The Law of Remedies in the Second Half of the Twentieth Century: An Australian Perspective

GARY DAVIS*
MICHAEL TILBURY**

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I. INTRODUCTION

Writing of American law in 1955, Professor Charles Wright was able to say, with obvious disappointment, that "there is no law of remedies."[1] What Professor Wright was lamenting was the absence of any treatment in American law, particularly in the literature, of the law of remedies as a whole. As he put it: "The votary of this obscure science must pursue

* Professor and Dean of Law, Flinders University, South Australia.
** Commissioner, New South Wales Law Reform Commission; Professorial Fellow, the University of Melbourne.

1. Charles Alan Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 376 (1955).

his researches through separate books and digest topics on Damages, Equity, Specific Performance, Injunction, Quasi-Contracts, Rescission, Declaratory Judgments, Restitution, and perhaps others."[2] If the question had occurred to an Australian legal scholar at the time, he or she would have written something similar. But, the Australian scholar would, we suspect, have added two observations. The first would have been that the position in Australian law was the same as that in English law. The second, not necessarily consistent with the first, would have been that, of the specific topics listed by Professor Wright, the ones that attracted most attention in Australia were those that involved equitable remedies. After all, damages was largely a jury question that barely raised any general issues beyond "remoteness" and the measure of recovery in specific instances.[3] And restitution lay hidden in the forms of action from which it seldom emerged.[4]

Professor Wright's landscape changed, at least marginally, in Australia in the second half of the twentieth century. Both observations of our hypothetical mid-century legal scholar are relevant to that change, and both continue to have their effect on the development of the common law of Australia.

II. THE EMERGENCE OF AN AUSTRALIAN LAW OF REMEDIES

A. The Emergence of an Independent Australian Law

British sovereignty over Australia dates from 1788. Notwithstanding the mutual dependence of legal and social development that we now take for granted,[5] there was a tendency, persisting well into the twentieth century, to stress the desirability of maintaining the uniformity of the common law in all those jurisdictions in which it applied in the British Empire. Thus, in 1879 in the heyday of empire, the Judicial Committee of the Privy Council in England, on appeal from a decision of the

2. *Id.*

3. This is readily apparent from *Mayne on Damages*, the standard English text, first published in 1856, and is true of all editions before the twelfth, which was written by Dr. Harvey McGregor. *See* HARVEY MCGREGOR, MAYNE AND MCGREGOR ON DAMAGES (12th ed. 1961); *see also* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES OR AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF COMPENSATION RECOVERED IN SUITS AT LAW, Chs. I–III (1847) (stating that general issues in damages relate only to compensation, nominal damages, remoteness, and consequential damages).

4. For the movement from quasi-contract to restitution in Australian law, see KEITH MASON & J.W. CARTER, RESTITUTION LAW IN AUSTRALIA 4–34 (1995). *See generally* Justice Keith Mason, *Where Has Australian Restitution Law Got To and Where is it Going?*, 77 AUSTL. L.J. 358 (2003).

5. Especially since FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24–31 (Abraham Hayward trans., 2d ed. 1828).

Supreme Court of New South Wales, said: "[I]t is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same."[6] Some sixty years later, the High Court of Australia, which by virtue of Chapter III of the *Australian Constitution* (which came into force in 1901) then stood together with the Privy Council at the apex of the Australian court system, applied this principle to prefer a decision of the House of Lords to one of its own previous decisions, simply because the Australian decision was inconsistent with the English decision.[7]

From 1968, appeals to the Privy Council from Australian courts were progressively abolished:[8] in 1968, in all matters having a "federal element";[9] in 1975, in all appeals from the High Court to the Privy Council;[10] and, in 1986 from any court in Australia.[11] This had the effect of freeing the High Court from the shackles of English precedent. As early as December 1986, the Court stated that, with the abolition of Privy Council appeals, no court in Australia was technically bound by decisions of English courts. The Court said:

> The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. . . . [T]he precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.[12]

In truth, this formal relegation of English precedent to the status of "foreign" represented what had been happening in practice for some

6. Trimble v. Hill, [1880] 5 App. Cas. 342, 345 (P.C. 1879) (appeal taken from N.S.W.). More modern manifestations of this view are sometimes found. For example, in *Cassell & Co. v. Broome*, [1972] A.C. 1027, 1083 (H.L.), Lord Hailsham hoped (in vain) that, after the decision in the instant case, Commonwealth courts would reconsider their opposition to *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.).

7. Piro v. W. Foster & Co. (1943) 68 C.L.R. 313, 320 (Austl.); *see also* Ford v. Ford (1947) 73 C.L.R. 524, 528 (Austl.).

8. For an exhaustive account of the issues surrounding the topic of Privy Council appeals from Australia, see generally A.R. Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and "The Law for Australia"*, ADEL. L. REV. 1 (1978).

9. Privy Council (Limitation of Appeals) Act 1968–1973, 1973, § 3 (Austl.).

10. Privy Council (Appeals from the High Court) Act, 1975, § 3 (Austl.).

11. Australia Act, 1986, § 11 (Austl.).

12. Cook v. Cook (1986) 162 C.L.R. 376, 390 (Austl.). The Court left open the binding nature of decisions of the House of Lords during the period when appeals lay to the Privy Council.

years.[13] The High Court had never been completely subservient to the Privy Council and conflict did occur between the two courts.[14] This occurred principally (but not exclusively) in constitutional cases, where the High Court, determined to develop a distinct constitutional jurisprudence which borrowed liberally from the United States and Canada, quickly asserted its authority over the Privy Council which, with its limited experience of dealing with written constitutions, appeared inept.[15] By 1967, it was clear that the Privy Council had "bowed out of the mainstream of Australian constitutional law by adopting a course the practical wisdom [i.e. of simply following decisions of the High Court of Australia] of which was, from another perspective, but a confirmation of its total inability to make an independent contribution to [Australian constitutional jurisprudence]."[16]

Beyond constitutional matters, disquiet with developments in English law began to emerge in the second half of the twentieth century. *Parker v. The Queen*[17] in 1963 became the first occasion of open dissent. The case concerned manslaughter and the object of the High Court's displeasure was the decision of the House of Lords in *Director of Public Prosecutions v. Smith*,[18] which was not strictly relevant to the actual decision in *Parker*, but which was in conflict with previous High Court decisions in so far as it restated aspects of the test for provocation in objective terms, rather than in the subjective terms favored by the High Court. The point was, thus, a fundamental one: defining moral blameworthiness for the purposes of the criminal law. The Court went out of its way to say that, at least in this instance, the decision of the House of Lords should not be followed. Sir Owen Dixon, often regarded as the greatest of Australia's Chief Justices, wrote:

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13. A point made by Sir Anthony Mason when he was sworn in as Chief Justice of the High Court of Australia. *See* 162 C.L.R. at x.

14. *See* DAVID B. SWINFEN, IMPERIAL APPEAL: THE DEBATE ON THE APPEAL TO THE PRIVY COUNCIL, 1833–1986, at 161–64 (1987).

15. For some contemporary and trenchant criticisms of the Privy Council's role in Australian constitutional (and other) law, see F.R. Beasley, *Appeals to the Judicial Committee: The Case for Abolition*, 7 RES JUDICATAE 399, 409–11 (1957); J.G. Latham, *Book Reviews*, 1 MELB. U. L. REV. 266, 270 (1958) (reviewing GEOFFREY SAWER, CASES ON THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA (2d ed. 1957) and W. ANSTEY WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA (2d ed. 1956)).

16. *See* MICHAEL COPER, FREEDOM OF INTERSTATE TRADE UNDER THE AUSTRALIAN CONSTITUTION 168 (1983) (the quotation has been generalized at the end, the original limiting the point to the jurisprudence associated with § 92 of the Constitution).

17. (1963) 111 C.L.R. 610 (Austl.), *rev'd*, (1964) 111 C.L.R. 665 (P.C.).

18. Dir. of Pub. Prosecutions v. Smith, [1961] A.C. 290 (H.L. 1960). The decision was reversed in England by the Criminal Justice Act, 1967, c. 80, § 8 (Eng.).

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Cas*e I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. . . . I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think that *Smith's Case* should not be used as authority in Australia at all.[19]

His Honor (whose judgment was a dissenting one) added that all the other members of the High Court concurred in this view.[20]

Beyond the criminal law, *Parker* held out the possibility that Australian courts were no longer automatically bound to follow English decisions that they regarded as wrong. The test came early, in defining the boundaries of that unique common law remedy, exemplary damages. Historically, the common law has attached a great deal of importance to the protection of some rights—ranging from rights to personal security to the right to vote. An interference with these rights is actionable per se without proof of loss.[21] Where the defendant interfered with such rights intentionally, as by trespassing on the plaintiff's property, the courts, from at least the seventeenth century, would consider whether the plaintiff ought to recover damages by way punishment of the defendant. The focus was on the conduct of the defendant to determine if it was, in the circumstances, so high-handed or obnoxious as to require punishment and deterrence. The conduct must, in the somewhat archaic English used in Australia, and derived from *Salmond on Torts*,[22] amount to "conscious wrongdoing in contumelious disregard of another's rights."[23]

There are many difficulties with such a remedy, not the least of which are that it confuses the purposes of the criminal and civil laws[24] and that it purports to punish the defendant without the safeguards of the criminal law—such as the presumption of innocence and the requirement that the

19. *Parker* 111 C.L.R. at 632 (footnotes omitted).
20. *Id.* at 635.
21. For a list of such torts, see CLERK & LINDSELL ON TORTS 65–66 (R.W.M. Dias et al. eds., 15th ed. 1982).
22. *See* 1 M.J. TILBURY, CIVIL REMEDIES para. 5004 (1990).
23. Whitfeld v. De Lauret & Co. (1920) 29 C.L.R. 71, 77 (Austl.); Gray v. Motor Accident Comm'n (1998) 196 C.L.R. 1, 7 (Austl.).
24. *Cf. Gray* 196 C.L.R. at 6–8 (drawing attention, respectively, to the historical mingling of tort and crime and to the fact that there is not necessarily a sharp cleavage between the civil and criminal law).

defendant's guilt be established beyond reasonable doubt.[25] In addition to these difficulties of principle, there were two other problems with the remedy. First, the cases did not clearly articulate the circumstances in which the remedy was available: was it available only in certain types of actions, such as torts actionable per se or in all actions in which the defendant's conduct was sufficiently egregious? Second, the cases in which these sorts of damages had been awarded did not really specify exactly what the purpose of the damages were: were they really aimed at punishment or at giving the plaintiff greater compensation because the plaintiff had (presumptively or otherwise) suffered greater loss than he or she would have done if the defendant had not acted so egregiously?

In 1964, the House of Lords attempted to clarify the law in *Rookes v. Barnard*.[26] In a part of his speech with which all the other members of the House concurred, Lord Devlin held that, in the future, exemplary damages should only be awarded in three cases:[27] (1) "[O]ppressive, arbitrary or unconstitutional action by the servants of the government"; (2) Where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff"; and (3) Where such damages are authorized by statute.

The decision was extremely controversial. In England, the Court of Appeal, led by Lord Denning, M.R., held, on specious grounds, that the decision had been delivered *per incuriam*.[28] An inevitable appeal followed to the House of Lords which reaffirmed *Rookes v. Barnard* and, not so gently, chastised the Court of Appeal for its disobedience.[29] In Australia, the High Court was more direct. In *Uren v. John Fairfax & Sons Pty. Ltd.*[30] in 1966, the Court held that Lord Devlin's categories were neither justified by precedent nor compelling in logic. Leaving aside the third category (exemplary damages authorized by statute), the latter point must readily be conceded:

- If one takes the first category, why should it only be the exercise of power by servants of the government? What about an oppressive exercise of power by a large corporation?
- If one takes the second category, why exemplary damages? Surely, if at all, this should be an action in restitution?

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25. The classical exposition of these concerns is *Cassell & Co. v. Broome*, [1972] A.C. 1027, 1087 (H.L.) (opinion of Lord Reid). *See also* Harris v. Digital Pulse Pty. Ltd. (2003) 56 N.S.W.L.R. 298, 386–91.

26. [1964] A.C. 1129 (H.L.).

27. *Id.* at 1226–27.

28. Broome v. Cassell & Co., [1971] 2 Q.B. 354, 382 (C.A.).

29. *Cassell*, [1972] A.C. at 1075–76.

30. Uren v. John Fairfax & Sons Pty. Ltd. (1966) 117 C.L.R. 118 (Austl.), *aff'd sub nom.* Austl. Consol. Press Ltd. v. Uren, [1969] 1 A.C. 590, 615 (P.C. 1967).

The inevitable appeal then possible from the High Court to the Privy Council saw the Privy Council agreeing with the High Court.[31] Delivering the Board's advice, Lord Morris of Borth-y-Gest said:

> The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning, or had it been founded upon misconceptions, it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision, and where its policy in a particular country is fashioned so largely by judicial opinion, it became a question for the High Court to decide whether the decision in *Rookes v. Barnard* compelled a change in what was a well-settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.[32]

As far as exemplary damages are concerned, the *Uren* decision meant that, unlike English law, the development of the law relating to exemplary damages could, theoretically at least, proceed on a principled basis by reference to its rationale. Thus, in *Gray v. Motor Accident Commission*[33] the High Court held that, even where the defendant's conduct is punishable in principle, it will not support a claim for exemplary damages to the extent to which the defendant has already been subjected to substantial criminal punishment in respect of that very conduct.[34] The award no longer has any function. Linking their availability to their rationale has the effect of ensuring that exemplary damages are only recoverable in Australian law in exceptional circumstances,[35] just as the "three-categories approach" does in English law.

In contrast to the Australian approach, an English court must determine at the outset whether the case falls within one of Lord Devlin's three categories.[36] And until recently, it also had to determine if the case fell within one of the causes of action for which exemplary damages were available before *Rookes v. Barnard* (on the basis that *Rookes v. Barnard* did not intend to widen the categories of cases in which exemplary damages could be recovered).[37] On that approach,

31. Austl. Consol. Press Ltd. v. Uren (1967) 117 C.L.R. 221 (P.C).
32. *Id.* at 241 (footnote omitted).
33. (1998) 196 C.L.R. 1 (Austl.).
34. *Id.* at 13–14.
35. *Id.* at 9.
36. *See* Kuddus v. Chief Constable of Leicestershire Constabulary, [2002] 2 A.C. 122 (H.L. 2001).
37. *See* A.B. v. S.W. Water Servs. Ltd., [1993] Q.B. 507 (Eng. C.A. 1992), *overruled by Kuddus*, [2002] 2 A.C. at 122.

exemplary damages would probably not be relevant in a negligence claim. Yet in Australian law, it is clear that exemplary damages are available where a claim lies in negligence because even a negligent defendant can behave consciously in contumelious disregard of the plaintiff's rights—as, for example, where an employer, more or less aware of the risks, negligently exposes employees to the risk of contracting asbestosis by reason of exposure to asbestos over many years.[38] But there is a limit: exemplary damages are probably not available in Australia where the case is exclusively equitable, simply because equity and penalty are strangers.[39] This is one reason why the principled development of equitable damages held out in *Uren* remains theoretical only.

B. The Emergence of an Independent Australian Law of Remedies

As with exemplary damages, so with other nominate remedies, there were developments with a distinctly Australian flavor in the second half of the twentieth century. Beyond exemplary damages, the *Uren* case itself was important for the development of the law of damages generally.[40] This is because the High Court there accepted the distinction that Lord Devlin, in *Rookes v. Barnard*,[41] had found between aggravated damages (intended to compensate) and exemplary damages (intended to punish and deter). This held out the promise of a principled development of the compensation principle itself. That promise has largely been fulfilled.[42] Further, the law of restitution continues to develop in Australia, although any broad acceptance of the doctrine of unjust enrichment as a basis of liability, as advocated by many restitution scholars,[43] is unlikely, at least at the point at which the doctrine would subsume the traditional doctrines of equity.[44] At one level, this reflects a skepticism that a basis of liability should be outcome-based, rather than focused more squarely on the conduct of the defendant.[45] At another level, it reflects the

38. For a review of the more recent cases, see Michael Tilbury, *Exemplary Damages in Negligence Claims*, 5 TORT L. REV. 85 (1997); Michael Tilbury, *Exemplary Damages in Medical Negligence*, 4 TORT L. REV. 167 (1996).

39. Harris v. Digital Pulse Pty. Ltd. (2003) 56 N.S.W.L.R. 298, 298.

40. Uren v. John Fairfax & Sons Pty. Ltd. (1966) 117 C.L.R. 118 (Austl.), *aff'd sub nom.* Austl. Consol. Press Ltd. v. Uren, [1969] 1 A.C. 590, 615 (P.C. 1967).

41. [1964] A.C. 1129, 1221 (H.L.).

42. *See infra* Part III.

43. Most influential in this scholarship is that inspired by Peter Birks. *See generally* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION (1985).

44. Consider, especially, the important analysis of unjust enrichment theory in *Roxborough v. Rothmans of Pall Mall Australia Ltd.* (2001) 208 C.L.R. 516, 543–45 (Austl.) (opinion of Gummow, J.).

45. *See* Paul Finn, *Equitable Doctrine and Discretion in Remedies*, *in* RESTITUTION:

continuing vitality in Australia of equity as a separate body of doctrine. It is at this point that the second observation of our hypothetical mid-century legal scholar becomes relevant. The development of the nominate remedies in Australian law in the second half of the twentieth century continued to reflect the importance of the separate development of law and equity.[46]

There were two factors compelling this separate development. The first is, essentially, the power and intellectual influence of the "equity bar" in New South Wales,[47] in practice the most important jurisdiction in Australia. New South Wales only completely adopted a judicature system in 1972,[48] so that it had the experience of the separate administration of law and equity for almost a century after "fusion" in England. That period was marked by the flowering of equity scholarship at Sydney University Law School, under the influence first of Sir Frederick Jordan[49] and subsequently of Meagher, Gummow, and Lehane,[50] of whose treatise on equity Justice Heydon (a Justice of the High Court of Australia) has said that "no greater legal work has been written by Australians."[51] The second factor was that contract cases litigated as far as the High Court tended, until the last twenty years or so of the last century, to involve contracts relating to the sale of land, rather than commercial contracts. And it is, of course, in the context of such contracts that the equitable remedy of specific performance flourishes.

The consideration of that remedy in Australian courts in the second half of the twentieth century continued to stress its inherently discretionary nature. The High Court had laid the foundations of the law of specific performance in the first half of the century, making it clear that equitable remedies would not be granted where their effect would allow the

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PAST, PRESENT AND FUTURE 251 (W.R. Cornish et al. eds., 1998).

46. *See infra* Part IV.

47. *See* Harris v. Digital Pulse Pty. Ltd. (2003) 53 N.S.W.L.R. 298, 305–06.

48. *See* Supreme Court Act, 1970 (N.S.W.); *see also* Law Reform (Law and Equity) Act, 1972 (N.S.W.).

49. Jordan's *Chapters on Equity in New South Wales* were the notes from which generations of students at Sydney Law School learned their "Equity." They are reprinted in SIR FREDERICK JORDAN, SELECT LEGAL PAPERS (6th ed. 1983).

50. *See* R.P. MEAGHER ET AL., EQUITY: DOCTRINES AND REMEDIES (1975). The work is now in its fourth edition, released in 2002.

51. J.D. Heydon, *The Role of the Equity Bar in the Judicature Era*, *in* NO MERE MOUTHPIECE: SERVANTS OF ALL, YET OF NONE 71, 81 (Geoff Lindsay & Carol Webster eds., 2002).

plaintiff to take advantage of unconscionable conduct[52] or would subject the defendant or relevant third parties to an unconscionable hardship[53]—the conduct or hardship in question outweighing all other discretionary considerations operating in the case. In the second half of the century, this venerable body of jurisprudence continued, and continues to be applied on a daily basis in Australian courts, for example, to deny equitable remedies against particularly vulnerable defendants, especially where the plaintiff had in some way taken advantage of the situation.[54] The importance of this is that the exercise of equitable discretion has never become completely rule-based in Australia. In *Patrick Stevedores Operations No. 2 Pty. Ltd. v. Maritime Union of Australia*,[55] a majority of the High Court cited with approval Vice Chancellor Sir Richard Kindersley's classical approach to the exercise of equitable discretion:

> [W]henever a Court of Equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry strict rights of the Plaintiff and Defendant, but also to the surrounding circumstances, to the rights or interests of other persons which may be more or less involved: it must, I say, have regard to those circumstances before it exercises its jurisdiction (which is unquestionably a strong one) of granting an injunction.[56]

A current illustration is the "constant supervision" consideration. Traditionally, courts of equity refused to grant specific performance where its grant would require the constant supervision of the court. In nineteenth century English case law this tended to provide a conclusive defense to an action for specific performance.[57] One manifestation was the "settled practice" of the courts in refusing specific performance of a contract to carry on a business, except in exceptional circumstances.[58] Although the English House of Lords has recently attempted to restate

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52. *See, e.g.*, Summers v. Cocks (1927) 40 C.L.R. 321 (Austl.); *cf.* Slee v. Warke (1949) 86 C.L.R. 271 (Austl.) (stating that the defendant's unilateral mistake, to which the plaintiff did not contribute, did not prevent the grant of a discretionary remedy).

53. *See, e.g.*, Dowsett v. Reid (1912) 15 C.L.R. 695, 705–07 (Austl.); Gall v. Mitchell (1924) 35 C.L.R. 222 (Austl.); *cf.* Patrick Stevedores Operations No. 2 Pty. Ltd. v. Mar. Union (1998) 195 C.L.R. 1, 41–43 (Austl.) (granting an injunction against a defendant in an industrial dispute notwithstanding the potential hardship to a third party by reason of the likely nonperformance of a contract between the defendant and the third party as a result of granting the injunction, in circumstances where the third party was aware of the industrial dispute at the time of entering into the contract with the defendant).

54. *See* Blomley v. Ryan (1956) 99 C.L.R. 362, 399–401 (Austl.).

55. *Patrick Stevedores Operations* 195 C.L.R. at 41.

56. Wood v. Sutcliffe, 61 Eng. Rep. 303, 304 (V.C. 1851).

57. *See* Ryan v. Mut. Tontine Westminster Chambers Ass'n, [1893] 1 Ch. 116; *see also* J.C. Williamson Ltd. v. Lukey and Mulholland (1931) 45 C.L.R. 282, 297–98 (Austl.) (opinion of Dixon, J.).

58. *See, e.g.*, Braddon Towers Ltd. v. Int'l Stores Ltd. [1987] 1 E.G.L.R. 209, 213 (Ch. 1979).

the "settled practice" in traditional terms,[59] which have been approved by the High Court,[60] it is likely that the restatement is too rigid for the purposes of Australian law and fails to allow sufficient room for the operation of the discretionary considerations involved.[61] Thus, there is little doubt that specific performance will, in appropriate cases, be ordered against an anchor tenant of a shopping centre who threatens, in breach of contract, to close its business causing potential loss to other tenants of the shopping centre.[62]

The separate or independent development of equitable remedies is also illustrated by the development of the "Mareva injunction" in Australian law. Invented by the English Court of Appeal in 1975,[63] a Mareva prevents a defendant before judgment from parting with property, its object being to prevent the frustration the court's processes. Its existence flies in the face of classical authority in the law of injunctions that "[y]ou cannot get an injunction to restrain a man who is alleged to be debtor from parting with his property."[64] As such, its acceptance in Australian law was always going to be problematic. At the same time, the need for it was felt in a number of areas of law. A compromise was found: an order restraining a party to litigation from parting with property before judgment can be made in appropriate cases, but not as part of the law of injunctions.[65] The order is rather an asset preservation order founded in the inherent jurisdiction of the court to prevent the frustration of its processes, particularly at the interlocutory level.[66] Classifying the order in this way

59. Coop. Ins. Soc'y Ltd. v. Argyll Stores (Holdings) Ltd., [1998] A.C. 1, 2 (H.L. 1997).

60. *Patrick Stevedores Operations*, 195 C.L.R. at 46–47.

61. *See* I.C.F. SPRY, THE PRINCIPLES OF EQUITABLE REMEDIES app. C (6th ed. 2001).

62. *See* Diagnostic X-Ray Servs. Pty. Ltd. v. Jewel Food Stores Pty. Ltd. (2001) 4 V.R. 632.

63. The Mareva takes its name from *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.*, [1980] 1 All E.R. 213 (C.A. 1975), although the first instance of such an injunction was *Nippon Yusen Kaisha v. Karageorgis*, [1975] 3 All E.R. 282, 283 (C.A.).

64. Robinson v. Pickering, [1881] 16 Ch. 660, 661 (opinion of James, L.J.); *see also* Lister & Co. v. Stubbs, [1890] 45 Ch. 1, 13.

65. *See* Cardile v. LED Builders Pty. Ltd. (1999) 198 C.L.R. 380, 380–81 (Austl.). Compare the approach of the U.S. Supreme Court in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–21, 330–31 (1999) (granting a *Mareva*-type order would involve the creation of an equitable remedy inconsistent with the equitable powers conferred by the Judiciary Act of 1789 and would otherwise interfere with the fundamental balance of debtor and creditor law).

66. *See also* Austl. Broad. Corp. v. Lenah Game Meats Pty. Ltd. (2001) 208

not only preserves the integrity of the traditional law of injunctions—and hence of equity as a separate body of doctrine—but also provides the basis for the principled development of the order in question.

The developments that we have outlined are, of course, no more than developments in nominate remedies. It remains true that there is no consideration of the law of remedies as such in the authoritative sources of Australian law.[67] However, there is increasing treatment of remedies as a legal subject in its own right in law schools across Australia. This, in turn, has generated an academic literature with texts[68] and casebooks[69] devoted to the subject. It is too early to say what the effect will be on the authoritative sources of the law, but this may form one of the leit-motifs of the twenty-first century.[70]

III. THE GENERAL TRIUMPH OF THE COMPENSATION PRINCIPLE

A very significant development in Australian law in the second half of the twentieth century—a development that will have a profound effect on the future development of the law of remedies—is the clear emergence of compensation not only as the governing principle of the law of damages (and hence as the most important objective of the law of remedies as a whole), but also as the express goal of civil liability.[71] While Oliver Wendell Holmes had found the "general purpose" of tort law in compensation as early as 1881,[72] it was not until 1966 that Justice Windeyer declared in *Uren v. John Fairfax & Sons Pty. Ltd.* that "[c]ompensation is the dominant remedy if not the purpose of the law of torts today,"[73] a statement capable of applying to the law of contract if its purpose is seen as satisfying the expectations of the party entitled to performance.[74] Compensation restores the status quo in tort and protects the expectation interest in contract. It thus reflects, and is indeed

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C.L.R. 199, 243 (Austl.) (opinion of Gummow and Hayne, J.J.).

67. On the importance of this, see *infra* Part VI.

68. Texts devoted exclusively to remedies are: WAYNE COVELL & KEITH LUPTON, PRINCIPLES OF REMEDIES (2d ed. 2003); BRUCE KERCHER & MICHAEL NOONE, REMEDIES (2d ed. 1990); 1–2 M.J. TILBURY, CIVIL REMEDIES (1990 & 1993). There are, of course, also texts on the individual remedies.

69. *See* ANNE COSSINS, REMEDIES IN CONTEXT: COMMENTARY AND MATERIALS (2003); MICHAEL TILBURY ET AL., REMEDIES: COMMENTARY AND MATERIALS (4th ed. 2004).

70. *See infra* Part VI.

71. This section draws on Michael Tilbury, *Reconstructing Damages*, 27 MELB. U. L. REV. 697, 708–11 (2003).

72. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 115 (Mark De Wolfe Howe ed., 1963).

73. Uren v. John Fairfax & Sons Pty. Ltd. (1966) 117 C.L.R. 118, 149 (Austl.), *aff'd sub nom.* Austl. Consol. Press Ltd. v. Uren, [1969] 1 A.C. 590, 615 (P.C. 1967).

74. *See* Coop. Ins. Soc'y Ltd. v. Argyll Stores (Holdings) Ltd., [1998] A.C. 1, 15 (H.L. 1997) (opinion of Lord Hoffman).

commensurate with, the underlying rationale of these bodies of the law.

There are many examples of the restatement and refinement of the compensation principle in the law of damages in Australia in the second half of the twentieth century. The acceptance, in *Uren*'s case, of Lord Devlin's distinction between aggravated (compensatory) damages and exemplary (punitive) damages, is undoubtedly the high watermark.[75] Some other important examples are:

- First, some cases have abandoned general formulae in common use in the assessment of damages in particular types of cases in favor of a measure that, in the circumstances, more accurately gives effect to the principle of compensation.[76] Thus, in *Butler v. Egg & Egg Pulp Marketing Board*,[77] the High Court subordinated the general measure of damages in conversion (the full value of the goods)[78] to the general principle of compensation in circumstances where the facts would have resulted in over-compensation by application of the conventional measure.
- Second, the compensation principle has driven the clear trend towards the deductibility of collateral benefits in the assessment of damages.[79]
- Third, the decision of the High Court in *Cullen v. Trappell*[80] held that, in accordance with the compensation principle, personal injury plaintiffs are only entitled to recover after-tax earnings in awards for lost earning capacity because they cannot have "lost" what they would never have "received."

75. *See supra* Part II.B.

76. *See generally* S.M. Waddams, *The Principles of Compensation*, *in* ESSAYS ON DAMAGES 1 (P.D. Finn ed., 1992).

77. Butler v. Egg & Egg Pulp Mktg. Bd. (1966) 114 C.L.R. 185 (Austl.).

78. *Id.* at 190.

79. HAROLD LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH 428–30 (4th ed. 2002); *see also* LAW COMM'N, DAMAGES FOR PERSONAL INJURY: MEDICAL, NURSING AND OTHER EXPENSES; COLLATERAL BENEFITS § 10.4–.8 (1999) (starting point is deductibility).

80. Cullen v. Trappel (1980) 146 C.L.R. 1, 30–32 (Austl.) (overruling Atlas Tiles Ltd. v. Briers (1978) 144 C.L.R. 202 (Austl.)).

- Fourth, the decision of the High Court in *Commonwealth of Australia v. Amann Aviation*[81] clearly establishes that a plaintiff is only entitled to claim "reliance loss" in an action for breach of contract to the extent to which the plaintiff can show (presumptively or otherwise) that such loss would have been recouped with the result that it cannot exceed the expectation interest.
- Fifth, the decision of the High Court in *Hungerfords v. Walker*,[82] overruling a long-standing principle that damages are not recoverable for the late payment of money,[83] held that compensation (in the form of interest) is recoverable by plaintiffs who have suffered loss by reason of being deprived or kept out of their damages.

These examples of the development of the law of damages by analysis and refinement of the principle of compensation only became possible in the latter half of the twentieth century with the virtual disappearance of the jury in civil proceedings. While juries still played a role in such proceedings, it was possible to say that damages were "an arcanum of the jury box into which judges hesitated to peer."[84] The disappearance of juries led, at first, to a restatement that the assessment of damages involved a "broadbrush" exercise looking at the overall award in a global sense and juxtaposing it to the injury in question.[85] But the assessment of damages soon took on a more scientific appearance in all branches of the law.[86] For example, future economic loss was (and is) computed in personal injury cases using mathematical or actuarial tables. And it is now clear that a broadbrush approach to the assessment of future economic loss is no longer acceptable, either generally[87] or in relation to specific items of economic damage.[88]

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81. Australia v. Amann Aviation Pty. Ltd. (1991) 174 C.L.R. 64, 104–05 (Austl.); *see also* McRae v. Commonwealth Disposals Comm'n (1951) 84 C.L.R. 377 (Austl.).

82. Hungerfords v. Walker (1989) 171 C.L.R. 125 (Austl.).

83. *See* London, Chatham & Dover Ry. Co. v. S. E. Ry. Co., [1893] A.C. 429 (H.L.).

84. Cassell & Co. v. Broome, [1972] A.C. 1027, 1125 (H.L.).

85. The high watermark is the decision of the High Court in *Arthur Robinson (Grafton) Ltd. v. Carter* (1968) 122 C.L.R. 649, 655 (Austl.) (discussing economic loss in a personal injury case).

86. For personal injury, the turning point was the approach in *Sharman v. Evans* (1977) 138 C.L.R. 563 (Austl.).

87. *See* Rosstown Holding Pty. Ltd. v. Mallinson (2000) 2 V.R. 299, 309–10 (C.A.).

88. *See* Nolan v. Hamersley Iron Pty. Ltd. (2000) 23 W.A.R. 287 (discussing loss of superannuation benefits).

IV. THE RESURGENCE OF EQUITABLE COMPENSATION

When we slide over to the equity side of the historical divide we find that, although its role is less dominant than at common law, a firm place for the compensation principle emerged in the late stages of the twentieth century. The relevant equitable remedy is usually called, simply, "equitable compensation." It has been described as "a developing area of law," its remedial vigor "of comparatively recent vintage."[89] But it can hardly be surprising that equity, in its inherent jurisdiction, would develop a compensatory remedy to deal with losses arising from breaches of equitable obligations.[90]

And there is no doubt that we must regard the remedy as one underpinned by the compensation objective. This is so notwithstanding a propensity among judges to use the term "restitution" to describe the purpose of equitable compensation.[91] But it is restitution in the sense of restoration to a previous position, not in the more modern sense of unjust enrichment. One of the benefits of the resurgence of the remedy is a wider recognition that its "object . . . is to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation."[92]

The resurgence came in two stages. Its genesis is the "great speech"[93] of Lord Haldane, L.C., in *Nocton v. Lord Ashburton*.[94] Previously, equitable compensation's "core territory"[95] was the simple personal duty of an express trustee to account for lost trust assets. But in *Nocton*, the House of Lords extended the remedy to apply against a solicitor who, conflicted in interest, advised his client to discharge certain mortgage securities. This left the client without adequate security when the loan

89. Beach Petroleum NL v. Kennedy (1999) 48 N.S.W.L.R. 1, 90.

90. Indeed, to some extent, the jurisdiction is long-established, grounded in the old Bill of Chancery to enforce compensation for breach of fiduciary duty. *See* Nocton v. Lord Ashburton, [1914] A.C. 932, 946 (H.L.); *see also* Joshua Getzler, *Equitable Compensation and the Regulation of Fiduciary Relationships*, in 1 RESTITUTION AND EQUITY 235, 235–36 (Peter Birks & Francis Rose eds., 2000); PETER M. MCDERMOTT, EQUITABLE DAMAGES Ch. 1 (1994).

91. For a good example of such usage, see the influential decision of Justice Street in *Re Dawson* [1966] 2 N.S.W.R. 211, 214–16.

92. O'Halloran v. R.T. Thomas & Family Pty. Ltd. (1998) 45 N.S.W.L.R. 262, 272 (opinion of Spigelman, C.J.).

93. R.P. MEAGHER ET AL., MEAGHER, GUMMOW & LEHANE'S EQUITY: DOCTRINES AND REMEDIES 831 (4th ed. 2002).

94. *Nocton*, [1914] A.C. at 943–58.

95. Getzler, *supra* note 90, at 236.

went bad. There was not here any dissipation of any part of a trust estate. Rather, the client was worse off following the breach of fiduciary duty, and the House of Lords held the solicitor liable to compensate for that loss: "The proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did."[96]

Despite this vulnerability of fiduciaries to liability for loss generally, the remedy lay largely (although not entirely) dormant.[97] But, with the "energetic development of the reach of equitable duties"[98] (even with Australian courts resisting the temptation seen elsewhere to expand the notion of fiduciary obligations),[99] the latter stages of the twentieth century saw a burgeoning of equitable compensation cases. In many instances this may have involved litigants, by way of asserting the existence of equitable obligations, seeking to escape limitation period defenses that would have applied had their actions been grounded in tort or contract.[100] However, the logic was perhaps inescapable—breach of an obligation, loss, the triumph of the compensatory objective, *Nocton v. Lord Ashburton*—and equitable compensation became quickly established as a "vital part of [the] judicial armoury" of all the major Commonwealth jurisdictions.[101]

And what powerful armory it can be. In one case, where a fraudulent joint venturer induced the other joint venture party to part with its interest to an incoming participant, the judicial analysis of the alternative legal outcomes was that damages for deceit would amount to $250,000 whereas equitable compensation (for breach of the fiduciary obligations that one joint venturer owes to another) came to $23 million—a difference (after allowing for the award of interest) of some $35 million.[102] The case, rather dramatically, raises a key issue. We have

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96. *Nocton*, [1914] A.C. at 958.

97. *See, e.g.*, McKenzie v. McDonald [1927] V.L.R. 134, 146 (1926). The highly influential case of *Re Dawson* [1966] 2 N.S.W.R 211 involved a defaulting custodial fiduciary who improperly caused to be paid away foreign currency trust funds; by the time of the trial these were worth considerably more in Australian terms and the fiduciary's liability was to compensate at the later value. As Rickett has recently reminded us, this scenario is in fact akin to the dissipating trustee being required to restore the trust estate. Charles E. F. Rickett, *Equitable Compensation: Towards a Blueprint?*, 25 SYDNEY L. REV. 31, 38 (2003) [hereinafter Rickett, *Blueprint*].

98. Rickett, *Blueprint*, *supra* note 97, at 31.

99. *See* Pilmer v. Duke Group Ltd. (in Liquidation) (2001) 207 C.L.R. 165, 196–97 (Austl.); Maguire v. Makaronis (1997) 188 C.L.R. 449, 474 (Austl.).

100. *See* the discussion in Getzler, *supra* note 90, at 246–48.

101. Charles Rickett, *Compensating for Loss in Equity—Choosing the Right Horse for Each Course*, *in* 1 RESTITUTION AND EQUITY, *supra* note 90, at 173 [hereinafter Rickett, *Right Horse*].

102. Biala Pty. Ltd. v. Mallina Holdings Ltd. (1993) 13 W.A.R. 11, *aff'd sub nom.*

identified above the triumph of the compensation principle in the law of damages. How do we justify two[103] such remedies in the one legal system?[104]

Within Australia (and elsewhere),[105] this issue has played itself out in the context of two related questions. First, to what extent, if at all, ought an award of equitable compensation be subject to limiting factors such as, or akin to, causation, remoteness, mitigation, contributory negligence, etc.? Second, are factors such as these applicable simply by analogy to the common law or by the flexibility inherent in the nature of an equitable remedy?

The matter has proved at its most challenging in respect of causation. In the context of a brief section such as this one, present purposes can be served if we limit our discussion to this factor.[106] Although causation must, in justice, always be a limitation on the recovery of compensation in equity,[107] courts have struggled to reconcile that undoubted truth with the implications derived from the decision of the Privy Council in *Brickenden v. London Loan & Savings Co*.[108] A solicitor breached his fiduciary duty by failing to disclose to his client his personal interest in elements of a loan transaction arranged between the plaintiff and another client, which transaction turned out badly for the plaintiff. It was argued

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Dempster v. Mallina Holdings Ltd. (1994) 13 W.A.R. 124; *see also* Jeff Berryman, *Some Observations on the Application of Equitable Compensation in WA:* Dempster v. Mallina Holdings Ltd., 25 U. W. AUSTL. L. REV. 317, 319–22 (1995); Wayne S. Martin, *Principles of Equitable Compensation*, *in* CIVIL REMEDIES: ISSUES AND DEVELOPMENTS 114, 135–38 (Robyn Carroll ed., 1996).

103. In fact the number is three, when one takes into account so-called equitable (or *Lord Cairns Act*) damages, i.e. statutory damages originally authorized to be awarded by the Court of Chancery in England pursuant to the Chancery Amendment Act, 1858, 21 & 22 Vict., c. 27 (Eng.), a jurisdiction that still survives in Australia. *See, e.g.*, Supreme Court Act, 1970, § 68 (N.S.W.), and corresponding provisions in other states and territories. *See generally* MCDERMOTT, *supra* note 90 (providing a full treatment of the remedy); Michael Tilbury & Gary Davis, *Equitable Compensation*, *in* THE PRINCIPLES OF EQUITY 797, 826–39 (Patrick Parkinson ed., 2d ed. 2003).

104. Michael Tilbury, *Teaching Remedies in Australia*, 39 BRANDEIS L.J. 587, 592 (2001).

105. *See, e.g.*, Canson Enters. v. Boughton & Co., [1991] 85 D.L.R. 4th 129 (Can.); Target Holdings Ltd. v. Redferns, [1996] A.C. 421 (H.L. 1995); Bank of N.Z. v. N.Z. Guardian Trust Co. [1999] 1 N.Z.L.R. 664.

106. At this point, we draw upon our Chapter 22 in Parkinson's THE PRINCIPLES OF EQUITY. *See generally* Tilbury & Davis, *supra* note 103.

107. *Target Holdings*, [1996] A.C. at 432; *see also* Anthony Mason, *The Place of Equity and Equitable Remedies in the Contemporary Common Law World*, 110 L.Q. REV. 238, 244 (1994).

108. [1934] 3 D.L.R. 465 (Can.) (opinion of Lord Thankerton).

against the plaintiff in the claim for compensation that there was no evidence that the plaintiff had not received full value in the transaction and that the plaintiff would have been no worse off even if full disclosure had been made by the solicitor. The "rule of *Brickenden*"[109] is contained in the following remarks:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.[110]

Read strictly, the test "seems to render it unnecessary even to inquire whether the loss would have occurred had there been no breach of duty . . . ."[111] Counsel have, on occasion, submitted as much.[112] Viewed in these absolute terms, *Brickenden* has the capacity to "present the spectre . . . that fiduciaries will be unfairly burdened with consequences that have no logical connection with their breach."[113]

But it seems clear now in Australia that this cannot be the correct interpretation of *Brickenden*. The High Court[114] has recently approved Lord Justice Mummery's pithy way of putting it: "[t]here is no equitable by-pass of the need to establish causation."[115] To answer the first question (as it is relevant to causation), equitable compensation as a remedy must certainly pass over a hurdle called "causation."[116]

This leaves a subsidiary question involving the nature of the causation requirement for equitable compensation. Does it, for example, incorporate elements of policy and values in the manner of Australian common

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109. *See* Maguire v. Makaronis (1997) 188 C.L.R. 449, 492 (Austl.).

110. *Brickenden*, [1934] 3 D.L.R. at 469.

111. Charles Lo Presti Pty. Ltd. v. Karabalios [2000] N.S.W.S.C. 395 (15 May 2000) at [26] (Austin, J.), *at* http://www.Austlii.edu/au/au/cases/nsw/supreme_ct/2000/395.html (last visited Oct. 30, 2004).

112. *See, e.g.*, Beach Petroleum NL v. Kennedy (1999) 48 N.S.W.L.R. 1, 91 ("[I]n the case of causation for purposes of determining equitable compensation, authority 'forbids speculation as to what might have occurred if not for the breach of fiduciary duty.'").

113. *Maguire* 188 C.L.R. at 494 (opinion of Kirby, J., although his Honor's analysis led him to reject that spectre). *See generally* J.D. Heydon, *Causal Relationships Between a Fiduciary's Default and the Principal's Loss*, 110 L.Q. REV. 328 (1994).

114. Youyang Pty. Ltd. v. Minter Ellison Morris Fletcher (2003) 196 A.L.R. 484, 492 (Gleeson, C.J., McHugh, Gummow, Kirby, and Hayne, J.J.).

115. Swindle v. Harrison, [1997] 4 All E.R. 705, 733 (C.A.).

116. However, it would seem otherwise for remoteness, mitigation, contributory negligence, etc. *See* Tilbury & Davis, *supra* note 103, at 819–22.

law?[117] Does it permit courts to decline to find a causal link when, on the balance of probabilities, a view is taken as to what would have happened had there been no breach of equitable obligation?[118]

What can be discerned in Australian case law is what one commentor calls (although not with specific reference to Australian law) a "very plaintiff-friendly"[119] attitude. Causation is dealt with by application of the full benefit of hindsight.[120] This leads to an acceptance of the notion that, on account of differing causation analyses, a plaintiff may recover more in compensation in equity than might be recoverable at common law on the same facts.[121] The Australian cases strongly suggest that the analysis in equity is one of "but for," that is, "the inquiry [is] whether the loss would have happened if there had been no breach."[122]

However, some recent analyses, both judicial[123] and academic,[124] try to avoid a monolithic approach to the problem. Equitable obligations are nowadays too diverse. The causation requirement must accommodate the diversity and adjust to fit the circumstances. It is therefore suggested that, where the equitable duty, for example of skill and care, resembles a common law duty, common law rules, not only of causation but also of remoteness, measure, etc., should apply by analogy. A modern and united legal system demands such coherence.

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117. This "common sense" approach oriented around whether liability *should* be attributed to a contract-breaker or tortfeasor is supported by numerous cases at the High Court level, of which *March v. E. & M. H. Stramare Pty. Ltd.* (1991) 171 C.L.R. 506, 514 (Austl.), and *Chappel v. Hart* (1998) 195 C.L.R. 232, 238 (Austl.), are perhaps the best known; the most recent exposition is contained in Justice Hayne's judgment in *Pledge v. Roads and Traffic Authority* (2004) 205 A.L.R. 56, 58–61.

118. *See, e.g.*, Beach Petroleum NL v. Kennedy (1999) 48 N.S.W.L.R. 1, 93–94; Gilbert v. Shanahan [1998] 3 N.Z.L.R. 528, 535–36; *Maguire* 188 C.L.R. at 493.

119. Rickett, *Right Horse*, *supra* note 101, at 176.

120. O'Halloran v. R T Thomas & Family Pty. Ltd. (1998) 45 N.S.W.L.R. 262, 273; Permanent Bldg. Soc'y (in Liquidation) v. Wheeler (1994) 11 W.A.R. 187, 235 (Ipp, J.).

121. Pilmer v. Duke Group Ltd. (in Liquidation) (2001) 207 C.L.R. 165, 225–26 (Austl.) ("[D]iffering approaches of equity and the common law to assessing the consequences of the wrong, and to whom that wrong is properly attributed."); McCann v. Switz. Ins. Austl. Ltd. (2000) 203 C.L.R. 579, 621–22 (Austl.).

122. *Re Dawson* [1966] 2 N.S.W.R. 211, 215 (Street, J.); *see also Pilmer* 207 C.L.R. at 227; *McCann* 203 C.L.R. at 588, 621–22; *Maguire* 188 C.L.R. at 491–94; *O'Halloran* 45 N.S.W.L.R. at 275, 277.

123. *See, e.g.*, Bank of N.Z. v. N.Z. Guardian Trust Co. [1999] 1 N.Z.L.R. 664; Bristol & W. Bldg. Soc'y v. Mothew, [1998] Ch. 1, 19 (C.A. 1996).

124. *See generally* Rickett, *Blueprint*, *supra* note 97.

Possibly so, but the High Court of Australia remains unconvinced, as evidenced by these very recent (albeit obiter) remarks from its judgment in *Youyang Pty Ltd. v Minter Ellison*:

> [T]here must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.[125]

While the Court endorsed the notion that in questions of causation one must focus on the relevant equitable duty,[126] one remains driven, judging by these remarks, to the view that if equitable compensation is to be limited, the limitations will arise from the nature and needs of equity itself.[127]

The resurgence of equitable compensation has forced us to confront, in something that goes beyond the comfortable confines of history, the place of modern equity in a judicature system that is now 130 years old. Professor Rickett, characteristically, has put the point with utter clarity:

> [I]n the end, the debate about equitable compensation . . . is actually a debate about the make-up of modern equity, and the latter's place in the civil law of obligations and property in the new century. The blueprint for equitable compensation is a particular application of the greater blueprint for modern equity.[128]

The passage extracted above from *Youyang* offers a solid signal to what is *not* on that blueprint so far as Australia is concerned—the common law. As Justice Kirby has put it, the High Court has repeatedly recognized that "in Australia, the substantive rules of equity have retained their identity as part of a separate and coherent body of principles."[129]

V. THE STATUTORY OVERLAY OF THE COMMON LAW

It would be difficult to overstate the impact that legislation has had on the development of Australian remedial law. Two developments will be discussed as contrasting illustrations, one promoting the compensation

125. Youyang Pty. Ltd. v. Minter Ellison Morris Fletcher (2003) 212 C.L.R. 484, 500 (Austl.) (Gleeson, C.J., McHugh, Gummow, Kirby, and Hayne, J.J.).

126. *Id.* at 502 (endorsing Swindle v. Harrison, [1997] 4 All E.R. 705, 734 (C.A.).

127. This was the view of McLachlin, J., in *Canson Enterprises v. Boughton & Co.*, (1991) 85 D.L.R. 4th 129, 154 (Can.), a view that has largely been endorsed by Australian judges, most recently in *Youyang* itself. *Youyang* 212 C.L.R. at 500.

128. Rickett, *Blueprint*, *supra* note 97, at 32.

129. Pilmer v. Duke Group Ltd. (in Liquidation) (2001) 207 C.L.R. 165, 231 (Austl.).

objective, the other undercutting it. However, it would be remiss to write about statutes without mentioning what is probably the single most dominant one, in practical terms, operating in Australia.

That statute is the *Trade Practices Act 1974* (Cth) (along with its State and Territory counterparts in the form of fair trading legislation).[130] This Act, especially Part V and even more especially the prohibition in section 52 of "conduct that is misleading or deceptive or is likely to mislead or deceive," has revolutionized commercial and consumer litigation in Australia: "[T]he 'luxuriant and proliferating growth in actions upon s 52 or upon its State counterparts' has quite overshadowed the general law."[131] The remedies provided for contravention are wide-ranging and broadly interpreted to promote the competition, consumer protection, and fair trading objects of the Act.[132] In respect of the damages or compensation remedies in particular, provided by sections 82 and 87, the High Court, after a tentative start,[133] has adopted an approach that eschews any presumption that the Act's remedial provisions are to be interpreted either by analogy to the common law or with the common law as a starting point.[134] Any doubt about that proposition has been removed by the High Court's recent emphatic reminder in rare (for that Court) unanimous joint reasons of the entire bench.[135] As we have seen with equitable compensation, Australian remedial law sections off its various source components.

Returning to our primary illustrations, the first sees statute as a mechanism for reinforcing the dominance of the compensation principle. As is well known, the common law denied damages entirely to persons who failed to care adequately for their own safety, notwithstanding otherwise actionable want of care on the part of a tortfeasor.[136] Justice McHugh has recently remarked upon this situation, and its consequences:

130. The *Fair Trading Act*, 1985 (Vict.), was the first of these to be enacted, with other jurisdictions following over the ensuing five years.

131. PETER HEFFEY ET AL., PRINCIPLES OF CONTRACT LAW 483 (2002) (quoting Prestia v. Aknar (1996) 40 N.S.W.L.R. 165, 181).

132. Henville v. Walker (2001) 206 C.L.R. 459, 489 (Austl.).

133. *See* Gates v. City Mut. Life Assurance Soc'y Ltd. (1986) 160 C.L.R. 1, 6 (Austl.).

134. *See* I & L Sec. Pty. Ltd. v. HTW Valuers (Brisbane) Pty. Ltd. (2002) 210 C.L.R. 109, 135 (Austl.); *Henville* 206 C.L.R. at 470; Marks v. GIO Austl. Holdings Ltd. (1998) 196 C.L.R. 494, 495 (Austl.).

135. Murphy v. Overton Invs. Pty. Ltd. (2004) 204 A.L.R. 26, 27, 37.

136. Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809).

> Until the middle of the twentieth century, the contributory negligence of a plaintiff was a defence to an action for negligence, even if the negligence of the defendant far outweighed the contributory negligence of the plaintiff. No one with experience of common law jury trials could fail to believe that juries often—perhaps usually—avoided the harshness of the rule by taking a benign view of the plaintiff's conduct. On some occasions, juries even appeared to compromise by reducing the plaintiff's damages to accord roughly with his or her responsibility for the damage suffered.[137]

His Honor went on to relate, again something well known, the various correctives that judges, having come to dislike the harshness of the rule, developed in order to weaken that harshness.[138]

All of these common law developments, with the possible exception of the tendency of juries to lessen damages in a rough and ready sense, worked against the compensation principle. The denial of damages to victims of negligence negates the compensation principle, obviously. But so did the correctives, because in an all-or-nothing environment, an avoidance of contributory negligence findings allowed plaintiffs to recover full compensation notwithstanding that they were, to some extent, the authors of their own misfortunes. The common law of contributory negligence also had a distorting effect on the principles of causation, as explained by Chief Justice Mason in *March v. E. & M. H. Stramare Pty. Ltd.*,[139] and to that extent, a potential adverse impact on the achievement of the compensation objective. This changed with development of a legislative mechanism for apportionment of the damages as between a negligent defendant and a contributorily negligent plaintiff. The latter half of the twentieth century saw all Australian jurisdictions enact legislation modeled upon the *Law Reform (Contributory Negligence) Act 1945* (UK).[140] Courts were given the power to apportion liability for loss according to the plaintiff's and defendant's share of responsibility. A wide discretion was conferred upon a court to reduce the damages recoverable "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."[141]

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137. Josyln v. Berryman (2003) 198 A.L.R. 137, 142.

138. *Id.* at 142–43. These correctives included a shifting of the onus of proof to the defendant to establish contributory negligence, the development of the "last opportunity" rule, the practical excision of contributory negligence from employment cases, and the doctrine that contributory negligence was not a defence to actions for breach of statutory duty.

139. (1991) 171 C.L.R. 506, 511–14 (Austl.).

140. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28 (Eng.).

141. Law Reform (Miscellaneous Provisions) Act, 1965, § 10(1) (N.S.W.); *see also* corresponding provisions in other states and territories.

Whether the common law itself eventually would have developed its own apportionment principles,[142] the legislative solution clearly hastened the arrival of a situation that, in the circumstances, best achieved rightful compensation for victims of negligence. And this role for statute remains true. In *Astley v. Austrust Ltd.*,[143] the High Court ruled that the apportionment legislation did not apply to claims made in contract, even in respect of breach of a contractual obligation of care that was parallel to and concurrent with a tortious duty. Plaintiffs fortunate enough to be able to found their claims on the common law of contract would obtain full damages, notwithstanding a proved failure on their parts to take care for their own interests.[144] Australian legislatures quickly responded to restore the primacy of the compensation principle.[145]

It has been quite the opposite in our second example of the statutory impact on the law of remedies. We have already addressed[146] the fact that in the field of recovery of damages for personal injuries, as elsewhere, the trend of common law damages assessment took on more and more of a scientific appearance in the second half of the last century than had previously been the case. The approach adopted was to identify as precisely as possible the losses and harms, so that they could be compensated adequately. Making due allowance for the impact of taxation, collateral benefits and so forth both added to the science of the approach and promoted the achievement of the ultimate objective.

However, as illustrated in the following discussion, much of this has been undermined by legislative developments of the past quarter century or so. The inexorable trend emanating from the legislatures has been to diminish the payouts to plaintiffs, leaving them undercompensated. Ironically, this grew out of legislative developments whose object was to ensure that the largest classes of injured plaintiffs actually received their compensatory payments, in the sense of ensuring that they did not remain vulnerable to judgment-proof defendants.

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142. See the discussions in Gary Davis & Jane Knowler, *Down But Not Out: Contributory Negligence, Contract, Statute and Common Law*, 23 MELB. U. L. REV. 795, 812–15 (1999) and Geoff Masel & David Kelly, *Contributory Negligence and the Provision of Services: A Critique of Astley*, 74 AUSTL. L.J. 306, 316–23 (2000).

143. (1999) 197 C.L.R. 1 (Austl.).

144. Full recovery arose because, unlike in tort, contributory negligence had never been a defense to breach of contract actions.

145. *See, e.g.*, Law Reform (Contributory Negligence and Apportionment of Liability) Act, 2001, § 3 (S. Austl.), defining fault to mean, *inter alia*, "a breach of a contractual duty of care." Other formulae are found in the legislation of other states and territories.

146. *See supra* Part III.

The field of transport accidents constitutes a leading example. That is, the concern is manifested in the issue of how to deal with the consequences of the "death of, or bodily injury to, any person caused by or arising out of the use of [a motor] vehicle . . . ."[147] Legislation of this nature created a scheme of compulsory third party (CTP) insurance, typically with the insurer being a publicly funded body.[148] The legislation would provide for a prescribed policy of insurance to be issued, with the CTP insurer being made liable to indemnify the persons specified in the policy.[149] However, the legislation would typically go beyond the provision of mere indemnity rights and obligations as between insured and CTP insurer and give a successful plaintiff direct recourse to the CTP insurer without the need to go through the usual enforcement processes against the negligent defendant.[150] This reinforced the legislative policy of assuring that injured persons' rights to compensation would not be defeated by a defendant's lack of assets.[151]

But the compensation principle eventually foundered upon the rock of politics or of, perhaps more charitably, sound public sector cost control measures. As common law damages awards started to escalate into the millions of dollars, with even lesser claims involving considerable transaction costs, the CTP insurance schemes became underfunded. Premiums rose substantially in consequence. With these being levied as part of the process for collection of motor vehicle registration charges and with, it should be recalled, the CTP insurer typically being a public statutory body, the popular perception was that governments were answerable for these increases in premiums. There was political capital in keeping premiums from rising, or at least from rising too often or too steeply. Accordingly, most Australian jurisdictions took legislative steps to restrict the damages payable to victims of motor vehicle accidents. There were several variations on the theme: floors and ceilings on recovery of damages might be imposed, availability of certain heads of damage might be curtailed or abolished, statutory formulae for the calculation of damages might be adopted, and the like. But the theme itself was clear enough.

Lately, the movement away from compensation has increased markedly. No longer are the legislatures merely responding to the apparent needs of publicly funded statutory insurers in certain spheres of activity.

147. *See, e.g.*, Motor Vehicles Act, 1959, § 104 (S.A.).
148. *See, e.g.*, Motor Accident Commission Act, 1992, §§ 4, 14 (S.A.).
149. *See, e.g.*, Motor Vehicles Act, § 107 (S.A.).
150. *Id.* § 112.
151. *See* JOHN G. FLEMING, THE LAW OF TORTS 441–42 (9th ed. 1998); *see also* Baskerville v. Martin (1967) S.A. St. R. 156, 157–58; Gassner v. Frost (1940) S.A. St. R. 295, 298.

Following the collapse of an aggressive discounter in the insurance market, and aided by media report after media report of either large premium increases or the cancellation of popular local attractions and events due to either the unaffordability of insurance premiums or the denial of coverage, the private insurers have been able to convince governments of a public liability insurance crisis in full bloom.[152] The legislative response has been towards nationally consistent and comprehensive tort reform.[153] This followed the recommendations of the Ipp Committee, headed by the Honorable Justice David Ipp of the New South Wales Court of Appeal, which reported on comprehensive reforms to the law of negligence designed to reduce the cost of injury claims and, as a consequence, the cost of insurance.[154]

Developments in the second half of the twentieth century mean that, in relation to personal injury claims in Australia, the compensation principle has not *triumphed*. A couple of letters have been lost, and it has instead been *trumped*—by affordability. That this is the case is conspicuously driven home through the realization that the Ipp Committee was established, not by the law officers of the executive branches of governments in Australia, but by the Commonwealth Minister for Revenue and Assistant Treasurer, with the concurrence of State and Territory Treasurers.[155]

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152. *See, e.g.*, the official *Report* (at 1) accompanying the introduction into the South Australian legislature of the Law Reform (Ipp Recommendations) Bill 2003: "This Bill represents the second stage of the Government's legislative response to the crisis in the cost and availability of insurance." See the legislative record: South Australia, *Parliamentary Debates*, House of Assembly, 3 April 2003, 2700 (K. O. Foley, Deputy Premier).

153. *See, e.g.*, Civil Liability Amendment (Personal Responsibility) Bill, 2002 (N.S.W.).

154. LAW OF NEGLIGENCE REVIEW PANEL, *Review of the Law of Negligence Report* (2002).

155. Further in this regard, note the opening to the Ipp Committee's Terms of Reference:

> The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.

Id. at ix. Note also the second Term of Reference: "Develop and evaluate principled options to *limit liability and quantum* of awards for damages." *Id.* (emphasis added).

The importance of viewing the law of remedies as a whole, rather than as a series of disparate nominate responses, is that it focuses attention on two inexorably connected issues, namely, the relationship between right and remedy; and the factors that affect remedial choice. Both of these issues are fundamental to the future development of the law of remedies. They raise, in particular, the question of the extent to which liability and remedy involve congruent rights (the "monist view") or ought to be subject to separate consideration and determination (the "dualist view").[156] And, if the latter, the extent to which choice of remedy belongs to the plaintiff or to the court. These are difficult questions, whose answers will have to address many powerful considerations along the way, including that of "discretionary remedialism."[157] The degree to which the courts become involved in the determination of these issues in the twenty-first century depends, in no small measure, on the extent to which today's law students come to appreciate the importance of an awareness of the law of remedies as a whole.

We have no doubt that most Australian law students will graduate with a sound understanding of nominate remedies that recognizes the need to articulate clearly the policies and objectives underlying each remedy, while bearing in mind the necessity for doctrinal "fit."[158] They will thus be well prepared to address, for example, the issue that must, inevitably, be faced in Australia about whether, in view of the dominance of compensation in the civil law, exemplary damages ought to have a place in our legal system at all,[159] and, if so, exactly what that place should be.

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156. *See generally* Kit Barker, *Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right*, 57 CAMBRIDGE L.J. 301 (1998); Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1 (2000); Grant Hammond, *Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies*, *in* REMEDIES: ISSUES AND PERSPECTIVES Ch. 4 (Jeffrey Berryman ed., 1991); Grant Hammond, *The Place of Damages in the Scheme of Remedies*, *in* ESSAYS ON DAMAGES Ch. 9 (P.D. Finn ed., 1992); Michael Tilbury, *Remedies and the Classification of Obligations*, *in* THE LAW OF OBLIGATIONS: CONNECTIONS AND BOUNDARIES Ch. 2 (Andrew Roberston ed., 2004); Justice Thomas, *An Endorsement of a More Flexible Law of Civil Remedies*, 7 WAIKATO L. REV. 23 (1999); Donovan W.M. Waters, *Liability and Remedy: An Adjustable Relationship*, 64 SASK. L. REV. 429 (2001).

157. *See* Peter Birks, *Three Kinds of Objection to Discretionary Remedialism*, 29 U. W. AUSTL. L. REV. 1 (2000) (arguing that allowing courts a strong discretion in remedy selection destabilizes the rule of law); *cf.* Simon Evans, *Defending Discretionary Remedialism*, 23 SYDNEY L. REV. 463 (2001) (arguing that the discretion in remedy selection is circumscribed and necessary).

158. On which, see especially *Harris v. Digital Pulse Pty. Ltd.* (2003) 56 N.S.W.L.R. 298, 335–39 (Mason, P., dissenting).

159. The High Court acknowledges this in *Gray v. Motor Accident Commission* (1998) 196 C.L.R. 1, 10, 33 (Austl.); *see also* Kuddus v. Chief Constable of Leicestershire Constabulary, [2002] 2 A.C. 122, 134–35 (H.L. 2001) (opinion of Lord

This necessitates at least an analysis of the underlying rationale of exemplary damages. But an understanding and appreciation of that rationale may not be enough. To articulate the basis of exemplary damages in terms of punishment or deterrence is one thing.[160] But to include within the purpose of exemplary damages the assuagement of the urge for revenge and the discouragement of self-help[161] is to envisage a remedy whose purpose is more indeterminate. The more so if those purposes then come to be articulated as "deterrence, vindication, condemnation, education, the avoidance of the abuses of . . . power, appeasement of the victim and the symbolic impact of a decision as an expression of society's disapproval of certain conduct."[162]

To define a remedy in such wide terms begs the question of its relationship to other remedies. It demonstrates the need for a holistic approach to remedies. As does the isolation of legal and equitable remedies. To take the example of exemplary damages once again: can we really support a rule that denies exemplary damages simply on the basis that the plaintiff's claim is in equity?[163] The result is purportedly justified by appealing to the notion that "equity and penalty are strangers."[164] But why is the common law any different? Indeed, is not the result the wrong way around? After all, the common law remedy of damages is imbued with the notion of compensation (not punishment) and compensation is the governing purpose of remedies in most legal systems.[165] Equitable money remedies have only recently embraced the concept as such.[166] Traditionally, they are gain-based. And gain-based remedies, with their

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Slynn); *id.* at 137–38 (opinion of Lord Mackay); *cf.* the opinions of Lord Hutton, *id*. at 146–49, and Lord Scott, *id.* at 155–57.

160. *See, e.g.*, Uren v. John Fairfax & Sons Pty. Ltd. (1966) 117 C.L.R. 118, 150 (Austl.), *aff'd sub nom.* Austl. Consol. Press Ltd. v. Uren, [1969] 1 A.C. 590, 615 (P.C. 1967).

161. *See* Lamb v. Cotogno (1987) 164 C.L.R. 1, 9 (Austl.).

162. Bottrill v. A. [2001] 3 N.Z.L.R. 622, 648 (C.A.) (Thomas, J., dissenting). In a powerful decision, the majority of the New Zealand Court of Appeal restricted the rationale of exemplary damages to punishment, but they were overruled by the Privy Council who saw that purpose as including "an emphatic vindication of the plaintiff's rights." A. v. Bottrill, [2003] 1 A.C. 449, 457 (P.C. 2002); *cf. id.* at 466 (Lords Hutton and Millett, dissenting).

163. Consider *Harris* 56 N.S.W.L.R. at 298.

164. The expression comes from the judgment of Justice Somers in *Aquaculture Corp. v. New Zealand Green Mussel Co.* [1990] 3 N.Z.L.R. 299, 302.

165. *See* Hans Stoll, *Consequence of Liability: Remedies*, *in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (TORTS) [8-1] (André Tunc ed., 1983).

166. *See supra* Part IV.

allowances for defendants and their awards of interest focused on the nature of the defendant's conduct, look far more punitive than compensatory ones.[167] The truth is that the question of the extent to which punitive monetary remedies are available in our law cannot sensibly be answered without regard to the whole fabric of legal, equitable, and statutory remedies.[168]

So viewed, the task of lawyers in the twenty-first century will be to ensure the continued principled development not only of the law surrounding individual remedies, but also the law of remedies as a whole. In this century, we must surely take seriously Professor Wright's censure of the absence of a law of remedies.[169]

167. *Cf. Harris* 56 N.S.W.L.R. at 365–84 (arguing that these factors do not disclose a punitive element in equitable monetary relief).

168. There is a hint of recognition of this in *Gray v. Motor Accident Commission* (1998) 196 C.L.R. 1, 7–8 (Austl.).

169. *See supra* note 1.