costs in new *Civil Procedure Rules* made it apparent that the overriding objective of the court was to make the costs order which justice required. Obviously a discretion is involved with the award of costs.

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126 The second idea within the concept of nominal damages, nominal damages are what the plaintiff receives for breach of a tort actionable *per se* will be addressed in the next section.

127 H McGregor, *McGregor on Damages* (16th ed, 1997) [428].

128 [1951] 1 All ER 873.

129 *Anglo-Cyprian Agencies v Paphos Industries* [1951] 1 All ER 873, 874.

130 *The Times*, 2 March 2000.

In Australia, courts are given the discretion not to order that costs follow the event.[131] If there are good reasons the court can exercise its discretion so that costs do not follow the event.[132] In other words, the winner of nominal damages does not necessarily obtain an order for costs. A winning plaintiff has no right to costs prior to the court exercising its discretion.[133] Additionally, Cairns has stated that:[134]

> The court has a duty not to follow [the general rule] blindly and irrespective of other relevant circumstances. Moreover, the court must actually exercise its discretion over costs.

The consequence of this is that one of the two reasons for the existence of nominal damages no longer exists.

The second and subsidiary reason for the award of nominal damages was it constituted a declaration of legal rights.[135] Frequently these actions were brought with regard to property rights. The most noticeable feature of the case law in this area relates its age. Indeed, as McGregor has noted;[136] 'Today, however, there are more direct means available to a plaintiff'. McGregor suggests rather the use of the injunction to protect property rights.[137] Another remedy that may be employed instead of nominal damages is the declaration. The declaration has only recently emerged from historical obscurity. With the wide-ranging jurisdiction of the court to award declarations today, the comment by Burrows that 'nominal damages are superfluous and could happily be abolished' must be correct.[138]

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131 O 62 r1 *Rules of the Supreme Court of the Australian Capital Territory*; O 62 r 15 *Federal Court Rules*, Part 52A r11 *Supreme Court Rules* 1970; O 91 r 1 *Rules of the Supreme Court* (Qld); r101.02 *Supreme Court Rules* (South Australia); O 66 r 1 *Supreme Court Rules* (Western Australia).

132 *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, *Armstrong v Boulton* [1990] VR 215, *Monier Ltd v Metal Work Tiling Co (No 2)* (1987) 43 SASR 588, *Gladstone Park hopping Centre Pty Ltd v Wills* (1984) 6 FCR 496.

133 *Donald Campbell & Co Ltd v Pollack* [1927] AC 732, 809.

134 *Australian Civil Procedure* (4th ed, 1996) 610.

135 It is for this reason that Tilbury, above n 2, deals with nominal damages in the chapter entitled 'Declaratory Relief'.

136 H McGregor, above n 127, [427].

137 Ibid.

138 A Burrows, above n 72, 270.

H *Torts Actionable* per se

Connected to the point of nominal damages, some torts are actionable *per se*. What this means is that these torts do not need proof of damage to be actionable. Torts actionable *per se* include[139] trespass,[140] nuisance affecting property rights and defamation. The damages for these are completely at the discretion of the court.[141] The only constraint is that the sum be 'reasonable'. It is obvious that such damages are non-compensatory in nature. In *Waters v Maynard*,[142] an action concerning a tort actionable *per se*, no evidence was given by the plaintiff of any damage suffered because of the exclusion. The jury found for the plaintiff, and awarded £75 damages. On appeal, this amount was allowed to stand.

I *Contractual Damages Where There is No Proven Damage*

Similar to defamation, where damage is presumed, there are two situations[143] where contractual damages are awarded without proof of damage. The first situation involves the loss of publicity suffered, when that person is entitled to screen recognition and has been wrongfully denied an opportunity of enhancing or maintaining his professional reputation.[144]

The second situation involves a pecuniary loss suffered to a plaintiff's reputation and credit caused by the defendant's wrongful dishonour of a plaintiff's drafts.[145] According to Lord Atkinson these damages can be substantial as long as they are 'temperate and reasonable'.[146] In other words, the quantum is discretionary within limits.

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139 This is not an exhaustive list. See John Dias (ed), *Clerk and Lindsell on Torts* (15th ed, 1982), [1]–[109] for a complete list.

140 The trespass can be to land, goods and persons. With regard to trespass to the person, it must be a intentional trespass.

141 *Turner v NSW Mont de Piete Co Ltd* (1910) 10 CLR 539, 548 (Griffith CJ).

142 (1924) 24 SR (NSW) 618. See also *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343.

143 Other situations include where a breach of contract involves a mismanagement of advertising (for example, see *Aerial Advertising Co v Batchelors Peas Ltd* [1938] 2 All ER 788) and situations where in breach of contract the defendant supplies goods or services that are not of the standard required by the plaintiff's customers (see, for example, *Anglo-Continental Holidays Ltd v Typaldos Lines (London) Ltd* [1967] 2 Lloyds Rep 61).

144 *White v Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266.

145 *Rolin v Steward* (1854) 14 CB 595, 139 ER 245.

146 *Wilson v United Counties Bank* [1920] AC 102, 133.

J *Jury Awards*

The use of the jury to determine the quantum of an award of damages involves much discretion. This is most obvious in the law of defamation.[147] These damages are said to be 'at large', in that the jury can decide upon the quantum of these damages. Indeed, a person defamed does not receive damages for compensation, rather damages are 'a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather a monetary recompense for harm measurable in money'.[148] There have been attempts to control the unpredictable nature of such awards. The High Court has held that when an appellant court is examining the damages awarded for defamation, the court may compare the quantum awarded with the quantum awarded for pain and suffering in a personal injury case.[149] Additionally, it has held that a trial judge in a defamation case may indicate to the jury what are the usual awards of damages for personal injuries.

K *Contemptuous Damages*

Contemptuous damages are most closely linked to jury awards and are rarely awarded. Generally, contemptuous damages are awarded by a jury[150] in a defamation case,[151] and the jury awards a very small amount to the plaintiff. The paltry amount[152] indicates that the plaintiff has been vindicated by proving that there has been a breach of his or her legal rights, coupled with an admonition to the plaintiff that he or she should not have brought the action. As a consequence of the two elements in a contemptuous damages award,

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147 Except in South Australia, the Australian Capital Territory and New South Wales (following amendments in 1994), juries can be sought by either party, although they are mostly employed in Victoria and Queensland.

148 *Uren v Fairfax* (1966) 117 CLR 118, 150.

149 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 56–60. See *John v MBN Ltd* [1996] 2 All ER 35 for the English position. However, Canada has rejected this approach to controlling jury's damages in defamation cases, see *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129, 178–9.

150 *Bailey v Truth and Sportman Ltd* (1938) 60 CLR 700 held that a jury's award of contemptuous damages will only be overturned where the appeal court finds that no reasonable jury could make such an award.

151 It is interesting to note that A Ogus, *The Law of Damages* (1973) 27 has stated that '[i]n modern times, [contemptuous damages] have therefore had their most frequent application in actions for defamation'. He bases this qualified conclusion upon the reality that contemptuous damages are only awarded by juries. It is interesting to speculate what other areas where there are juries determining damages.

152 Usually it will be the lowest coin of the jurisdiction.

Burrows has referred to it as a 'double-edged sword'[153] and he has suggested that as contemptuous damages involve these two elements of vindication and admonition that these damages should still be available.[154] Following the award of contemptuous damages the general rule relating to costs, that costs are borne by the unsuccessful party, is generally[155] abandoned and the successful plaintiff will have to pay his or her own costs.[156] Exceptionally, the successful plaintiff will also have to pay the cost of the losing party.[157]

An award of contemptuous damages may be made by the jury because it has formed a 'low opinion of the claim by the plaintiff, or its disapproval of his conduct prior to, or at the time of the commission of the tort'.[158] Clearly the jury has a discretion to consider factors which normally it does not consider with common law damages, such as the merit of the plaintiff's case. For this reason the contention by Ogus that contemptuous damages are compensatory in nature [159] must be considered as incorrect. Contemptuous damages, like exemplary damages, are non-compensable in nature and contain an element of discretion.

L *The Common Law Injunction*[160]

Originally, the common law could not grant an injunction. This was altered by s 79 of the *Common Law Procedure Act* 1854, which granted courts of common law the power to award injunctions.[161] According to s 81, the court was to award such injunctions 'as justice may require'. The same discretionary

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153 A Burrows, above n 72, 270.

154 Ibid.

155 See *Earnshaw v Loy (No 2)* [1959] VR 252.

156 *Martin v Benson* [1927] 1 KB 771 and *Connolly v 'Sunday Times' Publishing Co Ltd* (1908) 7 CLR 263.

157 *Red Man's Syndicate v Associated Newspapers Ltd* (1910) 26 TLR 394, 395 (Phillimore J).

158 R Balkin and J Davis, *Law of Torts* (2nd ed, 1996) 774.

159 A Ogus, above n 151, 27.

160 Importantly, it has been suggested that common law injunctions have been abolished but this is incorrect. Tilbury, above n 2, [6048] has stated that these have not been abolished but that 'the distinction between legal and equitable is now largely historical' must be right and that equitable injunctions should no longer be treated separated from Common Law injunctions. The Common Law injunction is now the basis for the anti-suit injunction, which has been reviewed by the High Court in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 146 ALR 402.

161 This importance of this is that this section remained in operation in New South Wales until 1970.

considerations evaluated by courts of equity in granting an injunction were considered by courts of common law.[162] It is impossible to maintain somehow that common law remedies are of right, when common law injunctions were granted or refused upon the same basis as equitable injunctions.

M *Contributory Negligence*

The term 'contributory negligence' means the plaintiff's failure to satisfy the standard of care to which the plaintiff is required to meet for his or her own protection. This omission, together with the defendant's act, causes injury to the plaintiff. The position with regard to torts and contributory negligence is reasonably straightforward. The common law viewed contributory negligence as a complete defence. Apportionment of damages, which prevailed in the civil law system and maritime law, was introduced into England[163] and later this legislation was adopted in Australia.[164] A good example of the provision is original section 10(1) of the New South Wales Act.[165] In its unamended state the legislation provided that:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable

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162 *Astor Electronics Pty Ltd v Japan Electron Optis Laboratory Co. Ltd.* [1966] 2 NSWLR 419. For additional discussion of this area, see I Spry, *Equitable Remedies* (5th ed, 1997) 326–7.

163 *Law Reform (Contributory Negligence) Act* 1945.

164 *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW); s26 *Wrongs Act* 1958 (Vic); Part 3 *Law Reform Act* 1995 (Qld); s27a *Wrongs Act* 1936 (SA); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) and *Tortfeasors and Contributory Negligence Act* 1954 (Tas). Note that the relevant Western Australian legislation is differently worded. Also note that this legislation was enacted into New Zealand by the *Contributory Negligence Act* 1947 (NZ).

165 It should be noted that this legislation has been amended by the Law Reform (Miscellanous Provisions) Amendment Act 2000 (NSW) so as to overcome the High Court decision in *Astley v Austrust* (1999) 161 ALR 153. However, the new legislation still retains the traditional 'just and equitable' terminology. Most jurisdictions in Australia have passed similar legislation to alter the result of *Astley*. Accordingly, where there is concurrent liability in tort and contract for negligence and, as in *Astley*, the plaintiff's negligence has contributed to his or her own loss, liability may be apportioned and the plaintiff's damages reduced accordingly, regardless of whether the plaintiff claims in tort or contract.

> having regard to the claimant's share in the responsibility of the damage ...

The apportionment occurs upon the basis of what is 'just and equitable'. Obviously this gives much discretion and, once again, undermines the proposition that common law remedies involve certainty. Fleming has observed that[166]

> [a]lthough some thought has been given to the formulation of factors which should properly influence apportionment, it seems to be generally regarded as undesirable to perplex juries with detailed instructions and so abridge their discretion in determining, on the basis of common sense and experience, what is 'just and equitable' in accordance with the statutory formula.

To further reinforce the discretionary nature of contributory negligence in tortious matters, Tilbury has stated that:[167]

> Given the discretionary nature of apportionment appellate interference will, of course, be rare, and confined to cases where the court below has made an error of principle or is clearly wrong.

The primary application of the legislation is with regard to tortious claims. Its role in claims for breach of contract is more contentious. Until *Astley v Austrust*[168] the High Court had been able to escape giving a definitive answer upon the application of the legislation to the law of contract.[169] Carter and Harland have made the observation that 'the clear trend of the recent authorities is in favour of the application of the legislation to situations of concurrent liability'.[170] However, the High Court in *Astley* decided that the legislation did not apply to contracts, even where concurrent liability was relevant. Examining a breach of an equitable obligation the majority of the High Court, after citing the decision in *Astley*, held in *Pilmer v Duke*:[171]

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166 J Fleming, *The Law of Torts* (9th ed, 1998) 307.

167 M Tilbury, above n 2, [3150].

168 (1999) 161 ALR 153.

169 There has been much writing upon this issue; for example, see J Palmer and J Davies, 'Contributory Negligence and Breach of Contract-English and Australasian Attitudes Compared' (1980) 29 *International Commercial Law Quarterly* 415; J Swanton, 'Contributory Negligence as a Defence to Actions for Breach of Contract' (1981) 55 *Australian Law Journal* 278; and A Burrows, above n 72, 80–7.

170 J Carter and D Harland, above n 51, [2130].

171 (2001) 75 ALJR 1067, [86].

> Contributory negligence focuses on the conduct of the plaintiff, fiduciary law upon the obligation by the defendant to act in the interests of the plaintiff.

N *Remoteness and Mitigation*[172]

Discretion is obviously central to these two fundamental ideas. Both remoteness and mitigation are concepts vital to placing limitations upon common law damages, and both introduce great flexibility into the award of common law remedies. In both contract and tort it must be shown that even if the damage was in fact caused by the defendant, the damage must not be too remote in law. The appropriate test of remoteness in contract is the contemplation test, but the test is different in torts. These different remoteness tests have caused Lord Denning MR to exclaim:[173]

> I find it difficult to apply those principles universally to all cases of contract or all cases of tort: and to draw a distinction between what a man 'contemplates' and what he 'foresees'. I soon begin to get out of my depth. I cannot swim in this sea of semantic exercises – to say nothing of the different degrees of probability – especially when the cause of action can be laid either in contract or in tort. I am swept under by the conflicting currents.

The discretionary nature of remoteness was recognised and explicitly endorsed by Sir Robin Cooke in his article 'Remoteness of Damages and Judicial Discretion'.[174] Likewise, Treitel[175] has indicated that general concepts such as remoteness and mitigation have a relatively low level of precision. Such a lack of precision allows the presence of discretion.

Regarding mitigation, in both tort and contract there is a duty to mitigate losses flowing from the defendant's wrong. With regard to both torts and breach of contract cases, this requirement is controlled by a reasonable test and this standard of reasonable has been applied in a partially subjective sense.[176]

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172 It is quite possible to spend a great amount of time on the discretionary nature of these two concepts, as much discretion can be found in them. However, for the sake of brevity the treatment here will be extremely general.

173 *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] 1 All ER 525, 534.

174 [1978] 37 *Cambridge Law Journal* 288.

175 G Treitel, *Remedies for Breach of Contract* (1988) 174.

176 For example, *Glavonjic v Foster* [1979] VR 536, 540 (Gobbo J), which was a torts case. It is partially subjective in that if it was fully subjective, there would have been no obligation to mitigate at all.

IV CONCLUSION

Generally, the uncertainty of common law obligations by the application of common law principles has been relatively slight. Contracts are usually enforceable at common law in accordance with their terms, the parties being free to make their own bargains, as long as they meet basic requirements. But this gives an inaccurate picture, as most of the methods of alleviating the harshness of a contract have been replaced by reliance on legislation, the doctrine of estoppel and other equitable doctrines.

The reluctance of the judiciary to introduce equitable doctrines and remedies into the commercial setting is based on a false belief that the common law is certain and without discretion. This certainty is viewed as necessary for the complex nature of the commercial market. However, this article demonstrates that discretion is inherent not only in equity, but also in common law. There is flexibility in common law obligations of contract and tort. In contract, the construction of the contract and implication of terms is an area of discretion for the court. In tort there is flexibility of language, and discretion in limitations such as duty of care, remoteness, contributory negligence and voluntary assumption of risk. The emerging ethical rules and personalisation of tort law reveal an increasing amount of discretion and flexibility.

However, this discretion with regard to the obligation is limited — there is much greater discretion with regard to remedies. The discretion in common law remedies emerges in the 'once and for all' rule, the assessment of damages and the date of assessment for damages in contract and tort. The impossibility/ difficulty of assessment of common law damages requires discretion and flexibility for a sensible outcome. Loss of a chance, exemplary and nominal damages all require an element of discretion. In situations where there is no loss or gain, discretion is needed in the area of costs. The circumstances of the case must be taken into account. Contributory negligence cannot involve inflexible rules. The unique circumstances and situation must be considered — interpretation and discretion are required so that the remedy fits the situation.

Equity and common law both involve discretion, and while this article is not suggesting that it is the same discretion, it is important to realise that both bodies of law contain discretion, particularly with regard to remedies. As Lord Browne-Wilkinson, speaking for the entire House of Lords, stated in *Target Holdings Ltd v Rawyards Coal Co*,[177] the two principles fundamental to awarding common law damages are firstly that the defendant's wrong must cause the damage to the plaintiff and secondly that the plaintiff must be put in

[177] [1996] 1 AC 421, 432.

the position he or she would be in if the wrong had not been committed. According to his Lordship, these two fundamental principles are applicable as much to equitable remedies as they are to common law remedies. The reasoning relied upon by many cases cited in this article — that the commercial setting needs certainty and therefore needs common law and not equity — cannot be sustained. If one can say that common law involves discretion as does equity, then one body of law cannot be held above the other. This second element essential to the remedial hierarchy has been proven to be illusory. Currently, however, there appears to be little in the way of a move towards the selection of the most appropriate remedy, away from a scheme based upon a flawed remedial hierarchy.