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‘A TURBID ADMIXTURE’: THE LONG SHADOW OF THE *COMMON LAW PROCEDURE ACT 1854*

Abstract

The innovations of the pre-judicature period continue to haunt us. In the 1850s, in response to agitation for procedural fusion, reforms were introduced to allow for the grafting of equitable remedies onto common law courts and vice versa. This well-intentioned blending of jurisdiction spawned two novel remedies that are with us to this day: equitable damages and the lesser known ‘common law injunction’. This article explores the Australian jurisprudence that has coalesced around the common law injunction and surveys the difficult theoretical problems that come to the fore when attempting to define its nature and scope.

I Introduction

In or about 1902, Walter Ashburner penned his now famous metaphor describing the effect of the *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 and *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77 (‘*Judicature Acts*’) on the relationship between law and equity. He said:

> the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters. The distinction between legal and equitable claims — between legal and equitable defences — and between legal and equitable remedies — has not been broken down in any respect by recent legislation.[1]

This metaphor does not quite tell the whole story. By the time the *Judicature Acts* were passed, the waters of law and equity had already mingled into something of a turbid admixture, courtesy of the well-intentioned but ultimately unsuccessful efforts of law reformers in the 1850s. The *Judicature Acts* fused only the administration of law and equity but the same cannot be said of the reform statutes that preceded them, in particular the *Common Law Procedure Act 1854*, 17 & 18 Vict, c 125 (‘*1854 Act*’) and the *Chancery Amendment Act 1858*, 21 & 22 Vict, c 27 (‘*1858 Act*’). The former sought to empower common law courts to grant injunctions in aid

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1 Walter Ashburner, *Principles of Equity* (Butterworth, 1st ed, 1902) 23.

of legal rights; the latter sought to empower courts of equity to grant common law damages. This arrangement prompted one dissatisfied observer, writing in 1872, to comment as follows:

> Division of jurisdiction, leaving the two systems of law and equity to run in distinct channels, will, at least until a perfect system of fusion is discovered, secure more satisfactory results than the turbid admixture which even now is manifest as a result of the equitable clauses of the Common Law Procedure Acts.[2]

Like the *Judicature Acts*, both the *1854 Act* and the *1858 Act* were directed at reducing the delay and double litigation that plagued the English court system.[3] But in the 1850s the idea of uniting 'the Courts into one Court of universal Jurisdiction'[4] had not yet come into its own. It was at that time resisted by Chancery lawyers sceptical of a system in which judges who were formerly 'common law judge[s]' would be called on to administer both common law and equity in one court.[5] The preferred approach was to effect 'a transfer or blending of jurisdiction … as [would] render each Court competent to administer complete justice in the cases which fall under its cognizance'.[6]

This approach, which eventually fell out of favour, precipitated certain unintended developments. For one, courts of equity developed the power to award damages 'in new, specifically equitable directions'[7] to the point where it could be said that 'Chancery judges [had] developed a new kind of remedy, exclusive to equity, from [the *1858 Act*]'.[8] Similarly, early commentators on the *1854 Act* wrestled with whether the *1854 Act* permitted common law courts to issue injunctions more readily and on a more liberal basis than courts of equity would.[9]

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2 Comment, 'Equity in Common Law Courts' (1872) 8(1) *Canada Law Journal* 130, 130.

3 Patricia I McMahon, 'Field, Fusion and the 1850s: How an American Law Reformer Influenced the Judicature Act of 1875' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 424, 442.

4 Chancery Commission, *First Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice, and System of Pleading in the Court of Chancery, &c* (Report, 1852) 3 ('*1852 Report*').

5 Michael Lobban, 'Field, Fusion and the 1850s: A Commentary' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 463, 464, 467, 469.

6 *1852 Report* (n 4) 3.

7 Lobban (n 5) 470.

8 Ibid.

9 See the differing analyses set out in: Henry Thurstan Holland and Thomas Chandless, *The Common Law Procedure Act MDCCCLIV with Treatises on Injunction and Relief* (S Sweet, 1854) 87–8; Charles Collett, *A Treatise on the Law of Injunctions, and the Appointment of Receivers, under the Code of Civil Procedure, Act VIII of 1859* (Higginbotham, 2nd ed, 1869) 1–2. See also Joseph Philips, *The Common Law Procedure Act*, *1854: with Explanatory Notes and Index* (William G Benning, 1854)

All of this may have become entirely academic had the remedial provisions of the *1854 Act* and *1858 Act* been reversed by the *Judicature Acts* or by some other subsequent legislation.[10] As it happened, no such reversal took place, which explains why the Supreme Court of Judicature thought it necessary to engage in what one author has described as 'minute analysis of pre-Judicature Act jurisdiction'[11] to establish the extent of its amalgamated jurisdiction.

The *1858 Act* came to be understood as a conferral 'upon the Court of Chancery, and … in course of time … the Supreme Court of Judicature, [of] a discretionary jurisdiction to award damages which could not have been awarded at common law'.[12] The jurisprudence that grew up around the *1854 Act* charted a similar trajectory. In time, English courts confirmed that the *1854 Act* permitted the granting of injunctions to restrain defamations, something that courts of equity had consistently disclaimed jurisdiction to do.[13]

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48 for the view that the powers set out in the *Common Law Procedure Act 1854*, 17 & 18 Vict, c 125 ('*1854 Act*') should not be limited by reference to the practice and principles developed by the courts of equity.

10 The *Chancery Amendment Act 1858*, 21 & 22 Vict, c 27 was progressively repealed but it is generally understood that jurisdiction to award equitable damages was preserved by s 16 of the *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66, s 3 of the *Statute Law Revision and Civil Procedure Act 1883*, 46 & 47 Vict, c 49, the Schedule to the *Statute Law Revision Act 1898*, 61 & 62 Vict, c 22 and s 18 of the *Supreme Court of Judicature (Consolidation) Act 1925*, 15 & 16 Geo V, c 49: Peter M McDermott, *Equitable Damages* (Butterworths, 1994) 42. But see PS Atiyah, 'Common Law and Statute Law' (1985) 48(1) *Modern Law Review* 1, 10–11.

11 Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, 1983) 53.

12 JA Jolowicz, 'Damages in Equity: A Study of Lord Cairns' Act' (1975) 34(2) *Cambridge Law Journal* 224, 227. See also *Leeds Industrial Co-Operative Society, Ltd v Slack* [1924] AC 851, 863 (Viscount Finlay) ('*Leeds*').

13 *Prudential Assurance Co v Knott* (1875) LR 10 Ch App 142, 145–6 (Lord Cairns LC). See also: *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304; 43 ER 119, 125 (Turner LJ); *Emperor of Austria v Day* (1861) 3 De G F & J 217; 45 ER 861, 870–1 (Lord Campbell LC); *White v Mellin* [1895] AC 154, 169–70 (Lord Macnaghten) ('*White*').

Equity's inability to injunct defamations is generally understood as a corollary of it only having jurisdiction in matters involving a proprietary right: David Rolph, *Defamation Law* (Thomson Reuters, 2016) 340 [16.20]; JD Heydon and MJ Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 9th ed, 2019) 1181 [40.7]; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2013) 579–80 [24.3].

An alternative explanation put forward for equity's inability to injunct defamations is the long standing requirement, first set out in *Libel Act 1792*, 32 Geo III, c 60 (also known as *Fox's Libel Act*) that libels be tried by jury and the fact that equity did not offer that mode of trial: JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 719 [21-125]; ICF Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Lawbook, 9th ed, 2014)

Common law injunctions continue to be sought and granted in the field of defamation.[14] Outside this field, the exact nature and scope of the common law injunction remains uncertain.[15] Equitable auxiliary injunctions on the other hand are much better understood and their use extends to virtually every field in which legal rights arise. Equitable auxiliary injunctions are often sought in relation to disputes involving contracts (for example, to restrain a threatened breach of contract)[16] and property (for example, to restrain a threatened trespass to land).[17] In an increasing number of fields, equitable auxiliary injunctions overlap substantially with statutory injunctions (for example, in fields involving corporations, intellectual property and family or domestic violence). It is necessary to reflect on the history of the jurisprudence surrounding common law injunctions to understand the uncertainty around the nature and scope of this remedy.

What then is the nature of the so-called 'common law injunction'[18] and how does its continued existence affect the law of injunctions generally? For example, is it correct that the common law injunction does away with the inadequacy of damages requirement, a requirement held out again and again as embodying '[t]he very first principle of injunction law'?[19]

More generally, do the principles that govern the granting of common law injunctions differ materially from those that govern the granting of injunctions in equity's auxiliary jurisdiction? Is the common law jurisdiction to grant injunctions in aid of legal rights now broader in all respects than the equivalent equitable jurisdiction? This article is an attempt to sketch out an answer to these questions.

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335. These matters, however, do not explain why courts of equity refused to grant final injunctions restraining defamation after a jury in a court of law had returned a verdict of libel, a point noted by Lindley J in *Saxby v Easterbrook* (1878) 3 CPD 339, 343.

14 See, eg: *Harbour Radio Pty Ltd v Wagner* (2019) 2 QR 468 ('*Wagner*'); *Chau v Australian Broadcasting Corporation [No 3]* (2021) 386 ALR 36 ('*Chau*'). There is also judicial support for the notion that the equitable auxiliary jurisdiction is an additional or alternative source of power to restrain defamations: *Carolan v Fairfax Media Publications Pty Ltd [No 7]* [2017] NSWSC 351, [11]; *Chau* (n 14) 81–2 [181]–[182]. Cf *Wagner* (n 14) 488 [50] (Fraser JA).

15 See Heydon, Leeming and Turner (n 13) 709.

16 *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 ('*Curro*').

17 *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464.

18 'Common law injunction', not to be confused with 'common injunction', is the nomenclature adopted in Heydon, Leeming and Turner (n 13). The term 'legal injunction' is preferred in Spry (n 13). The appellation 'common law injunction' is used in this article for convenience only. Its use is not intended to prejudge the very question with which this article grapples, namely whether the common law injunction differs materially from other injunctions granted in aid of legal rights, such that it should be regarded as a distinct remedy.

19 *London & Blackwall Railway Co v Cross* (1886) 31 Ch D 354, 369 (Lindley LJ), quoted with approval in *Irving v Emu & Prospect Gravel & Road Metal Co Ltd* (1909) 26 WN (NSW) 137, 137.

Part II examines the language of relevant sections of the *1854 Act* and comments on the apparent legislative intent behind the *1854 Act* generally and the injunction provisions in particular.

Part III sets out the generally accepted understanding in Australia of the nature and scope of the common law injunction, including vis-à-vis the equitable auxiliary injunction. This is done by reference to work done by Australian equity scholars in the 1970s and 1980s in this area, which continues to exert influence, both at the practitioner level and in academic circles, on the way in which the common law injunction is understood.

Parts IV and V deal with the interesting question of whether the common law injunction is subject to the inadequacy of damages principle. Part IV considers whether the inadequacy of damages principle operates as a prerequisite or jurisdictional threshold to obtaining a common law injunction. The answer to that question is far from clear, and depends ultimately, it will be argued, on a distinction that presents as straightforward but is in fact rather abstract, namely the distinction between a legal remedy and an equitable one.

Part V grapples with the separate but related question of whether the inadequacy of damages principle, if not a jurisdictional requirement, can nevertheless operate as a consideration going to a court's discretion to grant a common law injunction.

II Legislative Background and Textual Analysis

A *The Policy Behind the* 1854 Act

The *1854 Act* was a multi-faceted Act dealing with subjects as diverse as arbitration, cross-examination, oaths, appeals and remedies. The policy behind the remedial provisions of the *1854 Act* can best be explained by reference to the law reform environment of the 1850s.

The 1850s saw the first organised push for procedural fusion: the administration of law and equity by a single court or system of courts. The notion of procedural fusion had acquired impressive momentum on the back of David Dudley Field's seminal visit to England in 1850.[20] Field had, in the 1840s, made a name for himself by pioneering the procedural fusion of law and equity in New York, and it was only in the aftermath of his visit that the debates about fusion began in earnest.[21] In 1850, two royal commissions were established: a 'Chancery Commission' comprised of seven, and later 13, commissioners;[22] and a 'Common Law Commission' comprised of five, and later six, common law lawyers.[23]

20 See generally McMahon (n 3) 426–7, 437.

21 See generally ibid 426–7, 430–7.

22 JM Collinge (ed), *Office-Holders in Modern Britain: Officials of Royal Commissions of Inquiry 1815–1870* (University of London, 1984) vol 9, 43.

23 Ibid 41.

The goal of procedural fusion would, however, have to wait until the 1870s to be realised.[24] In the 1850s, Chancery lawyers were generally averse to the idea of judges with common law backgrounds only being called on to administer equity.[25] In a report tabled in 1852, the Chancery Commission advocated, as an alternative to procedural fusion, for 'a transfer or blending of jurisdiction'.[26]

A year later, the Common Law Commission published its report ('*1853 Report*').[27] The *1853 Report* borrowed heavily from a report published in 1831 ('*1831 Report*')[28] by an earlier commission also comprised of common law lawyers, and on the subject of remedies, the *1853 Report* adopted and reproduced verbatim certain parts of the *1831 Report*.[29] Relevantly, the *1853 Report* reiterated that

> [t]here seems to be no reason why a court of law should not exercise the same jurisdiction, and restrain violations of legal rights in the cases in which an injunction now issues for that purpose from the courts of equity … it would obviously be attended with great advantage and convenience, that where common law rights are concerned, the whole litigation relating to them should fall within the cognizance of a common law court …[30]

The *1853 Report* also reproduced unaltered a number of draft provisions relating to remedies that had first been proposed in the *1831 Report*, including draft provisions that would form the basis for the injunction provisions in the *1854 Act*. The draft provision that corresponds to s 79 of the *1854 Act* was as follows:

> That in all cases of injury or breach of contract, or threatened injury or breach of contract, for which an Action at Law for damages may be maintained, … application shall, upon proper affidavit, be allowed to be made by way of motion in any of the Courts of Common Law at Westminster, or in vacation time to a Judge at Chambers, for a Writ of Prohibition; and that if the Court or Judge shall be satisfied that the case is such that the recovery of damages would be an inadequate-remedy, or that the amount of damages could not be precisely or conveniently ascertained, a rule or order shall be made for issuing a Writ of Prohibition forthwith, … prohibiting him or them from the commission or further commission of the acts which are the subject of complaint.[31]

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24 McMahon (n 3) 425, 461.

25 Lobban (n 5) 467, 469.

26 *1852 Report* (n 4) 3.

27 Common Law Commission, *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law, &c* (House of Lords Paper No 172, Session 1852–3) ('*1853 Report*').

28 Common Law Commission, *Third Report Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law* (House of Lords Paper No 99, Session 1831) ('*1831 Report*').

29 *1853 Report* (n 27) 42–4.

30 Ibid 43, quoting *1831 Report* (n 28) 18–19 (emphasis omitted).

31 *1831 Report* (n 28) 74 [30].

By 1854, the draft provisions in the *1853 Report* had been converted into the Common Law Procedure Bill 1854 ('1854 Bill'), and in that process the draft provision corresponding to s 79 was amended to refer to injunctions instead of writs of prohibition. The draft provision was also shorn of the requirement that a court or judge be satisfied that recovery of damages would be an inadequate remedy. Finally, the draft provision was amended so as not to apply in respect of merely threatened legal wrongs. Quia timet injunctions in aid of legal rights would remain the preserve of equity.

The 1854 Bill was favourably received and Lord Cranworth LC, who spoke in Parliament in favour of the 1854 Bill, echoed the enthusiasm of his Lordship's fellow Chancery Commissioners for cross-jurisdictional grafting, as against procedural fusion. His speech is recorded in Hansard as follows:

> They had heard of late a great deal about the expediency of what was called a fusion of the courts of law and equity, so that each court should be competent to administer justice either as a court of law or of equity. … He was not, however, one of those who held the opinion, considering the position in which we were now placed, that so much advantage would result from the proposed fusion of law and equity as many persons seemed to imagine. … But, although this was the view he took, he was far from not agreeing that, if they could so far assimilate the two that a party, by going to law, could obtain all he could now get by going to law and equity, so as to have everything done in one court, it would not be a most desirable object.[32]

This speech neatly summarises the legislative intent behind the *1854 Act*. The *1854 Act* was an attempt to give effect to a compromise position formulated in response to calls for procedural fusion. The stated purpose of the *1854 Act* was to replicate unaltered, in the context of the common law courts, the powers that courts of equity had to restrain the commission of legal wrongs and, as originally drafted, the remedial provisions of the *1854 Act* appear to give effect to that purpose.[33] At the time the injunction provisions of the *1854 Act* were enacted, there was no inkling that they would give rise to a jurisdiction to issue injunctions that was, in some key respects, more expansive than the equitable jurisdiction on which it was based. But, according to authorities such as *Quartz Hill Consolidated Gold Mining v Beall* ('*Quartz Hill*')[34] and *Bonnard v Perryman* ('*Bonnard*')[35] (discussed in greater detail in Part III(A) below), an expansive appraisal of the scope of the common law jurisdiction is warranted, and even required, by the broad and general language of the injunction provisions, as enacted, and it is to that language which we now turn.

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32 United Kingdom, *Parliamentary Debates*, House of Lords, 27 February 1854, vol 130, col 1343.

33 See *1854 Act* (n 9) ss 68–82.

34 (1882) 20 Ch D 501 ('*Quartz Hill*').

35 [1891] 2 Ch 269 ('*Bonnard*').

B *Textual Analysis*[36]

1 *Relevant Provisions*

The injunction provisions of the *1854 Act* are set out at ss 79–82. Relevantly for the Australian position, these sections were reproduced in substance in legislation enacted in New South Wales,[37] Queensland,[38] South Australia,[39] Tasmania,[40] Victoria[41] and Western Australia.[42]

Section 79 of the *1854 Act* is as follows:

> In all Cases of Breach of Contract or other Injury, where the Party injured is entitled to maintain and has brought an Action, he may, in like Case and Manner as herein-before provided with respect to Mandamus, claim a Writ of Injunction against the Repetition or Continuance of such Breach of Contract, or other Injury, or the Committal of any Breach of Contract or Injury of a like kind, arising out of the same Contract, or

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36 The arguments advanced in this article depend almost entirely on the assumption that the *1854 Act* and its Australian equivalents will be given full effect according to their terms by courts, except to the extent they are affected by subsequent statutes. This is the rationale for the close analysis in this Part of the article of the language used in the relevant provisions of the *1854 Act*.

Against this assumption, it has been argued that there ought to be 'judicial power to sunset some statutes', particularly with respect to statutes that have failed to achieve their purposes: Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) 82, 105, 164. An appraisal of Calabresi's proposal is beyond the scope of this article. The interested reader may consult Mark Leeming, 'Equity: Ageless in the "Age of Statutes"' (2015) 9(2) *Journal of Equity* 108 for a treatment of Calabresi's arguments from an Australian perspective.

The debate around Calabresi's proposal also overlaps with the question of how strictly and textually courts should interpret statutes that are obviously defective. In Australia, a strict approach is preferred: *Taylor v The Owners — Strata Plan No 11564* (2014) 253 CLR 531, 549 [39]–[40] (French CJ, Crennan and Bell JJ). See also the distinction drawn in Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1, 20 between 'enactment intentions' and 'application intentions'. Cf *McGirt v Oklahoma*, 591 US 1, 14 (2020) (Roberts CJ), citing *Johnson v United States*, 163 F 30, 32 (1908) (Holmes J) which illustrates the more flexible approach used from time to time by courts in the United States. A discussion of these divergent approaches is also beyond the scope of this article.

37 *Common Law Procedure Act 1857* (NSW) ss 44–7; *Common Law Procedure Act 1899* (NSW) ss 176–9; *Supreme Court Act 1970* (NSW) s 66(1), as enacted.

38 *Interdict Act 1867* (Qld) ss 52–5; *Supreme Court Act 1995* (Qld) ss 180–3; *Civil Proceedings Act 2011* (Qld) s 9.

39 *Supreme Court Procedure Act 1856* (SA) ss 69–72.

40 *Common Law Procedure Act (No 2) 1855* (Tas) ss 63–6.

41 *Common Law Procedure Statute 1865* (Vic) ss 239–42.

42 *Supreme Court Ordinance 1861* (WA) s 4.

> relating to the same Property or Right; and he may also in the same Action include a Claim for Damages or other Redress.

The provisions of the *1854 Act* that relate to mandamus[43] are too lengthy to set out here but they essentially established a procedure for the bringing of a statutory action of mandamus made available under the *1854 Act*, which was to be in addition to the prerogative writ of mandamus.

Section 82 expressly provides for the granting of common law injunctions in response to an ex parte application and on an interim basis. It has been understood as empowering courts to allow 'ex parte injunctions in every case where a final injunction could be granted under the 79th section'.[44] Section 82 also provides that a court or judge could grant or refuse an application for an injunction under the *1854 Act* on such terms as shall seem reasonable and just. For convenient reference, s 82 is set out below in its entirety:

> It shall be lawful for the Plaintiff at any Time after the Commencement of the Action, and whether before or after Judgment, to apply *ex parte* to the Court or a Judge for a Writ of Injunction to restrain the Defendant in such Action from the Repetition or Continuance of the wrongful Act or Breach of Contract complained of, or the Committal of any Breach of Contract, or Injury of a like kind, arising out of the same Contract, or relating to the same Property or Right; and such Writ may be granted or denied by the Court or Judge upon such Terms as to the Duration of the Writ, keeping an Account, giving Security, or otherwise, as to such Court or Judge shall seem reasonable and just, and in case of Disobedience such Writ may be enforced by Attachment by the Court, or, when such Courts shall not be sitting, by a Judge: Provided always, that any Order for a Writ of Injunction made by a Judge, or any Writ issued by virtue thereof, may be discharged or varied or set aside by the Court, on Application made thereto by any Party dissatisfied with such Order.

Finally, while not itself a source of power to grant injunctive relief, s 81 of the *1854 Act* is nonetheless relevant to any discussion of the nature of the common law injunction. It relevantly provides 'in such Action Judgment may be given that the Writ of Injunction do or do not issue, as Justice may require'.

2 *Analysis of Section 79*

As mentioned already, s 79 differs in significant respects from its draft. It is, on its face, broader in scope than the draft and its apparent breadth was noted by early commentators on the *1854 Act*.[45]

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43 *1854 Act* (n 9) ss 68–77.

44 *Quartz Hill* (n 34) 507 (Jessel MR).

45 See above n 9.

Most notable and worth mentioning is the commentary written by Henry Thurstan Holland and Thomas Chandless, which went to press that same year. Holland and Chandless made the following observations in respect of s 79:

> in one point of view, the jurisdiction of the Courts of Law under this act may, perhaps, be held to be more extensive than that of Courts of Equity; inasmuch as the latter Courts have, except in the case of infants, lunatics, &c., no jurisdiction over persons, but only in respect of property. They would not interfere in respect of merely personal wrongs, such as to restrain the repetition of a libel, or the continuance of any other act merely affecting personal character. It may be a question, whether the power of the Common Law Courts will not be more extensive; but we apprehend that such question must be answered in the negative, as it would seem, from the use of the words 'property or right' in the latter part of sect. 79, that such extension was not contemplated; and, further, in most cases where personal character is affected by libel, or otherwise, it would probably be considered that damages would be a sufficient compensation, and that, therefore, the Courts of Common Law, acting upon the principle laid down in Equity, would not interfere by injunction.[46]

The above commentary is telling in that Holland was secretary to the Common Law Commission and appears to have been responsible for preparing the draft provisions in the *1853 Report*.[47] Holland and Chandless, quite presciently, note the possibility of s 79 being interpreted as conferring a more expansive jurisdiction on the common law courts than enjoyed by courts of equity, and note its possible application to cases in which courts of equity have historically disclaimed jurisdiction (for example, instances where litigants seeking an injunction do not have a requisite proprietary interest).

Ultimately, Holland and Chandless conclude against an expansive reading of s 79 and they argue for that view by reference to the words 'property or right' (which did not feature in the draft provisions in the *1853 Report*). A close reading of s 79, however, casts doubt on whether the inference argued for by Holland and Chandless can be sustained. The words 'property or right', if anything, support the opposite inference that the jurisdiction conferred on the common law courts was not confined to property but extended to rights that were merely personal rights. If 'right' is to be read down to mean 'proprietary right', the phrase 'property or right' becomes a tautology.

It is also interesting that Holland and Chandless assume that the inadequacy of damages requirement will regulate the availability of injunctive relief under s 79. As noted above, that requirement was expressly provided for in the draft but was deleted in the redrafting process leading up to the introduction of the 1854 Bill. Holland and Chandless' assumption surfaces again (albeit tangentially) as an uncontroversial proposition in the case of *Sutton v The South Eastern Railway Co*.[48]

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46 Holland and Chandless (n 9) 87–8 (citations omitted).

47 Collinge (n 22) 41.

48 (1865) LR 1 Ex 32, 36 (Field QC, Phear and FM White) (during argument), 40 (Channell B).

One can see how this assumption was arrived at. The deletion of the reference to the inadequacy of damages requirement occurred roughly contemporaneously with the decision to substitute the words 'an injunction' for the words 'a writ of prohibition'. That substitution may have been taken as implying what had previously been expressly stated, in which case it was the substitution that likely prompted the deletion of the reference to the inadequacy of damages requirement. On this view, the inadequacy of damages requirement is an integral feature of any injunction. In other words, it is a requirement that runs with the remedy.

The draftspersons working on the 1854 Bill may also have assumed that the proprietary right requirement, similarly, ran with the remedy. Or they may have not turned their mind to the proprietary right requirement, seeing that it did not feature in the draft provisions in the *1853 Report*. As it happened, it was the decision not to make express reference to that requirement that provided the textual foundation for the expansive interpretation of s 79 adopted in *Quartz Hill*[49] and *Bonnard*.[50]

There is however a sense in which s 79 is narrower than its draft. Section 79 requires an injured party seeking an injunction to have 'brought an Action' that they are entitled to maintain. As such, unlike its draft, s 79 does not apply in respect of a merely threatened injury or breach of contract. The power to grant quia timet injunctions was seen, by Chancery lawyers, as a feature of 'core … equity jurisdiction' and, in the lead up to the introduction of the 1854 Bill, Chancery lawyers stridently opposed the conferral of similar powers on common law courts.[51]

3 *Analysis of Other Relevant Sections*

Consistently with s 79, s 82 is stated in broad terms and without reference to either the proprietary right requirement or the inadequacy of damages requirement. Moreover, s 82 applies only after the commencement of an action, which again implies the unavailability of quia timet injunctive relief at law.

Section 82 is also noteworthy in that it refers to a writ of injunction being granted or denied by a court or judge upon such terms as shall seem reasonable and just. This is suggestive of an element of discretion on the part of the issuing judge and is redolent of the discretionary considerations that inform the granting of injunctions in equity's auxiliary and exclusive jurisdictions.

Section 81, similarly, allows a court or judge to issue or not to issue an injunction, 'as Justice may require'.

What these provisions do not address, in terms, is whether common law courts are required to apply the same discretionary considerations that guide courts of equity

49 *Quartz Hill* (n 34) 507 (Jessel MR), 509–10 (Baggallay LJ).

50 *Bonnard* (n 35) 283 (Lord Coleridge CJ for Lord Coleridge CJ, Lord Esher MR, Lindley, Bowen and Lopes LJJ, Kay LJ agreeing at 285).

51 See Lobban (n 5) 467–8. An unsuccessful attempt was made in 1860 to amend the *1854 Act* to empower the common law courts to injunct on a quia timet basis which was vehemently opposed by Chancery lawyers: at 469.

in disposing of injunction applications or whether there is scope, on the part of common law courts, for dispensing with certain discretionary considerations and embracing novel considerations. *Astor Electronics Pty Ltd v Japan Electron Optics Laboratory Co Ltd* ('*Astor Electronics*')[52] provides a partial answer to this question and will be discussed in greater detail in Part III.

III English and Australian Perspectives on the Common Law Injunction

A *The Expansive Approach Adopted by English Courts*

In Australia, the generally accepted understanding of the nature and scope of the common law injunction is informed by the expansive approach to the construction of the *1854 Act* adopted by English courts in the post-judicature period. That expansive approach emerged in a series of defamation cases, beginning with the 1882 case of *Quartz Hill*.[53]

Quartz Hill was concerned with the publication of an allegedly defamatory circular to a company's shareholders.[54] In that case, it was argued that the Court lacked jurisdiction to injunct defamations.[55] Lord Justice of Appeal Baggallay disagreed and explained the effect of the *1854 Act* in these terms:

> From the time when the *Common Law Procedure Act*, 1854, became law until the passing of the Judicature Acts, the Courts of Common Law had a more extensive jurisdiction as regards the granting of injunctions than the Court of Chancery. The cases in which the Court of Chancery could grant injunctions were of certain limited though well ascertained classes, but the language of the *Common Law Procedure Act* authorized the granting of an injunction in all cases of breach of contract or other injury where the party injured is entitled to maintain and has brought an action.[56]

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52 [1966] 2 NSWR 419 ('*Astor Electronics*').

53 There is a dearth of authority considering the proper construction of the *1854 Act* prior to *Quartz Hill*. It is suggested in *Quartz Hill* that the power to grant injunctions in accordance with ss 79 and 82 of the *1854 Act* was very seldom exercised prior to 1875: *Quartz Hill* (n 34) 510 (Baggallay LJ). See also *Monson v Tussauds Ltd* [1894] 1 QB 671, 692–3 (Lopes LJ). One contemporary source, *Solicitor's Journal and Reporter*, noted that common lawyers had initially invested considerable time reading up on specific performance and injunctions, but in the end 'relinquished their study of equity' such that 'the equitable jurisdiction under the [Act] became nearly a dead letter': Comment, 'The Law and Equity Bill' (1859–60) 4(1) *Solicitors Journal and Reporter* 300, 301. A similar observation was made in relation to the Canadian equivalents of the *1854 Act*: Review, 'The Law and Practice of Injunctions in Equity and the Common Law by William Joyce' (1872) 8(1) *Canada Law Journal* 229, 230.

54 *Quartz Hill* (n 34) 502.

55 Ibid 506 (Higgins QC and Beddall) (during argument).

56 Ibid 509–10 (Baggallay LJ, Jessel MR agreeing at 507).

The issue arose again in *Bonnard*. The plaintiff there sought, by injunction, to restrain the defendant publisher and defendant printer from selling or circulating copies of a particular article, and printing or publishing any other material that imputed dishonest or fraudulent conduct to the plaintiff.[57] In response to the suggestion, in argument, that the Court had no jurisdiction to injunct defamations (at least not where a defendant deposed to being able to justify the relevant defamations at trial),[58] Lord Coleridge CJ made the following observations:

> Prior to the [*1854 Act*], neither Courts of Law nor Courts of Equity could issue injunctions in such a case as this: not Courts of Equity, because cases of libel could not come before them; not Courts of Law, because prior to 1854 they could not issue injunctions at all. But the 79th and 82nd sections of the [*1854 Act*] undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation.[59]

Quartz Hill and *Bonnard* are not without their critics.[60] But those decisions have been consistently followed, both in the United Kingdom ('UK')[61] and in those Australian jurisdictions that have enacted local equivalents to ss 79 and 82 of the *1854 Act*.[62] The jurisdiction of Australian superior courts to injunct defamations is not seriously doubted[63] and the High Court has signalled, in dicta, that it is now too

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57 *Bonnard* (n 35) 269–70.

58 Ibid 279 (Cozens-Hardy QC and WE Vernon) (during argument).

59 Ibid 283 (citations omitted).

60 See especially Roscoe Pound, 'Equitable Relief against Defamation and Injuries to Personality' (1916) 29(6) *Harvard Law Review* 640, 665–6. See also: Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005) 84–7; HAJ Ford, 'A Note on the Protection of Reputation in Equity' (1953) 6(3) *Res Judicatae* 345, 348–9. But see *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 126–7 [198]–[199], 130 [206], 133 [211] (Heydon J) ('*O'Neill*').

61 See, eg, *White* (n 13) 163 (Lord Herschell LC).

62 See, eg: *Stocker v McElhinney [No 2]* [1961] NSWR 1043, 1048 ('*Stocker*'); *Wagner* (n 14) 488 [50] (Fraser JA); *Chau* (n 14) 80–2 [176]–[183].

63 The position of inferior courts is much less clear. For example, in *Martin v Najem* [2022] NSWDC 479 ('*Najem*'), the District Court of New South Wales, at [128], asserted jurisdiction to grant permanent injunctions restraining defamation. The basis for that assertion was reasoning set out in the dissenting judgments of McHugh and Kirby JJ in *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435, 456–62 [71]–[84] (McHugh J), 473–83 [117]–[142] (Kirby J). *Najem* is yet to be considered by an appellate court and was decided against the backdrop of the New South Wales Court of Appeal, in *Mahommed v Unicomb* [2017] NSWCA 65 ('*Unicomb*'), declining to provide appellate guidance on the issue of the limits of the District Court's jurisdiction on account of *Unicomb* not being a suitable vehicle for argument on that issue: at [57]–[58] (Ward JA, Macfarlan JA agreeing at [1], McDougall J agreeing at [64]).

late to depart from the construction of the *1854 Act* adopted in cases such as *Quartz Hill* and *Bonnard*.[64]

Quartz Hill and *Bonnard* also represent the high-water mark of judicial engagement with the injunction provisions of the *1854 Act*, at least in the UK. Consideration of the common law injunction in subsequent UK case law is sporadic and cursory. It appears that, with the onset of the judicature system, the common law injunction failed to attract sustained interest and perhaps even faded from institutional memory. Alternatively or additionally, common law injunctions may have fallen out of usage on account of the inability to obtain such injunctions on a quia timet basis.

In Australia, matters would ultimately take a slightly different course.

B *The* Astor Electronics *Decision*

In Australia, the common law injunction resurfaced in 1966, in the case of *Astor Electronics*. *Astor Electronics* was decided in New South Wales and the facts of that case were made possible by the unusual history of the Supreme Court in that state.

The Supreme Court of New South Wales, at the time it was established in 1824, was a single Court administering both law and equity.[65] This changed in time and legislation was enacted, in 1840 and 1841,[66] which brought about the formal separation of the equitable jurisdiction of the Supreme Court of New South Wales from its common law jurisdiction.[67] Once this separation of jurisdictions was established, it proved to be surprisingly persistent. The peculiarity of one Supreme Court exercising (never simultaneously) two separate jurisdictions lasted until 1972.[68]

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64 *O'Neill* (n 60) 81 [64] (Gummow and Hayne JJ, Heydon J dissenting at 128–30 [202]–[204]).

65 *New South Wales Act 1823* (Imp) 4 Geo 4, c 96, ss 2, 9.

66 *Administration of Justice Act 1840* (NSW) s 20; *Advancement of Justice Act 1841* (NSW) s 1.

67 The separation had in practice been observed prior to 1840. As early as 1825, rules and orders of the Supreme Court were propounded with a view to bringing the judiciary in New South Wales in line with the pre-judicature structure of the English courts: ML Smith, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72(1) *Australian Law Journal* 799, 800; MJ Leeming, 'Five Judicature Fallacies' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, 169, 179 n 51.

A detailed account of how this separation came about is set out in Mark Leeming, 'Fusion–Fission–Fusion: Pre-Judicature Equity Jurisdiction in New South Wales, 1824–1972' in John CP Goldberg, Henry E Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge University Press, 2019) 118.

68 *Supreme Court Act 1970* (NSW) s 5. See also Mark Leeming, 'Equity, The Judicature Acts and Restitution' (2011) 5(3) *Journal of Equity* 199, 221–2, 222 n 156.

New South Wales also kept in place its local equivalent of the *1854 Act*. Sections 79–82 of the *1854 Act* were replicated in ss 44–7 of the *Common Law Procedure Act 1857* (NSW), which in turn were restated, first, in the *Common Law Procedure Act 1899* (NSW) as ss 176–9, and then a second time (and in more modern language) in s 66(1) of the *Supreme Court Act 1970* (NSW).

It was in this context that the common law injunction assumed some importance. Admittedly, and as in the case of the UK, the common law injunction appears to have not been regularly invoked in New South Wales.[69] That said, there is reason to suppose that astute practitioners were aware of it, seeing that it served the practical purpose of allowing a litigant bringing an action on the common law side of the Supreme Court to access injunctive relief without commencing proceedings on the equity side.

In *Astor Electronics*, Japan Electron Optics Laboratory Co Ltd ('Japan Electron') took issue with common law injunctions that had been issued against it at the request of the plaintiff, Astor Electronics Pty Ltd.[70] Japan Electron had been appointed by the plaintiff as its exclusive distributor in Australia, and on 11 February 1966, it purported to terminate its distributorship agreement with the plaintiff on the ground that the plaintiff was in breach of a condition that it would use its best endeavours to sell a certain number of its products.[71] In response, '[t]he plaintiff alleged that [the] purported cancellation was a wrongful repudiation … which it did not accept'.[72] Shortly afterwards, Japan Electron commenced distribution to Jeolco (Australasia) Pty Ltd ('Jeolco'), a company jointly owned by a former employee of the plaintiff and a former employee of the defendant.[73]

The plaintiff sought and obtained ex parte common law injunctions prohibiting Japan Electron from using Jeolco to distribute its products in Australia.[74] The plaintiff then sought a continuation of those ex parte injunctions before Macfarlan J.[75]

RM Hope QC and RP Meagher, appearing for the plaintiff, argued against the applicability of *Atlas Steels (Australia) Pty Ltd v Atlas Steels Ltd* ('*Atlas*'),[76] a decision that was put forward by Japan Electron as an impediment to injunctive relief.[77]

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69 Sir Frederick Jordan, *Chapters on Equity in New South Wales*, ed FC Stephen (Thomas Henry Tennant, 6th ed, 1945) 144. Prior to 1966, there are two reported cases in which a common law injunction was granted: *Walker v Peel Shire Council* (1908) 8 SR (NSW) 333 and *Stocker* (n 62).

70 *Astor Electronics* (n 52) 419.

71 Ibid.

72 Ibid.

73 Ibid.

74 Ibid.

75 Ibid.

76 (1948) 49 SR (NSW) 157.

77 *Astor Electronics* (n 52) 424.

The substance of *Atlas* was that a court would not injunct future breaches of a negative contractual stipulation if it would thereby be ordering specific performance of a contract of personal service.[78] Mr Hope QC advanced the argument that *Atlas*, being a case decided on the equity side of the Supreme Court, was not determinative of the approach to be taken on the common law side of the Supreme Court in relation to the issuance of a common law injunction.[79]

Importantly, in giving his *ex tempore* decision, Macfarlan J accepted, without reservation, the proposition that the common law injunction was wider in certain respects than its counterpart in the equitable auxiliary jurisdiction.[80] His Honour said that, in enacting s 79 of the *1854 Act*, the predecessor to s 179, the 'Imperial Parliament [had] added to the field of subject-matter in which Equity Courts regarded themselves as at liberty or under a duty to grant injunctions'.[81]

The critical question, however, in *Astor Electronics* was whether a common law injunction should be governed by different discretionary considerations than those applicable to equitable auxiliary injunctions. Justice Macfarlan expressed the view that at least in those fields common to law and equity, judges should apply the same discretionary principles.[82] Accordingly, Macfarlan J declined to distinguish *Atlas* in the way agitated for by the plaintiff.[83]

In a way, *Astor Electronics* marks the genesis of contemporary thinking about the common law injunction. *Astor Electronics* confirmed the view that the common law injunction covered 'fields of subject matter' which were additional to those in which equity operated (for example, defamation).[84] It also offered guidance with respect to the operation of the common law injunction in, what one might call, 'overlapping fields' (for example, breach of contract cases).[85] Despite reviving scholarly interest in the common law injunction, *Astor Electronics* has received little attention in the subsequent case law (which has primarily focused on the role of the common law injunction in defamation cases).[86] *Astor Electronics* is the only Australian case to date to consider the common law injunction in a breach of contract context, and as such the operation of common law injunctions in breach of contract cases remains largely untested. This, in the author's opinion, is regrettable, given the implications of the nature and scope of the common law injunction for day-to-day commercial

78 See also: *Lumley v Wagner* (1852) 5 De Ge & Sm 485; 64 ER 1209; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209.

79 *Astor Electronics* (n 52) 424.

80 Ibid 425.

81 Ibid, citing *White* (n 13) 163.

82 *Astor Electronics* (n 52) 425–6.

83 Ibid.

84 Ibid.

85 See ibid.

86 See, eg: *Wagner* (n 14); *Chau* (n 14) 79–82 [173]–[183]; *Capilano Honey Ltd v Dowling [No 2]* [2018] NSWCA 217, [51] (Basten JA).

practice. For example, it is not uncommon for commercial contracts to contain acknowledgements of the inadequacy of damages in the event certain terms of the contract are breached, the purpose of such acknowledgments being to facilitate enforcement of the contract. However, if it is correct that a common law injunction may issue without inadequacy of damages being established, then the somewhat artificial acknowledgment of inadequacy clauses can be safely done away with.

To take another example, contracting parties (through their legal representatives) from time to time agonise over whether obligations expressed in a deed are enforceable by injunction in circumstances where there is no clear consideration passing between the parties. It is, on the one hand, reasonably clear that equity will not assist a volunteer,[87] and, on the other hand, less than clear whether a deed necessarily imports consideration. However, if it is correct that equitable maxims do not apply, or do not apply with equal force, to the granting of a common law injunction, then obligations in a deed may be enforceable regardless of whether they are voluntary or entered into for value, and the question of whether a deed imports consideration may recede into more theoretical territory.

The common law injunction has also, for the time being, not been subjected to in-depth analysis in the public law context, notwithstanding the prominent role injunctions play in that field. Again, this is regrettable, especially in light of the High Court's recent decision in *Smethurst v Commissioner of Police* ('*Smethurst*').[88] That decision confirmed that an injunction can only issue in aid of a recognised legal or equitable right and that injunctions issued in public law contexts (including under s 75(v) of the *Australian Constitution*) are no exception to that rule.[89] In other words, the shape of the court's power to grant injunctive relief is determined principally by historical and doctrinal considerations, including those historical and doctrinal considerations that relate to the granting of common law injunctions.[90] That being so, it is not difficult to see that the unsettled debates concerning the nature and scope of the common law injunction may in time assume practical significance in the public law sphere.

There is admittedly no discussion in *Smethurst* of the extent to which resort might be had to common law injunctions to circumvent the inadequacy of damages principle. This is unsurprising given that no party to the proceedings raised that as a possibility. Rather, to the extent that it turned its mind to the inadequacy of damages principle, the Court proceeded on the assumption that the inadequacy of damages principle would regulate the availability of any injunction in aid of legal

87 *Milroy v Lord* (1862) 4 De G F & J 264; 45 ER 1185; *Corin v Patton* (1990) 169 CLR 540, 551, 556 (Mason CJ and McHugh J), 579–80 (Deane J).

88 (2020) 272 CLR 177 ('*Smethurst*').

89 Ibid 216–17 [85] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 241–2 [155], Edelman J agreeing at 268 [232], Gordon J dissenting at 250–1 [179]), citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 241 [91] (Gummow and Hayne JJ).

90 *Smethurst* (n 88) 237–8 [145]–[146] (Nettle J).

rights issued in a public law context,[91] either as a limit 'of the court's power to grant injunctions'[92] or as a matter to be taken into consideration.[93] As argued below, that is with respect far from certain.

C *A Survey of Australian Scholarship Concerning the Common Law Injunction*

Interest in the common law injunction was somewhat revived in the 1970s and 1980s with the publication of ICF Spry's *The Principles of Equitable Remedies* in 1971 and *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* ('*Doctrines and Remedies*') in 1984.[94] Both texts grapple with the interaction between the common law injunction and the equitable auxiliary injunction and advance two propositions as being more or less settled and two other propositions on a more tentative basis.

1 *The Relative Width and Narrowness of the Common Law Jurisdiction*

The first proposition that appears to be more or less settled is that the common law injunction is wider in some respects than the equitable auxiliary injunction and narrower in other respects.[95] The common law injunction is wider than its equitable counterpart in that it may issue in aid of a legal right that is not a proprietary right.[96] The classic example here is the personal interest an individual has in their reputation, and the corresponding right to claim damages for unjustified or otherwise indefensible defamation. This greater width, however, may be less extensive than what appears at first blush. The point is made in *Doctrines and Remedies* that, in this specific context, the proprietary right concept is not as unforgiving as it once was and now arguably encompasses many rights that were historically viewed as merely personal rights.[97]

The common law injunction is narrower than its equitable counterpart in that an equitable auxiliary injunction may issue on a quia timet basis, whereas a common

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91 Ibid 229–30 [120]–[123] (Gageler J), 242 [156] (Nettle J), 280–2 [261]–[265] (Edelman J).

92 Ibid 241–2 [155] (Nettle J).

93 Ibid 282 [265] (Edelman J).

94 Since this period, other substantial works on equity and equitable remedies have been published, including: MJ Tilbury, *Civil Remedies: Principles of Civil Remedies* (Butterworths, 1990) vol 1 ('*Principles of Civil Remedies*'); MJ Tilbury, *Civil Remedies: Remedies in Particular Contexts* (Butterworths, 1993) vol 2; GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia and New Zealand* (LBC Information Services, 1st ed, 1996); Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009). These works, however, contain very limited consideration of the common law injunction.

95 Heydon, Leeming and Turner (n 13) 709 [21-060].

96 Ibid.

97 Ibid 757–9. See also Spry (n 13) 351–2.

law injunction may not.[98] The reason for this result is that ss 79 and 82 require an applicant for a common law injunction to have commenced an action at law that they are entitled to maintain, and no action for common law damages can be brought for a merely threatened or apprehended legal wrong.[99]

It is important to note that the inability to injunct on a quia timet basis is ultimately a feature of the terms in which ss 79 and 82 of the *1854 Act* are cast and, as such, this particular limitation may be cured by express statutory language to the contrary. In various Australian jurisdictions, express statutory language of that kind has been enacted.[100]

In New South Wales, the relevant provision is s 66 of the *Supreme Court Act 1970* (NSW). As already mentioned, s 66 was initially a restatement of ss 79 and 82 of the *1854 Act* in more modern language. Section 66 was, however, recast in 1972 as follows: 'The Court may, at any stage of proceedings, by interlocutory or other injunction, restrain any threatened or apprehended breach of contract or other injury.'[101]

The effect of the words 'any threatened or apprehended breach of contract or other injury' is to allow for the granting of common law injunctions on a quia timet basis in relation to all legal wrongs.[102]

In Queensland, there is a similar provision that allows for the granting of common law injunctions in relation to 'a threatened or apprehended breach of contract or other wrongful conduct'.[103]

As such, in New South Wales and Queensland, the scope of the common law injunction is at least equal to that of the equitable auxiliary injunction.

98 Heydon, Leeming and Turner (n 13) 709 [21-060]; Spry (n 13) 334. This result was criticised as absurd in Samuel Prentice, *Chitty's Archbold's Practice of the Court of Queen's Bench, in Personal Actions and Ejectment, Including the Common Pleas and Exchequer* (H Sweet, 12th ed, 1866) vol 2, 1113 n (c).

99 *Leeds* (n 12).

100 Tilbury has argued that, even without express statutory language, common law injunctions can now be granted on a quia timet basis: Tilbury, *Principles of Civil Remedies* (n 94) 304. This view depends on the proposition that courts of equity were, at all times, courts of unlimited jurisdiction and that the so-called jurisdictional limits on intervention in support of legal rights were no more than entrenched rules of practice: see below n 111. According to Tilbury, in a judicature system, any limitation propounded by the *1854 Act* can be (and has in fact now been) overcome by a court's inherent equitable jurisdiction: Tilbury, *Principles of Civil Remedies* (n 94) 304.

101 *Supreme Court Act 1970* (NSW) s 66.

102 Heydon, Leeming and Turner (n 13) 711 [21-070], 722 [21-135].

103 *Civil Proceedings Act 2011* (Qld) s 9(1).

In South Australia, Tasmania and Western Australia, express statutory language has extended the circumstances in which a common law injunction can be sought on a quia timet basis.[104] The extension, however, is not to all legal wrongs but to waste and trespass only.[105]

Victoria does not appear to have enacted statutory language extending the scope of the common law injunction.

2 *The 'No Circumvention' Principle Set Out in* Astor Electronics

A second point on which there appears to be a consensus (at least in Australia) is that the common law injunction cannot ordinarily be used to circumvent the discretionary principles that apply to equitable auxiliary injunctions.[106] This is the approach marked out by Macfarlan J in *Astor Electronics*[107] and it is an approach that allows, and even requires, judges to have regard to familiar considerations such as whether injunctive relief may cause a defendant undue hardship or require constant supervision or be futile in the circumstances.

One area in which the 'no circumvention' principle has been applied is in relation to the principle that equity will not grant injunctions to administer the criminal law. This principle has historically been expressed as a fact of jurisdiction (although it is no longer understood in this way), and the locus classicus in this area is the statement of Lord Eldon LC in *Gee v Pritchard* that his Lordship had 'no jurisdiction to prevent the commission of crimes'.[108] The *1854 Act* has been understood as putting beyond any doubt the jurisdiction of a court to injunct criminal conduct.[109] However, in exercising its power to injunct criminal conduct, a court is to give effect to equity's long-standing reluctance to administer the criminal law, and adhere to the narrow exceptions developed by equity in this area.[110]

3 *The Status of the Inadequacy of Damages Principle*

A third and somewhat less certain proposition relates to the inadequacy of damages principle. It is suggested by the authors of *Doctrines and Remedies* that the inadequacy of damages principle does not apply to the common law injunction, at least not as a

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104 *Supreme Court Act 1935* (SA) s 29(3); *Supreme Court Civil Procedure Act 1932* (Tas) s 11(12); *Supreme Court Act 1935* (WA) s 25(9).

105 *Supreme Court Act 1935* (SA) s 29(3); *Supreme Court Civil Procedure Act 1932* (Tas) s 11(12); *Supreme Court Act 1935* (WA) s 25(9).

106 Heydon, Leeming and Turner (n 13) 709; Spry (n 13) 336–7, 345, 460–1.

107 *Astor Electronics* (n 52) 425–6.

108 *Gee v Pritchard* (1818) 2 Swans 402; 36 ER 670, 674.

109 *Australian Securities and Investment Commission v Burton-Clay* (2003) 21 ACLC 651, 652–3 [2] ('*Burton-Clay*'); *Australian Securities and Investment Commission v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487, 493 [19] ('*HLP Financial Planning*').

110 *Burton-Clay* (n 109) 652–3 [2]; *HLP Financial Planning* (n 109) 493 [19].

jurisdictional prerequisite.[111] This conclusion is reached by recognising: (1) that the inadequacy of damages principle, like the proprietary right requirement, goes to the question of jurisdiction or, to put it differently, to the question of whether a litigant has the requisite equity to approach a court of equity for the relief sought;[112] and (2) that the decisions of *Quartz Hill* and *Bonnard* were concerned, not so much with the proprietary right requirement specifically, but more generally with the jurisdictional prerequisites that apply in equity's auxiliary jurisdiction.[113] The authors of *Doctrines and Remedies*, however, concede that this conclusion is not supported by any direct authority.[114]

As mentioned before, the primary challenge that can be raised in respect of this argument is that it was never the intention of the drafters of the *1854 Act* to remove the inadequacy of damages principle. In fact, the draft provisions in the *1831 Report* and *1853 Report* expressly condition the availability of injunctive relief on proof of inadequacy of damages.

It has also been suggested that the inadequacy of damages principle, whatever it may have been in the past, has, over time, decayed into a discretionary consideration.[115] If that characterisation is correct, *Astor Electronics* may require courts to have regard to the inadequacy of damages principle in the common law jurisdiction, albeit as a discretionary consideration. This argument will be explored more fully in Part V, against the backdrop of the fourth and final proposition noted in this Part.

4 *Exceptions to the 'No Circumvention' Principle*

The fourth proposition relates to the exact import of *Astor Electronics*, specifically whether that decision requires the discretion to issue common law injunctions to be exercised in strict accordance with the discretionary principles that apply to equitable auxiliary injunctions,[116] or whether it is open for a court to modify or

111 Heydon, Leeming and Turner (n 13) 719 [21-120]. See also Spry (n 13) 334–5. Spry does not accept that courts of equity lacked jurisdiction in the sense that it lacked power to injunct, for example, defamations, and prefers the view that, properly conceived, courts of equity enjoy unlimited jurisdiction: at 333, 341. He does, however, accept that a practice developed whereby courts of equity would not restrain certain wrongs, including defamations, and that s 79 does not, in its terms, import limitations that are tied to practices peculiar to courts of equity: at 335.

112 Heydon, Leeming and Turner (n 13) 719 [21-120].

113 Ibid 709 [21-060].

114 Ibid 719 [21-120].

115 David Wright, 'Unity in Remedies: Finding the Best Remedy' (2014) 38(1) *University of Western Australia Law Review* 30, 33, 46. The inadequacy of damages principle was also regarded as a discretionary factor in *Curro* (n 16) 348.

116 See Michael Tilbury, 'Francis Gurry: Breach of Confidence' (1984) 7(2) *University of New South Wales Law Journal* 392, 392–3 for the view that common law injunctions should not issue on different principles to those applicable to equitable auxiliary injunctions.

disapply those discretionary principles or develop novel discretionary principles with a view to satisfying the mandate (if that is what it is), in ss 81 and 82 of the *1854 Act*, that the common law injunction issue or not issue 'as Justice may require' and on terms that are 'reasonable and just'. For convenience only, these words will be referred to as 'words of limitation'.

Spry's analysis of the common law injunction proceeds on the basis that the words 'as Justice may require' are operative and not merely ornamental. He states that while there will generally be 'no difference between what appears to be just according to established equitable doctrines and what appears to be just according to more general conceptions',[117] there may also be exceptional circumstances in which a court issuing a common law injunction will 'decline to adopt special equitable rules of practice'.[118] This is consistent with his view of the 'just and convenient' formulation in s 25(8) of the *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 which is that those words do not, in and of themselves, extend the jurisdiction of a court to which it applies, or alter the principles to be applied by such a court, but instead provide a statutory basis for departing from rigid rules of practice (where they exist).[119]

This approach is also consistent with Jessel MR's construction of ss 79, 81 and 82 of the *1854 Act* in *Beddow v Beddow*.[120] In that case, Jessel MR observed that '[w]hat is reasonable and just is the only limit'[121] and that 'what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles'.[122] Master of the Rolls Jessel acknowledged that the Court of Chancery at its inception exercised a similar unlimited jurisdiction but that over time it became settled that 'there were certain well-known cases in which … the Court ought not to grant an injunction'.[123] Additionally, Jessel MR acknowledged that 'in course of time various vexatious and inconvenient restrictions [had been] adopted'[124] by courts of equity in relation to injunctions.

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117 Spry (n 13) 336.

118 Ibid 337. Spry singles out, as potentially inapplicable to a common law injunction, the rules of practice that give effect to the maxim that the one who seeks equity must do equity: at 337–8, 435, 460–1. Spry also notes that the common law may view requirements of accrued rights differently from equity and questions whether legal injunctions may apply the principle in equity that injunctions are to be granted or refused by reference to the circumstances and state of the law existing at the date of the hearing and not at the date of the writ's issue: at 345 n 18. This observation will have a ring of familiarity to those acquainted with the English and Australian authorities considering the different points at which equitable damages and common law damages are assessed: See McDermott (n 10) 103, 122.

119 Spry (n 13) 341–2.

120 (1878) 9 Ch D 89.

121 Ibid 92.

122 Ibid 93.

123 Ibid 92.

124 Ibid.

The gap between justice 'according to established equitable doctrines' and justice 'according to more general conceptions' is likely to be narrow, perhaps even vanishingly so.[125] The class of cases in which inflexible application of equitable principles results in unjust outcomes is also difficult to contemplate in the abstract. Moreover, if one conceives of there being a core of cases in which the application of equitable discretionary considerations consistently achieves justice 'according to more general conceptions' (and that by virtue of those considerations being fine-tuned over time), the class of cases in which there is a gap is likely to exist on the periphery of that core, that is in cases that are so infrequently brought, or have not to date been brought, and to which discretionary considerations are yet to be adapted, or applied unadapted with unjust effect.

It may be that the common law injunction has a role to play in this peripheral region. It could act as a safeguard against the unjust or reflexive application of received equitable doctrine and practice, by focusing judicial attention not on equitable doctrine and practice but on the words of limitation set out in ss 81 and 82 of the *1854 Act*.

The authors of *Doctrines and Remedies* have argued for a reading of *Astor Electronics* that accords with this flexible approach, although they make no reference to the words of limitation in ss 81 and 82. They make the following comment in relation to the use of injunctions to restrain breaches of negative stipulations, but the comment is of general application:

> it must be remembered that in 1854 the common law jurisdiction acquired a power to restrain breaches of contract, … and the defamation cases show that the common law jurisdiction need not be whittled down by any equitable considerations. … If one is invoking the old common law jurisdiction, it does not matter whether the breach was of an affirmative or of a negative stipulation; whether personal services are involved or not; whether the contract concerns chattels personal or not; whether supervision of the injunction would be required or not; and so on. The attitude to which a consideration of equitable principles would lead one would certainly be a relevant factor in determining what attitude one should adopt in exercising the common law jurisdiction, but it need not be a decisive consideration. If *Astor Electronics Pty Ltd v Japan Electron Optics Laboratory Co Ltd* tends to the contrary (which, it is suggested, it does not) it should be regarded as wrongly decided.[126]

Much has been written, in the context of the fusion fallacy debates, about whether there is scope for equitable principles to be developed incrementally in new directions. The common law injunction may provide, at least in the sphere of injunctions, an avenue for exactly that kind of organic, incremental development (to the extent that it is needed). Ironically, the case for such flexibility is best made by reference to the methodology favoured by equity traditionalists, that is, by grounding the inherent powers of contemporary courts in powers available to courts of equity and courts of

125 See above n 117.

126 Heydon, Leeming and Turner (n 13) 745–6 [21-230].

common law immediately prior to the enactment of the *Judicature Acts*, including by reason of, or as augmented by, any statute that preceded the *Judicature Acts*.

IV Inadequacy of Damages as a Jurisdictional Requirement

Is satisfying a court of the inadequacy or inappropriateness of damages as a remedy a prerequisite to the issuing of a common law injunction?[127]

The clear intention of the framers of the *1854 Act* was that it would be and, if ss 79 and 82 were enacted as originally drafted, the answer to the above question would be yes.

But, as enacted, the only textual basis in ss 79 and 82 for an inadequacy of damages requirement is the word 'injunction' and the strength of that textual basis depends on whether one accepts the unstated assumption that the inadequacy of damages requirement runs with the remedy.

That assumption has a superficial attractiveness to it but appears to break down once subjected to analysis. What that analysis reveals is a paradox in the form of a jurisdictional Möbius strip.

This paradox comes into focus when one considers the nature and history of the inadequacy of damages requirement. The true principle that stands behind the inadequacy of damages requirement is that equity will only intervene in aid of legal rights where relief at law, including statutory relief, is inadequate.[128] The requirement is said to be jurisdictional because where inadequacy of relief at law cannot be demonstrated, a court of equity will 'refuse, according to established equitable principles, to consider at all whether or not they should exercise their discretion' to grant relief.[129]

Any attempt to characterise the rule as incarnating some broader normative principle is misconceived. The rule and the remedial hierarchy which it supports are not premised on a preference for substitutionary relief over specific relief, notwithstanding the fact that debate surrounding the rule is occasionally cast in exactly these terms.[130] Such a characterisation of the rule hardly explains why equitable compensation in the exclusive jurisdiction is not subject to a similar adequacy test. It also does not account for the fact that relief at law includes various forms of specific relief (for example, recovery under detinue and replevin actions), which,

127 A similar question has been raised and in fact litigated (albeit not at an appellate level) with respect to the issuing of statutory injunctions. See *Varley v Varley* [2006] NSWSC 1025, [19]–[26].

128 PG Turner, 'Inadequacy in Equity of Common Law Relief: The Relevance of Contractual Terms' (2014) 73(3) *Cambridge Law Journal* 493, 495; Spry (n 13) 402.

129 Spry (n 13) 651.

130 See, eg: Wright (n 115) 38–9; Douglas Laycock, *The Death of the Irreparable Injury Rule* (Oxford University Press, 1991) 12–14.

if adequate, preclude a litigant from accessing specific relief in equity.[131] It is also incorrect to say that, whatever the inadequacy requirement may have entailed in the past, the inadequacy requirement has now collapsed into a requirement concerned solely with the adequacy of damages. Peter Turner makes the point that decrees of specific performance in important cases dealing with part performance can only be explained if the inadequacy requirement is concerned with relief at law generally as opposed to damages only.[132]

The rule, to use Geoffrey Gibson's phrase, is an 'accident of history'.[133] It is the product of an inter-fora struggle between the common law courts, on the one hand, and courts of equity, on the other, and not the embodiment of a grand jurisprudential vision.

The true principle on which the inadequacy of damages requirement is based gives rise to a circularity problem. The common law injunction is capable of being issued by a common law court and is therefore a legal remedy. The availability of a common law injunction would therefore be conditional on the inadequacy or inappropriateness of legal remedies, including the common law injunction itself.

This paradox is admittedly premised on a formalistic approach to categorising remedies. The only reason the common law injunction is categorised, for the purpose of this paradox, as a common law remedy is that it was a remedy that common law courts had power to grant prior to the passage of the *Judicature Acts*. But there are good reasons for insisting on this kind of formalism. The only alternative is to attempt to categorise remedies by reference to whether a given remedy has some innate legal quality or equitable quality, which is an impossible task. There is no innate quality in an injunction that qualifies that remedy as equitable any more than there is an innate quality in an award of damages that qualifies that award as legal. That is why FW Maitland insisted that

> if we were to inquire what it is that all these rules have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity.[134]

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131 Spry (n 13) 402.

132 Turner (n 128) 495–6, citing *Maddison v Alderson* (1883) 8 App Cas 467, 475–6 (Earl of Selborne LC).

133 Geoffrey Gibson, *The Common Law: A History* (Australian Scholarly, 2012) 115, reproduced in Geoffrey Gibson, 'Actual Decline and Likely Fall' (2012) 15(1) *Legal History* 110, 115.

134 FW Maitland, *Equity: A Course of Lectures*, ed AH Chaytor, WJ Whittaker and John Brunyate (Cambridge University Press, 2nd rev ed, 1936) 1. The correctness of Maitland's conception of equity is the subject of a protracted academic debate. A helpful and relatively recent summary of opposing views can be found in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020).

It could be said that a remedy should be seen as being equitable if it has some discretionary element to it and legal if it is a remedy that is rigidly and inflexibly available as of right. But this, in the author's view, really puts the cart before the proverbial horse. If anything, it is the categorisation of a remedy as legal or equitable that has historically determined whether that remedy should be discretionary or available as of right.

It is therefore tentatively suggested that the inadequacy of damages requirement does not apply to the common law injunction, at least not as a jurisdictional prerequisite. The true principle behind the inadequacy of damages requirement gives rise to a paradox. The paradox could, of course, be resolved by untangling the inadequacy of damages requirement from its historical underpinnings and antecedents. That, however, seems unlikely to occur organically and would probably require legislative intervention.

V Inadequacy of Damages as a Discretionary Consideration

Up to this point, we have assumed, without interrogation, that the inadequacy of damages principle operates only as a jurisdictional requirement. As alluded to above, this assumption is not without its detractors. It is increasingly suggested that, whatever it may have been in the past, the inadequacy of damages principle has now decayed into a kind of discretionary consideration.[135] In other words, the classification of the inadequacy of damages principle as a jurisdictional prerequisite is little more than a nominal veil that obscures the fact that, in practice, the principle is applied at the point of discretion and not jurisdiction.[136]

It is therefore necessary to consider what, if anything, turns on the correctness of our assumption as to the jurisdictional nature of the inadequacy of damages principle.

On one view, if the inadequacy of damages principle operates as a discretionary consideration in equity's auxiliary jurisdiction, there is no reason why the same should not obtain with respect to the common law injunction. That is so because *Astor Electronics* promotes a policy of approximate uniformity between the discretionary considerations that apply in the equitable auxiliary jurisdiction and those that apply in the common law jurisdiction.[137] It would then no longer be to the point that the inadequacy of damages principle does not run with the remedy. *Astor*

135 See above n 115.

136 It has also been suggested that the inadequacy of damages principle rarely affects the outcome of cases, even as a discretionary consideration. See generally Laycock (n 130) but note its focus on cases decided in the United States. See also: Wright (n 115) 31; David Wright, 'Discretion with Common Law Remedies' (2002) 23(2) *Adelaide Law Review* 243, 246–7. But see Gene R Shreve, 'Book Review: The Premature Burial of the Irreparable Injury Rule' (1991–92) 70(4) *Texas Law Review* 1063.

137 *Astor Electronics* (n 52) 425–6.

Electronics provides an entirely separate avenue for that principle (or at least a less absolute version of that principle) to 'cross over', as it were, the jurisdictional divide.

It is difficult, however, to be definitive on this point, given the flexibility introduced by the words of limitation in ss 81 and 82, which, as already noted, have been construed as being operative, and not merely ornamental. Unlike many other discretionary considerations that exist in equity's auxiliary jurisdiction, there is a fundamental tension between the inadequacy of damages principle and the requirements of ss 81 and 82. The inadequacy of damages principle prompts a court to ask 'is it just or unjust, in all the circumstances, that a plaintiff should be confined to his remedy in damages?'.[138] Such a question is different to the enquiry that ss 81 and 82 require a court to make, namely whether it would be just or unjust in all the circumstances for a plaintiff to be granted an injunction.

The first question assumes the appropriateness of both pecuniary relief and injunctive relief and asks whether it is just for the plaintiff to be confined to a single remedy (an award of damages) or be awarded a combination of otherwise appropriate remedies (an award of damages and an injunction). The second question is directed to the appropriateness of injunctive relief.

Damages can simultaneously be a just remedy and an insufficient remedy. This is the very premise for most specific performance cases involving real property[139] and personal property not readily available on an open market.[140] In these cases, an award of damages may be an insufficient remedy not because a different amount is warranted (in which case, it would be an unjust award) but because the relevant shortfall can only be made up by a different kind of remedy.

In the same way, an injunction can simultaneously be a just remedy and an insufficient remedy. The sufficiency and, for that matter, the effect of a combination of remedies is distinct from the justice achieved by the individual remedies comprising that combination.

As such, there is at least an argument to be made that the inadequacy of damages principle is screened out on account of the words of limitation in ss 81 and 82.

VI Conclusion

More than 150 years after its introduction, the nature and scope of the common law injunction are yet to be settled. This is due, in no small part, to the fact that it is difficult to disentangle remedies, and the principles that regulate their availability, from idiosyncrasies of jurisdiction. This difficulty is here amplified by the fact that

138 *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349, 379 (Sachs LJ).

139 *Adderley v Dixon* (1824) 1 Sim & St 607; 57 ER 239, 240–1.

140 *Dougan v Ley* (1946) 71 CLR 142, 150–1 (Dixon J, McTiernan J agreeing at 152), 153 (Williams J).

the framers of the *1854 Act* clearly did not distinguish between a remedy's irreducible or core content and its jurisdictional incidents.

Some headway has been made by Australian equity scholars in clarifying aspects of this turbid admixture but there remain areas of uncertainty. It is true that the common law injunction appears in certain Australian jurisdictions to be broader in all respects than the equitable auxiliary injunction. That said, how significant that greater breadth is remains to be seen. Much will depend on how courts decide to resolve the difficult question of whether the inadequacy of damages principle has a role to play in applications for common law injunctions.

Examining the history behind the enactment of the *1854 Act* is helpful, but only up to a certain point, and early commentary of the *1854 Act* is divided on what should be made of the breadth of the language used in ss 79 and 82. Similarly, while the English and Australian cases dealing with the injunction provisions in the *1854 Act* and its Australian equivalents provide a foundation for regarding the proprietary right requirement as not applicable to the common law injunction, it is unclear whether, by analogy, the inadequacy of damages principle has no role to play where common law injunctions are concerned. The analogy relies on the following proposition: the inadequacy of damages principle should be treated in the same manner as the proprietary right requirement because the former is and the latter either is or was a jurisdictional prerequisite to obtaining equitable auxiliary injunctions. Against that proposition, there is some doubt as to whether the inadequacy of damages principle should today be regarded as a jurisdictional prerequisite, as opposed to a mere discretionary consideration.

The author has also weighed into the balance of the nature and history of the inadequacy of damages principle, which appear to give rise to a paradox.

The author's tentative view is that the inadequacy of damages principle does not regulate the availability of common law injunctions. There are, admittedly, sound arguments pointing in both directions, but in the author's opinion the broad language used in the relevant statutory provisions and the nature and history of the inadequacy of damages principle tips the scale in favour of courts disregarding the inadequacy of damages principle in granting common law injunctions.

That said, the law in this area would benefit from legislative intervention. It is somewhat unsatisfactory that the nature and scope of the common law injunction is unclear and dependent on somewhat abstruse historical and even theoretical considerations. There is also the fact of non-uniformity across jurisdictions. As interesting as these matters may be from an academic standpoint, the resulting uncertainty is less than ideal for litigants and those advising them.